

Chapter 6

Legal foundation for peacekeeping operations

6.1 By its nature, a peacekeeping operation involves an outside state, or states, providing security and humanitarian support to a sovereign country. While such operations are frequently undertaken with the permission of the host country, an intervention may also take place without consent, for example, in humanitarian and peace enforcement operations. In all instances, peacekeeping operations raise important legal considerations for participants. This chapter examines the legal framework of both UN peacekeeping operations and those that have not been initiated by the UN. It then looks at the Australian Government's consideration of the legal aspects of a peacekeeping operation before it decides whether to commit Australian personnel to a mission.

UN operations

6.2 As outlined in Chapter 2, under international law the UN has the authority to deploy international forces and to authorise the use of force to restore and maintain peace. Within the UN, the Security Council has primary responsibility for promoting international peace and security.¹ Resolutions of the UN Security Council based on Chapters VI and VII of the UN Charter provide the legal foundations for a UN peacekeeping or peace enforcement operation. Chapter VIII of the UN Charter recognises the existence of regional arrangements or agencies for dealing with the maintenance of international peace and security that are appropriate for regional action. This provision means that regional organisations do not need a UN mandate to undertake a peacekeeping operation but that no enforcement action shall be taken under regional arrangements without the Security Council's authorisation.²

1 See for example, UN General Assembly, Report of the High-level Panel on Threats, Challenges and Change, *A more secure world: our shared responsibility*, A/59/565, 2 December 2004, paragraphs 193–194, p. 55.

2 Article 53, Chapter VIII, Charter of the United Nations. The committee discussed the increase in the complexity of peacekeeping mandates and the blurring between peacekeeping and enforcement action. Thus the definition of enforcement can be contested. The Australian Defence Force Peacekeeping Centre defined peace enforcement as 'the coercive use of civil and military sanctions and collective security actions, by legitimate, international intervention forces, to assist diplomatic efforts to prevent armed conflict from starting, escalating or spreading or to restore peace between belligerents, who may not consent to that intervention. Peace enforcement operations differ from war. In war, the ultimate military aim is to defeat a designated enemy force. In peace enforcement operations, the military aim will normally be to coerce the belligerent(s) or potential belligerent(s) into avoiding or ceasing armed conflict and participating in peaceful settlement of disputes'.
<http://www.defence.gov.au/adfwp/peacekeeping/index.htm> (accessed 12 January 2008).

6.3 Even though a UN-mandated peacekeeping operation carries considerable legal weight and is backed by the authority of the international community, Australian experts study carefully the legal aspects of a UN mission. The Attorney-General's Department has a key role in providing legal and legal policy advice to government on issues involved in implementing a decision to participate in a peacekeeping operation, including the interpretation and implementation of Security Council resolutions.³ It works closely with DFAT and also the ADF and the AFP to ensure that the proposed operation accords with international law, Australian domestic law and the law of the state in which the operation is taking place.⁴

Non-UN operations

6.4 In some cases, individual countries or a coalition of countries may be better placed than the UN to deploy a peacekeeping operation. For example, the Security Council recognises that regional organisations, with their local knowledge, are 'well positioned to understand the root causes' of many conflicts in their neighbourhood and to assist in their prevention or resolution. The need for prompt action may also result in a regional organisation deploying a peacekeeping operation without a UN resolution.⁵ Ms Bird, DFAT, explained that a situation could develop where there is a desperate call by a host country for intervention but where the Security Council for a variety of reasons—political or other considerations—is not able to give its blessing to an operation but a regional grouping of countries are prepared to do it.⁶

6.5 As noted above, Chapter VIII of the UN Charter provides for regional organisations to be involved in settling disputes. Even so, such arrangements lack the legal standing that derives from a UN mandate. Ms Bird outlined the differences between UN and non-UN missions:

UN peacekeeping operations are the ones that are authorised by the UN Security Council and funding is provided through the UN. Operations which are carried out by regional organisations or groups of countries are organised by those countries themselves...the essential difference is that the

3 Attorney-General's Department, *Submission 13*, p. 2.

4 See for example, *Committee Hansard*, 24 July 2007, p. 5. Lt Gen Gillespie stated: 'we also have our lawyers working with the Attorney-General's Department and Foreign Affairs lawyers to see that the legal framework for what we are being asked to do is there—for example, whether or not there is a Security Council resolution that covers it'.

