The Laws of Occupation and Human Rights: Which Framework Should Apply to United Nations Forces?

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1. Introduction

Military forces mandated by the Security Council are probably the most visible manifestation of United Nations activities. Their conduct and success bears directly on the credibility of the UN as a whole. However, recent history, from Somalia to Kosovo, reveals the difficulties faced by UN-mandated forces when the legal regime under which they operate is uncertain.

UN forces are increasingly being called upon to operate in complex post-conflict or transitional societies. In these situations, they are usually mandated first to provide public security by restoring law and order, and second to create the security environment in which national democratic institutions can be rebuilt. However, this task is not straightforward, and can go badly wrong without a firm legal foundation on which to base actions. In Somalia, Canadian peacekeepers, frustrated by constant looting but their inability to make an arrest, beat a Somali youth to death.[1] In Kosovo, under the COMKFOR Detention Directive 42,[2] KFOR forces detained individuals seen as 'security risks' in breach of their human rights.[3]

UN forces need a clear legal framework which balances the need for robust short-term actions to restore law and order with the longer-term issues of respect for the law and human rights, which bear directly on the legitimacy of their operations and the success of their mandates. Without a clear and firm legal foundation, it is difficult to define legal and acceptable behaviour of the troops, to draw up rules of engagement, and ultimately to carry out a successful mission.

Presently, the applicable legal framework in these situations is unclear. Obligations of the UN forces can arise from their mandate, the Status of Forces Agreement, the Contributing Nations Agreement, human rights obligations, customary international

1 Clyde Farnsworth, 'The Killing of a Somali Jars Canada?, *The New York Times*, 11 February 1996.

2 COMKFOR Dentention Directive 42 (9 October 2001).

3 Amnesty International, *Serbia and Montenegro (Kosovo): The Legacy of Past Human Rights Abuses*, 1 April 2004, AI Index=EUR 70/009/2004 at [2.1.1].

law, international criminal law, pre-existing national law and, in some circumstances, the laws of occupation.

This article discusses the applicability and appropriateness of the laws of occupation to UN peace support operations in restoring law and order. First, it will briefly introduce the changing role of UN forces. Secondly, it will examine when the laws of occupation might apply to UN forces *de jure*, focusing on the key issue of host State consent. Thirdly, it will provide an overview of human rights law as an alternative legal framework. Fourthly, it will propose how a new legal framework could be created by the Security Council, what it might look like and how it might operate. The article will conclude that the Security Council has the authority to clarify the legal frameworks applicable for UN forces in restoring law and order, and should do so.

2. The Role of UN Forces

Since the end of the Cold War and the breaking of the Security Council deadlock, there has been a vastly increased role for UN forces. From 1945 to 1988 there were only 15 peacekeeping operations;[4] between 1988 and 2003 30 new missions were added. Earlier peacekeeping forces were often deployed between States; newer ones are often deployed within States involved in civil wars[5] or in their immediate aftermath. The need for this type of operation appears to be increasing.[6]

While the public security function has been an increasingly prominent part of recent peace support operations such as Timor Leste, it has been present in some form in peace support operations since UN Emergency Forces I in 1956.[7] The predominance of recent peacekeeping operations in civil wars has led to new challenges, such as the challenges to law and order from the breakdown or collapse of State institutions.[8] Often, only UN forces are capable of restoring law and order, without which none of the more complex tasks can be undertaken.[9]

When UN forces have been inserted into chaotic situations, their first mission is almost invariably the restoration of law and order.[10] The rapid restoration of law and

4 Christine Gray, 'The UN and the Use of Force' in Christine Gray (ed), *International Law and the Use of Force* (2nd ed, 2004) at 209.

5 Ibid.

6 Bruce Oswald, 'Addressing the Institutional Law and Order Vacuum, Key Issues and Dilemmas for Peacekeeping Operations' in *Department of Peacekeeping Best Practice Series* (September 2005) at 4; Peter Viggo Jakobsen, 'The Role of Military Forces in Managing Public Security Challenges: As Little as Possible or Filling the Gap?' (2002) at 17 (copy on file with the author).