5 The Report of the High-level Panel on Threats, Challenges and Change recommended that Security Council approval should be 'in all cases sought for regional peace operations'. It noted, however, that in some urgent situations authorisation 'may be sought after such operations have commenced'. UN General Assembly, Report of the High-level Panel on Threats, Challenges and Change, *A more secure world: our shared responsibility*, A/59/565, 2 December 2004, paragraph 272 (a), p. 71.

6 *Committee Hansard*, 25 July 2007, p. 55.

UN peacekeeping operations are mandated by the Security Council, organised and run by the UN.⁷

6.6 Although a mission established without a UN mandate does not have the legal underpinnings that derive from a UN resolution, there are measures that can be taken to align it closely with a UN operation. The UN Charter stipulates that the activities of regional operations are to be consistent with the purposes and principles of the UN.⁸ It also asserts that the Security Council shall be kept fully informed of activities undertaken or in contemplation under regional arrangements.⁹ Ms Bird noted that often there is some kind of UN authorisation but that the level of UN approval or acknowledgement can vary: the Council may sanction or endorse the mission or the Secretary-General may simply put out a statement welcoming it.¹⁰

6.7 The following section looks at Australia's engagements in regional peacekeeping operations that have not been established under a UN mandate.

Australia's engagement in regional operations

6.8 Australia has contributed to a number of peacekeeping operations not conducted under a UN mandate. This engagement has drawn comment on the legal standing of such operations. In June 2001, the Joint Standing Committee on Foreign Affairs, Defence and Trade considered the conditions under which Australia should contribute to a peacekeeping operation and recommended that Australia should only support operations where there is:

- proper authorisation of the Security Council and the mandate is sufficient to meet the circumstances; and
- in the absence of Security Council authorisation, an agreement and commitment between all parties to end a conflict.

6.9 In responding to this recommendation, the then government stated that it 'places high importance on Security Council authorisation of peacekeeping operations, and looks to the Security Council to exercise its responsibility in authorising action to preserve international peace and security'. It did not address the second part of this recommendation.¹¹

6.10 Since 2001, Australia has been actively involved in non-UN mandated regional operations in East Timor and Solomon Islands. Some witnesses to the current

7 *Committee Hansard*, 25 July 2007, p. 55.

8 Article 52, Chapter VIII, Charter of the United Nations.

9 Article 54, Chapter VIII, Charter of the United Nations.

10 *Committee Hansard*, 25 July 2007, pp. 55–56.

11 Government response to the report of the Joint Standing Committee on Foreign Affairs, Defence and Trade on *Australia's Role in United Nations Reform*, *Senate Hansard*, 27 March 2003, pp. 10426–10427.

inquiry expressed reservations about Australia's engagement in, and the legal foundations of, these operations. Austcare was concerned about what it believed was 'the recent trend of the Australian Government (and other western governments) to prosecute peacekeeping outside the UN framework, and without adopting or applying the considerable amount of UN doctrine and experience'.¹² It supported peacekeeping operations that 'are legitimate, in accordance with international law, and preferably authorised under a mandate of the United Nations'.¹³

6.11 The United Nations Association of Australia (UNAA) also argued that the effectiveness of any peacekeeping operation would be 'greatly enhanced if it is clearly under the banner of the UN and has the legitimacy that flows from endorsement by the Security Council'. In its view:

Recent interventions by Australian forces in the Pacific region have lacked that UN support and have accordingly generated unexpected resistance. This has reflected Australia's dominant political and economic position in the Pacific region, making its interventions more easily characterised by opponents as self-serving.¹⁴

6.12 It supported the Joint Committee's recommendations about obtaining proper Security Council authorisation.

Committee view

6.13 The committee strongly supports the finding of the 2001 Joint Committee that the deployment of a peacekeeping operation requires proper authorisation from the Security Council. It notes the Australian Government's response in 2003 to this recommendation which clearly indicated that the government is cognizant of the importance of obtaining this authorisation. Even so, Australia has participated in, and continues to be involved in, regional missions conducted under Chapter VIII that do not have a UN mandate. The committee now examines the key legal factors influencing the government's decision to contribute to such missions.