7 Bruce Oswald, 'The Law of Occupation and the United Nations Peace Operations: An Effective Mechanism to Fulfill Command and Responsibility?' in Alexandre Faite & Jeremie Labbe Grenier (eds), *Expert Meeting on Multinational Peace Operations: Applicability of International Humanitarian Law and International Human Rights Law to UN-Mandated Forces* (2004) ('*ICRC Experts Meeting Report*').

8 Gray, above n4.

9 Simon Chesterman, 'The Use of Force in UN Peace Operations' in *Department of Peacekeeping Best Practices Series* (August 2004).

10 See, for example, SC Res 1264, UN SCOR, 54th sess, 4045th mtg, UN Doc S/Res/1264 (1999) authorising INTERFET activities in Timor Leste. The first task of INTERFET under the mandate was 'to restore peace and security in East Timor' at [3].

order lays the foundation for the establishment of rule of law; it ensures that locals do not take the law into their own hands.[11] However, it also forms the first phase of longer-term UN operations focused on restoring or building national democratic institutions. If UN forces over-emphasise the public security function at the expense of human rights, it may be counterproductive to the longer-term goals.[12] UN forces must therefore balance the need for robust action in the exercise of the public security function with the longer-term objectives of democratic institution-building and human rights. They must act effectively, and with legitimacy. The two should not be mutually exclusive.

UN forces can be described in various ways. Considering their composition and command, UN forces can include 'contracted out' multinational coalitions, sometimes led by a single coalition leader,[13] regional arrangements,[14] or 'blue helmet' forces under UN command and control.[15] Their mandates range from authorised 'extreme' peace-enforcement in the Coalition repulsion of Iraq's invasion of Kuwait in 1991 to 'traditional' peacekeeping in support of local law and order, and the original peace monitoring missions.[16]

In this article, 'UN forces' will be used to describe all UN-authorised military deployments, with or without the consent of the host State, and including both 'contracted out' and 'blue helmet' deployments. 'UN peace support operations' will be used to describe the deployment of UN military forces for the purposes of peacekeeping, whether under Chapter VI or Chapter VII of the *UN Charter*.

3. When Do the Laws of Occupation Apply to UN-Authorised Forces?

A. What are the Laws of Occupation?

The laws of occupation are codified in the *1907 Hague Regulations*,[17] the *1949 Fourth Geneva Convention*[18] ('*GCIV*') and some provisions of its *1977 First Additional Protocol*.[19]

11 Chesterman, above n9 at 13.

12 Jakobsen, above n6 at 3; *ICRC Experts Meeting Report*, above n7 at 58.

13 'Contracted out' forces operating under a UN mandate include: UNITAF in Somalia, Operation Turquoise in Rwanda, the MNF in Haiti, IFOR and SFOR in Bosnia-Herzegovina, KFOR in Kosovo, INTERFET in Timor Leste, ISAF in Afghanistan, Operation Licorne in the Ivory Coast.

14 Such as ECOMOG and ECOMIL in Liberia, ECOMOG in Sierra Leone, and AMF in Burundi.

15 Such as UNTAC in Cambodia, UNOSOM II in Somalia, UNPROFOR in Bosnia-Herzegovina, UNAMIR II in Rwanda, UNMIH in Haiti, UNMIK in Kosovo, UNTAET in Timor Leste, UNAMSIL in Sierra Leone, UNMEE in Ethiopia and Eritrea, MONUC in Democratic Republic of Congo, MINUCI in Ivory Coast and UNMIL in Liberia.

16 For example, in Sierra Leone under SC Res 1270, UN SCOR, 54th sess, 4054th mtg, UN Doc S/Res/1270 (1999); Liberia under SC Res 1509, UN SCOR, 58th sess, 4830th mtg, UN Doc S/Res/1509 (2003); and Haiti under SC Res 1542, UN SCOR, 59th sess, 4961st mtg, UN Doc S/Res 1542 (2004).

17 *Regulations Respecting the Laws and Customs of War on Land, annexed to Hague Convention (IV) Respecting the Laws and Customs of War on Land*, opened for signature 18 October 1907 (entered into force 26 January 1910).

18 *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) ('*GCIV*').

The distinction between occupation and annexation began to emerge during the 18th century.[20] Previously, conquered lands were presumed to be annexed to the territory of the conqueror.[21] In 1828, Chief Justice John Marshall enunciated the proposition that the holding of conquered territory might be considered as 'a mere military occupation, until its fate shall be determined at the treaty of peace.'[22] From the drafting of the *Lieber Code* in 1863, the formulation of the laws of war occurred predominantly in the drafting of military manuals. In 1874, States met in Brussels to attempt to codify the laws of war, but no State ratified the resulting *Projet de Declaration*.[23] Two more successful peace conferences were held in the Hague in 1899 and 1907. Annexed to the *1907 Hague Convention*[24] were the *1907 Hague Regulations*, which formed the basis for the development of the laws of occupation. The *1949 Geneva Conventions* were drafted in light of the experiences of World War II, where actions towards civilians in occupied territories demonstrated the inadequacy of the existing legal framework.[25]

The laws of occupation are premised on a number of assumptions. First, sovereignty may not be alienated by the use of force.[26] Hence, an occupier exercises temporary control of territory without affecting the sovereign status of the State, maintaining *status quo ex ante* of the territory,[27] and with the aim of restoring the authority of the sovereign, as soon as possible in the case of 'non-belligerent' occupation.[28] They impose upon an occupier an obligation to restore law and order.[29] Importantly, the laws of occupation acknowledge that the primary consideration of an occupying power remains the prosecution of the war to its successful conclusion.[30] Thus, the laws of occupation provide to the occupier a right to defend its forces,[31] and continue to take actions in accordance with the principles of military necessity.[32]

A key feature of the laws of occupation is that they are based around the occupier, rather than the citizen. Pictet maintains that the *1949 Geneva Conventions* are 'first and foremost to protect individuals'.[33] Benvenisti claims that *GCIV* delineated 'a bill of

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19 *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts,* opened for signature 8 June 1977, 1125 UNTS 3, (entered into force 7 December 1978) arts 72–79.

20 Gerard von Glahn, *The Occupation of Enemy Territory: A Commentary of the Law and Practice of Belligerent Occupation* (1957) at 7.

21 Ibid.

22 *American Insurance Company v Canter* (1828) 1 Peters 542, cited in von Glahn, above n20 at 7.

23 von Glahn, above n20 at 8.

24 *1907 Hague Convention (IV)*, above n17.

25 von Glahn, above n20 at 16.

26 Eyal Benvenisti, *The International Law of Occupation* (1993) at 3, 5.

27 Alexandre Faite, 'Background Paper 2: Applicability of the Law of Occupation to UN-Mandated Forces' in *ICRC Experts Meeting Report*, above n7 at 75.

28 Michael Kelly, *Restoring and Maintaining Order in Complex Peace Operations: The Search for a Legal Framework* (1999) at 132, 141.

29 *GCIV*, art 64; Oswald, above n7 at 36, maintains that the substitution of order for chaos is the fundamental aim of the laws of occupation.

30 von Glahn, above n20 at 224.

31 *GCIV*, art 64.

32 von Glahn, above n20 at 224.

rights for the occupied population,'[34] and other authors have observed that international humanitarian law and human rights law share the same objective.[35] However, the laws of occupation are not a citizen-centred framework, and the expression 'human rights' is not to be found in any of the *1949 Geneva Conventions*, despite the passage of the *Universal Declaration of Human Rights*[36] in 1948. Protection is accorded[37] to occupied peoples; rights are not conferred.[38] Obligations fall on the occupier to provide certain minimum protections to the occupied civilians, which can be subordinated to the demands of military necessity to protect the occupying forces.[39] A number of provisions of the *1907 Hague Convention* allow otherwise forbidden acts to be committed in cases of military necessity.[40] The primary consideration of an occupying power remains the prosecution of the war to its successful conclusion.[41]

B. *Applicability of Laws of Occupation*

In what situations do the laws of occupation apply?

(i) The 'de facto' *Approach*

Some commentators take a *de facto* approach to the applicability of the laws of occupation.[42] Abhorring a humanitarian law vacuum, they declare that where *de facto* occupation can be made out, the laws of occupation should apply *de jure*. Applying a strict separation between *jus ad bello* and *jus in bellum*, they maintain that the purpose or legitimacy of the occupation is not a relevant consideration in determining whether the laws of occupation apply.