Consent and legal instruments

6.14 The UNAA recognised that circumstances may arise where the UN is reluctant to intervene but where Australia believes that for national interest reasons a peacekeeping operation is needed.¹⁵ In the absence of Security Council authorisation, it stressed, as did the 2001 Joint Committee, the importance of having an agreement and commitment between all parties to end the conflict. Indeed, UNAA underlined the

12 *Submission 11*, p. 6.

13 *Submission 11*, p. 2.

14 *Submission 3*, paragraph 4.3.

15 *Submission 3*, paragraph 4.5.

importance of having clear support of the parties directly involved in the conflict and the approval of regional organisations.¹⁶

6.15 DFAT and Defence similarly recognised the need to have a peacekeeping mission well grounded in law, particularly by securing the consent of the host country to the operation.¹⁷ Ms Bird explained further:

One of the considerations that we look at when deciding whether or not to participate, or recommend to government to participate, is to ensure that it does have an appropriate legal framework—so a UN endorsed operation or a regional operation where we have the consent of the state involved. Those kinds of considerations filter through the process. We have the benefit of our own legal branches that consult quite closely with A-Gs.¹⁸

6.16 The Attorney-General's Department went into greater detail about the legal requirements for a non-UN mandated mission. It argued that in the absence of authorisation by the Security Council, the consent or request of a state provides the basis under international law for another state to deploy its personnel in the territory of the requesting state. Furthermore, it cited two fundamental requirements for consent that must be satisfied:

- the entity making the request has the legal authority to request and consent to deployment by another State; and
- recognised international instruments that document the State's authorisation for a foreign deployment are used.

6.17 In collaboration with DFAT and Defence, A-G's provides legal advice and drafting assistance on the legal instruments documenting the authorisation of a deployment. Recent international instruments that have been used to authorise a deployment include:

- May 2006—an exchange of Third Party Notes between Australia and East Timor (the term 'Third Party Note' refers to written communications between States);
- November 2006—an exchange of Third Party Notes between Australia and Tonga;
- 2003—Agreement in the form of a treaty between Solomon Islands, Australia, New Zealand, Fiji, Papua New Guinea, Samoa and Tonga concerning the operations and status of the police and armed forces and other personnel deployed to Solomon Islands to assist in the restoration of law and order and security.¹⁹

16 *Submission 3*, paragraph 4.5.

17 See for example, Defence answer to question on notice W1, 24 July 2007.

18 *Committee Hansard*, 25 July 2007, p. 46.

19 *Submission 13*, pp. 2–3.

International Stabilisation Force—Timor-Leste

6.18 The legal framework for the ISF deployed to Timor-Leste in May 2006 provides an example of the consideration the Australian Government gave to the legal standing of the mission. Authority for the ISF is based on a bilateral agreement following a signed request from Timor-Leste. This operation is separate, though complementary, to the UN peacekeeping mission in Timor-Leste.²⁰ To ensure that the requesting authority had the power to request and consent to the deployment, the then Minister for Foreign Affairs, Alexander Downer, insisted that if Timor-Leste were going to issue an invitation to Australia to contribute to the mission, it needed to be signed by its President, Prime Minister and 'ideally by the Speaker'.²¹

6.19 Securing Security Council approval or endorsement is another important means of conferring international legal recognition on a regional peacekeeping operation. The UN recognised the ISF mission in Security Council Resolution 1690 by expressing its appreciation and full support for the deployment of the multforce in response to the request of the Government of Timor-Leste. The resolution called on the international security force 'to continue to work in close coordination with the Government of Timor-Leste as well as the United Nations Office in Timor-Leste'.²² The Security Council reaffirmed these views in August in resolutions 1703 and 1704. Resolution 1704, which established the United Nations Integrated Mission in Timor-Leste (UNMIT), not only recognised the ISF but called upon this force to cooperate with and provide assistance to UNMIT. It also asked all parties in Timor-Leste to cooperate fully in the deployment and operation of UNMIT and the international security forces. The Australian Government believes that these resolutions conferred legitimacy on the ISF.²³

Regional Assistance Mission to Solomon Islands

6.20 RAMSI also illustrates the steps that Australia took to ensure that this regional peacekeeping operation had a firm legal footing.