The *de facto* approach should be understood in light of two considerations. First, historically, States have consistently denied that the law of occupation applies *de jure* to specific situations,[43] or have established puppet governments to allow them to disavow legal responsibility.[44] This trend continues today, and is likely to continue into

33 Jean Pictet, *Commentary on the Fourth Geneva Convention Relative to the Protection of Civilians in Time of War* (1957) at 21.

34 Benvenisti, above n26 at 211.

35 Francoise Hampson & Ibrahim Salama, 'Adminstration of Justice, Rule of Law and Democracy: Working Paper on the Relationship between Human Rights Law and International Humanitarian Law' Commission on Human Rights, 57th Session E/CN.4/Sub.2/2005/14 (21 June 2005) at 19.

36 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 183rd plen mtg, UN Doc A/RES/217A (1948) ('*UDHR*').

37 Pictet, above n33 at 46.

38 *cf* Theodor Meron, *Human Rights in Internal Strife: Their International Protection* (1987).

39 Bernadette Boss, 'Chapter 6: The Boundary Between International Humanitarian Law and International Human Rights Law' (Draft PhD Thesis, Australian National University, 2005) (copy on file with author) at 3.

40 von Glahn, above n20 at 224.

41 Ibid.

42 *ICRC Experts Meeting Report*, above n7 at 13–14.

43 For example, Israel denies the *de jure* operation of the laws of occupation in the Occupied Territories.

44 Benvenisti, above n26 at 5.

the future.[45] Even where the application of the laws of occupation is recognised, States are keen to avoid the language of occupation.[46] This can lead to a legal vacuum, where humanitarian law protections do not apply, and occupying States can and have argued that their human rights obligations are not applicable.

Second, the policy justification proffered by the *de facto* approach is to ensure some minimum protections for civilians in occupied territory.[47] However, this underestimates the development in coverage and efficacy of human rights law since 1949, the increasing recognition that human rights obligations still exist during armed conflict, and the higher level of protection they can provide. These will be discussed further below.

(ii) Operation of Laws of Occupation Displaced by Agreement

A number of commentators note that the laws of occupation may be modified or displaced if an occupation is governed by an agreement. For example, von Glahn notes that in an armistice occupation, *1907 Hague Regulations* could be modified by the terms of the armistice agreement.[48]

This view needs to be reconciled with the requirement under the laws of occupation that do not allow derogation from a basic level of protection for civilians under occupation.[49] Further, it may be inconsistent with the view expressed below that a peace-time occupation cannot occur with the valid and on-going consent of the host State.

(iii) Relevant Provisions of the Laws of Occupation

The application of *GCIV* is governed by article 2 which is common to the four *1949 Geneva Conventions*.

Article 2 provides:

> In addition to the provisions which shall be implemented in peace-time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them.
>
> The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Sections II and III of the *1907 Hague Regulations* are incorporated into *GCIV* by article 154 for States which are bound by the *Hague Conventions*. Arguably, the *1907 Hague*

45 Id at 182.

46 The US/UK letter of 8 May 2003 addressed to the President of the UNSC does not use the word occupation: Adam Roberts, 'The End of Occupation: Iraq 2004' (2005) 54 *International and Comparative Law Quarterly* 27 at 31.

47 Adam Roberts, 'What is a Military Occupation?' (1984) 55 *British Yearbook of International Law* 250.

48 von Glahn, above n20 at 29.

49 *GCIV*, arts 7, 8, 47.

Regulations now constitute customary international law and thus bind all States.[50] Relevantly, article 42, under the part heading 'Military Authority Over the Territory of the Hostile State', provides that '[t]erritory is considered occupied when it is actually placed under the authority of the hostile army.'

It is not disputed that occupation involves effective control of territory by a foreign army.[51] Effective control involves displacing the previous government,[52] or assuming the authority of the sovereign.[53] The British and US Military Manuals[54] support these definitions.

Differences arise among commentators on the answer to the following two questions: is armed conflict a necessary precursor to the application of the laws of occupation? Does an implied or express consent on behalf of the host State void the application of the laws of occupation?

Some commentators[55] argue that the test for occupation requires that armed conflict must occur beforehand to trigger the application of the *1949 Geneva Conventions*. In the case of occupations, this interpretation requires a conjunctive reading of the first two paragraphs of article 2 of *GCIV*.[56] However, it appears from a simple good faith reading in accordance with the ordinary meaning of the text,[57] and from an examination of the *travaux préparatoires* to clarify doubt as to the meaning,[58] that *GCIV* is triggered in situations short of armed conflict.

The second paragraph of article 2 clearly provides that the *GCIV* 'shall *also* apply to *all* cases of partial or total occupation'[emphasis added] of a party, even if the said occupation meets with no armed resistance. This draws on the experience of World War II,[59] where countries such as Czechoslovakia[60] and Denmark[61] were occupied without hostilities. Thus, the *GCIV* should apply regardless of the previous existence of armed conflict. The preparations for the drafting of the *1949 Geneva Conventions* show a clear intention that armed conflict is not a necessary precursor to the application of *GCIV*. In its *Wall Advisory Opinion*,[62] the ICJ cited a 1947 Conference

50 Marten Zwanenburg, *Accountability of Peace Support Operations* (2005) at 200; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136 at [89] ('*Wall Advisory Opinion*'); *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226 at [75] ('*Nuclear Weapons Case*'); von Glahn, above n20 at 11; Kelly, above n28 at 147.

51 Roberts, above n47 at 251: 'different to the population in nationality, allegiance or interests'; Zwanenburg, above n50 at 193.

52 Roberts, above n47; Zwanenburg, above n50 at 193.

53 Kelly, above n28 at 112.

54 Cited in Maxine Marcus, 'Humanitarian Intervention without Borders: Belligerent Occupation or Colonization?' (2003) 25 *Houston Journal of International Law* 99 at 99, 110.

55 See Boss, above n39.

56 Boss, above n39 at 22; *cf* Pictet, above n33 at 22, who maintains that paragraph 2 specifically fills the gap left by paragraph 1 and hence the paragraphs operate disjunctively.

57 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331, (entered into force 27 January 1980) ('*VCLT*') art 31.

58 Id at 32.

59 Pictet, above n33 at 21.

60 Kelly, above n28 at 152.

61 von Glahn, above n20 at 20; Benvenisti, above n26 at 3.

62 *Wall Advisory Opinion*, above n50.

of Government Experts as declaring that the Conventions would apply 'to cases of occupation of territories in absence of any state of war'.[63] Further, Zwanenburg observes that the Rapporteur of the Committee at the 1949 Conference stated that it 'was perfectly well understood that the word "occupation" referred not only to occupation during war itself, but also to sudden occupation without war, as provided in the second paragraph of article 2'.[64]

This analysis fortifies the *de facto* commentators, and accords with the position of the Australian Defence Forces that the law of occupation does not require a prior armed conflict for it to apply *de jure*.[65]

The second contentious threshold question is whether an implied or express consent on behalf of the host State negates the *de jure* application of the laws of occupation. Boss notes that the definition of occupation is drawn from article 42 of the *1907 Hague Regulations*. She emphasises the requirement that the army be 'hostile', in arguing that forces operating with the consent of the host State cannot be considered occupiers.[66]

Establishing 'effective control' requires the displacement of sovereignty, which can serve as a test for whether a state of occupation has arisen.[67] However, a host State consenting to a foreign presence on its soil could be argued to be exercising sovereignty, rather than conceding it.[68] For example, it is rarely questioned that the presence of foreign military bases does not extinguish the host State's sovereignty.[69] The validity of the consent could be tested by whether the sovereign has the right to direct those foreign forces to withdraw.

Roberts puts a further argument that fortifies the position that *GCIV* was not intended to apply when the army is not hostile. If *GCIV* were to apply to the occupation of allied territory, the second paragraph of article 4 would be rendered obsolete.[70] Article 4 outlines the categories of protected persons. The second paragraph states that nationals of allies ('co-belligerents') within the occupied territory are not protected. Pictet points out that nationals of allies do not need protection under *GCIV*.[71] Were *GCIV* to apply to the occupation of allied territory, none of the nationals of that territory would be protected,[72] which seems to be contrary to the purpose of *GCIV*.

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63 Id at [95].