6.21 An agreement between the host and participating countries, the RAMSI treaty, provided the international and regional legal basis for the mission. There were also complementary legal instruments to the deployment, notably the *Facilitation of*

20 Department of Foreign Affairs and Trade, *Annual Report 2005–2006: South and South-East Asia*, www.dfat.gov.au/dept/annual_reports/05_06/performance/1/1.1.2.html (accessed 15 March 2007). By 25 May 2006, Australia, Malaysia, New Zealand and Portugal sent troops to East Timor under the ISF to help restore security and support the UN missions. Australia led the force and its commitment included 2,600 troops and 200 police.

21 Minister for Foreign Affairs, the Hon Alexander Downer MP, interview, AM, 25 May 2006.

22 UN Security Council, Resolution 1690, S/RES/1690 (2006), 20 June 2006, paragraph 3, p. 2.

23 Attorney-General's Department, *Submission 13*, p. 2; Department of Foreign Affairs and Trade, *Submission 15*, p. 3.

International Assistance Act 2003 (FIA).²⁴ This legislation, which supported the intervention and authorised the presence of external personnel, was initially passed by the Solomon Islands Parliament without dissent, and is reapplied annually. The then Minister for Foreign Affairs, Alexander Downer, informed the Australian Parliament that the first condition necessary for Australia to deploy forces was 'wholehearted support in the Solomon Islands for an intervention'. He stated further that although there was some debate, the Parliament of Solomon Islands in the end unanimously passed a resolution supporting the peacekeeping operation.²⁵

6.22 DFAT had no doubts that the mission had solid legal foundations, especially considering the consent of the Solomon Islands Government to the operation.²⁶ Furthermore, to strengthen the legal basis for RAMSI, Australia insisted that the mission have 'comprehensive support' from the region. In this regard, the Pacific Islands Forum (PIF), representing 16 member states, endorsed the intervention.²⁷ Mr David Ritchie, DFAT, noted that PIF leaders themselves 'annually consider RAMSI and annually endorse it'.²⁸ In his view, the 'spectrum of legal mechanisms and quasi-legal mechanisms' provides 'a very solid underpinning for RAMSI's legitimacy'.²⁹

6.23 It should also be noted that the RAMSI treaty underwent parliamentary scrutiny in Australia. The Attorney-General's Department explained that where the instrument is a treaty, it is subject to the Australian parliamentary treaty process which involves the treaty being tabled in Parliament with an accompanying National Interest Analysis. Treaties are also examined by the Joint Standing Committee on Treaties.³⁰

6.24 Although not a UN-mandated mission, the Solomon Islands Government notified the President of the Security Council of the mission and provided him with the key legal documents authorising the intervention.³¹ The Pacific Islands Forum also

24 *Committee Hansard*, 25 July 2007, pp. 69–70.

25 Minister for Foreign Affairs, the Hon Alexander Downer MP, *House Hansard*, 12 August 2003, p. 18206.

26 *Committee Hansard*, 25 July 2007, p. 48.

27 Minister for Foreign Affairs, the Hon Alexander Downer MP, *House Hansard*, 12 August 2003, p. 18206.

28 *Committee Hansard*, 25 July 2007, pp. 69–70.

29 *Committee Hansard*, 25 July 2007, pp. 69–70.

30 *Submission 13*, pp. 2–3. Attorney-General's and DFAT routinely appear before that committee to provide advice concerning the interpretation of treaties and domestic implementation of international obligations.

31 UN Security Council, Letter dated 31 July 2003 from the Charge d'affaires a.i. of the Permanent Mission of Solomon Islands to the United Nations addressed to the President of the Security Council, S/2003/799, 11 August 2003.

provided the Security Council with a report on their activities relating to RAMSI.³² In September 2003, New Zealand, the then Chair of the Forum, acknowledged the statements of support from the Security Council, noting at the same time that RAMSI was undertaken in accordance with the Charter. New Zealand urged the UN, where it could, to assist the process to rebuild the social structure and economy of Solomon Islands.³³

6.25 In September 2004, the Security Council recognised the deployment of RAMSI. In his report to the General Assembly, the Secretary-General stated that the Security Council was briefed by the UN Secretariat before 'it endorsed the operation'. He stated further that the Department of Political Affairs and UN Development Program 'undertook a needs assessment mission to Solomon Islands to determine the additional support needed to move the peace-building and reconciliation process forward and to complement the activities of RAMSI'.³⁴

Committee view

6.26 The committee supports the view that the Security Council should be the primary authority for the deployment of a peacekeeping operation and that Australia should not take any action that would diminish this authority. Even so, it accepts that a conflict situation may arise where the Security Council is not able to act and, due to the seriousness or urgency of the situation, Australia may feel duty bound to participate in a peacekeeping operation. In these cases, the legal grounds for a regional operation must stem from the host country's request for assistance and its consent for the particular operation. Evidence suggested that the government is fully aware of the importance of having solid international legal underpinnings, in the form of the host country's consent, for a regional operation.

Legality and legitimacy

6.27 Confusion or doubts about the source and nature of the consent or the terms of the operation's mandate may undermine the legitimacy of the legal arrangements for a peacekeeping operation. Although legal instruments inviting and consenting to a mission confer international legitimacy on a peacekeeping operation, local political circumstances may undermine their currency in the host country. A background note to the *Workshop on the Fundamental Principles of UN Peacekeeping* observed that 'consent is often unreliable and subject to manipulation by the parties'. It observed further that 'much depends on whether consent is given freely or grudgingly through

32 UN General Assembly, Letter dated 21 August 2003 from the Permanent Representative of New Zealand to the United Nations addressed to the Secretary-General, A/58/304, 22 August 2003, paragraphs 13–15.

33 UN General Assembly, 14th plenary meeting, A/58/PV.14, 26 September 2003, p. 7.

34 UN General Assembly, Report of the Secretary-General, *Cooperation between the United Nations and regional and other organizations*, A/59/303, 1 September 2004, paragraph 83, p. 19.

external pressure'.³⁵ The former Ambassador of the Federal Republic of Germany to the UN, Professor Tono Eitel, has made a clear distinction between legality and legitimacy. He said:

The main criterion for legitimacy is the attitude of the public towards a measure and not the legal basis: thus a measure which is considered to be 'legitimate' might be illegal, i.e. not supported by the law, but somehow 'right' according to ethical consideration, while 'legal' could mean that something is legally right, but considered to be ethically and politically wrong.³⁶

6.28 Thus, the recognition conferred on a mission by way of legal instruments can be fragile if parties to the dispute question the status of the documents, re-interpret them or withdraw their consent. For example, in March 2007, the then Australian Minister for Foreign Affairs expressed concern about what appeared to be a deliberate attempt by some local groups in Solomon Islands to frustrate the work of RAMSI and to undermine its reputation. In an open letter to the people of Solomon Islands, he noted some of the difficulties being created for RAMSI personnel and sought continuing support for the mission.³⁷ More recently, the Solomon Islands Minister for Foreign Affairs, External Trade and Immigration informed the UN General Assembly that 'the nature of the arrangements and activities embraced by the 2003 agreement, as well as their practical application and operation since that time, appear to transgress Article 52 of the Charter' dealing with regional arrangements.³⁸

6.29 Clearly, any legal document must have the continuing support of all parties to the arrangement, particularly that of the host country. This matter of legitimacy, as distinct from the legality of a mission, is discussed in greater detail in Chapter 16.