64 Zwanenburg, above n50 at 194; see also Pictet, above n33 at 21.

65 Michael Kelly, Timothy McCormack, Paul Muggleton & Bruce Oswald, 'Legal Aspects of Australia's Involvement in the International Force for East Timor' (2001) 841 *International Review of the Red Cross* 101.

66 Boss, above n39.

67 Kelly, above n28 at 112; Zwanenburg above n50 at 196.

68 See, for example, Benvenisti, above n26 at 3.

69 See, for example, Dieter Fleck, 'The UN Peacekeeping Experience' in Dieter Fleck & Stuart Addy (eds), *The Handbook of the Law of Visiting Forces* (2001) at 491, 501; *cf* von Glahn, above n20 at 28.

70 *VCLT*, art 32 strives to prevent such obsolescence by allowing reference to *travaux préparatoires* when a meaning is absurd or unreasonable.

71 Pictet, above n33 at 49.

72 See Roberts, above n47 at 265.

From first principles and an examination of the texts of the laws of occupation, it appears that there can be no occupation where the host State has consented to the presence of the foreign troops. On the other hand, both Roberts and van Glahn discuss types of occupation that occur with the consent of the occupied State. This proposition seems counter-intuitive, but has garnered some influential support,[73] and is therefore worthy of closer examination.

Lieutenant-Colonel Michael Kelly of the Australian Defence Force argues that the laws of occupation applied *de jure* to Australia's contribution to the UN peace support mission in Somalia.[74] He cites historical examples of occupation with consent, including the Allied forces' presence in Germany under the *Statute of Occupation* with the consent of the German government,[75] Israel's occupied territories after agreements with the Palestinian Authorities,[76] the UN operations in Cambodia under the *Paris Accords*,[77] and Kosovo under the *Dayton Agreement*.[78]

Kelly draws on the seminal article on occupation by Adam Roberts.[79] Roberts identifies 17 types of occupation, including two types of peacetime occupation: forcible peacetime occupation, and peacetime occupation by consent. Forcible peacetime occupation refers to situations short of armed conflict without the previous consent of the government, such as the German occupation of Bohemia and Moravia without resistance prior to the outbreak of the World War II. There can now be little dispute that these situations fall within the scope of the second paragraph of article 2 of *GCIV*, which specifically contemplates such situations ('even if the said occupation meets with no armed resistance'). Indeed, this second paragraph was worded to catch such situations in the future,[80] as the ICJ has confirmed.[81]

The second type of peacetime occupation to which Roberts refers is peacetime occupation by consent, sometimes called 'pacific occupation'. Both von Glahn and Roberts list sub-types of peacetime occupation by consent. Von Glahn[82] speaks of peaceful occupation 'as a means of self-help',[83] 'conventional occupation' based on an agreement with the host State, and for a variety of possible purposes including ensuring fulfilment of treaty obligations, withdrawing troops, or legalizing the occupation of foreign bases.[84] Roberts[85] outlines three sub-types of peacetime occupation by consent: 'conventional occupation' with a view to ensuring the observance of a treaty; 'evacuation occupation', to safeguard the withdrawal of armed

73 Kelly, above n28 at also relies on this category of 'pacific occupations' to argue that the laws of occupation applied *de facto* to UN forces in Somalia.

74 Ibid.

75 Id at 127.

76 Id at 163.

77 Ibid.

78 Id at 165.

79 Roberts, above n47.

80 Kelly, above n28 at 121–29; Pictet, above n33 at 21.

81 *Wall Advisory Opinion*, above n50 at [95].

82 von Glahn, above n20 at 27.

83 Id at 5.

84 *cf* Roberts, above n47, who states that foreign bases are not occupations.

85 Id at 277.

forces from foreign territory; and 'occupation by invitation', following which foreign troops take over administration of leadership of the host State.

Are these scenarios really peacetime occupations by consent?

Implicit in both 'conventional occupation' and 'evacuation occupation' is a direct nexus between the occupying and the occupied States, presumably arising from a preceding state of armed conflict to which both States were parties. In conventional occupation, it seems implicit that the occupier is a party to the Convention to be enforced; in evacuation occupation, it seems implicit that the troops to be withdrawn are its nationals.