Committee view

6.30 Because the status of legal documents authorising a peacekeeping operation may be undermined by circumstances such as political tensions between the parties to the agreement, other means are necessary to buttress the legal standing of a non-UN-mandated operation. Thus, the committee also recognises the importance of securing clear endorsement for the mission from the UN, preferably through a Security Council resolution. Essential to gaining UN authorisation or approval is to ensure that the mission mandate is consistent with the principles of the UN Charter. The committee also notes the importance of ensuring that the UN is kept fully informed about the

35 Background note, Workshop on the Fundamental Principles of UN Peacekeeping, Stockholm, 26–28 September 2006.

36 Professor Tono Eitel, 'The United Nations in the 21st Century: Japanese, German and US perspectives', Forschungskreis Vereinte Nationen, 21–22 September 2000, p. 7.

37 A letter to the People of Solomon Islands from the Hon Alexander Downer MP, Minister for Foreign Affairs, Australia, Attachment A to answer to question in writing no. 5423, *House Hansard*, 22 March 2007, p. 206. See also paragraphs 16.9–16.11.

38 UN General Assembly, 13th plenary meeting, A/62/PV.13, 1 October 2007, p. 25.

activities associated with the regional mission and, where possible, is involved in supporting or assisting the mission.

6.31 The committee strongly supports the recommendations of the 2001 Joint Committee that any regional peacekeeping operation in which Australia is engaged has UN authorisation. The committee understands, however, that in some urgent cases UN authorisation may not be forthcoming in time for a deployment. In these instances, the committee believes that the government needs to take added precautions to secure a firm legal footing for the operation.

Conclusion

6.32 The committee is satisfied that the Australian Government gives adequate consideration to the legal aspects of a peacekeeping operation before committing Australian personnel to that mission. The committee's only concern relates to the legal arrangements for non-UN missions where any consideration of Australia's participation must take account of factors likely to affect the perceived legitimacy of the arrangement. The committee considers that endorsement, recognition or approval by the UN assists in conferring legitimacy on the peacekeeping operation and strengthens the legal standing of the documents authorising the mission. In the committee's view, the stronger the connection with the UN, the more likely it is that the legal arrangements for the peacekeeping operations will be seen as correct and proper. Strong endorsement from countries in the region also adds legal weight to a non-UN mandated mission.

Recommendation 3

6.33 The committee recommends that before the Australian Government decides to contribute to a non-UN mandated peacekeeping operation, it is satisfied that the mission has a proper legal framework with recognised authority to deploy the operation and is consistent with Australian law. In this regard the committee recommends that:

- **as early as practicable, the UN is consulted and fully informed about developments and any proposals for a peacekeeping operation;**
- **the Australian Government places the highest priority on securing regional support for the peacekeeping operation;**
- **the host country, through its legally recognised authorities, has requested the establishment of a peacekeeping operation and willingly consented to the deployment of forces and the conditions under which they are to operate—the agreement to be documented in appropriate legal instruments and provided to the Security Council; and**
- **the legal documents authorising the deployment of a peacekeeping operation to be treated, if not in the form of a treaty, in a way similar to treaties; that is, tabled in Parliament with an accompanying National Interest Analysis and examined by a parliamentary committee.**

Furthermore, that the operation's mandate:

- **is in complete accord with the UN Charter and is accountable to universally accepted human rights standards and Australian law;**
- **contains arrangements to ensure that the Security Council and the peacekeeping operation complement each other's efforts to keep the peace; and**
- **includes provisions making the mission accountable to the UN and covers issues such as reporting procedures and channels for the exchange of information.**

Finally, through both formal and informal channels, the government endeavours to obtain UN endorsement of the operation even though the operation may have commenced.

6.34 Australia's active role in recent regional peacekeeping missions underlines the importance of ensuring that they had solid legal underpinnings. The committee believes that this difficult and complex area of securing internationally recognised legal authority to undertake a peacekeeping operation warrants further discussion and clarification. The committee suggests that its proposed white paper on peacekeeping contain a discussion and an explanation of this matter and of the guidelines the government would apply in considering a regional peacekeeping operation.