It is not clear why Roberts has not included these sub-types in the categorization of 'post-war' occupations, which includes 'armistice occupation'[86] and 'post-surrender occupation'.[87] Pictet agrees that situations such as armistices would be captured by *GCIV* as they merely suspend hostilities, not end them, and thus cannot be said to occur in peacetime.[88] In any event, these two sub-types of 'peacetime occupations' could as easily, and perhaps more accurately, be categorized as 'post-war occupations'.

Roberts' own test seems to indicate that when there is consent, there can be no occupation. He lists some 'markers' which may indicate the presence of an occupation,[89] including when 'there is a military force whose presence in a territory is not sanctioned or regulated by a valid agreement, or whose activities there involve an extensive ranged of contacts with the host society not adequately covered by the original agreement'. The concomitant of this is that where there *is* a valid agreement sanctioning the foreign forces' initial and on-going presence, there is *not* an occupation.

In any event, such situations could perhaps more accurately be re-categorized as 'stationing of foreign military forces by agreement', which Roberts says is distinct from military occupation.[90] Both 'conventional occupation' and 'evacuation occupation' are governed by agreement with the host State and are for a particular purpose, short of displacing the sovereign.

In any event, even if a category of peacetime occupation by consent did exist, in all three sub-types there is a question as to the quality and validity of consent. As discussed above, both 'conventional occupation' and 'evacuation occupation' seem to be in the context of a State vanquished in an immediately preceding armed conflict; any consent would therefore be under duress. Occupation by invitation seems oxymoronic, and this is borne out by consideration of the main example of the sub-type: USSR forces in Afghanistan. Can it be accurately claimed that Afghanistan gave and maintained consent for USSR troops to be in its territory throughout their intervention? Benvenisti offers a compelling historical view that not only was the original 'consent' manufactured,[91] but the on-going consent was ensured by the

86 Id at 265.
87 Id at 267.
88 Pictet, above n33 at 22.
89 Roberts, above n47 at 300.
90 Id at 297.
91 Benvenisti, above n26 at 160.

installation of a puppet government.[92] It is highly contentious whether these occupations meet Roberts' own requirements of a valid prior agreement obtained without duress, as he himself points out.[93] Benvenisti proposes that such invitations should be assessed against the 'internal lawfulness of the government and the genuineness of the invitation.'[94]

It is submitted that foreign military forces in another State's territory in peacetime either have the valid consent of the host State for their presence and activities, or they do not. If they do have active and on-going consent of the host State, it is not an occupation, as sovereignty is exercised, not extinguished, by the agreement to host foreign forces. If they do not have valid consent, then the laws of occupation will apply. If this is the case, there can be no such thing as 'peacetime occupation by consent'.

If a test is needed, perhaps it is whether the foreign forces would obey a request from the host State to withdraw. If they would, they cannot be considered to be occupiers. However, it is submitted that even if pacific occupation continues to exist as a category of occupation known to international law, consensual UN peace support operations do not fall into the category.[95]

C. *When Do Laws of Occupation Apply to UN Forces?*

A number of commentators make assertions about when the laws of occupation might apply to UN forces. Implicitly, most commentators seem to adhere to a consent-based approach similar to the one outlined above;[96] where UN forces are in a territory with the host State's consent, most critics are very reluctant to apply the laws of occupation.[97] For example, Roberts argues that UN peacekeeping forces would not be considered to be occupiers where they act within one State on the basis of Status of Forces Agreements with the host State,[98] and that this situation does not change automatically if their operations involve 'an element of exerting authority over society or maintaining public order'.[99] Similarly, Greenwood has observed, '[t]he law of belligerent occupation is rightly considered not to apply when a United Nations force is involved in administering a territory but has not been a party to an international armed conflict.'[100] However, many of these commentators avoid a detailed discussion of the legal foundation for such claims.

92 Id at 161.
93 Roberts, above n47 at 298.
94 Benvenisti, above n26 at 163.
95 Roberts, above n47 at 291.
96 See, for example, *ICRC Experts Meeting Report*, above n7 at 16.
97 Marco Sassoli, 'Outline of de jure and de facto Applicability of the Law of Occupation to United Nations-Mandated Forces', in *ICRC Experts Meeting Report*, above n7 at 33.
98 Roberts, above n47 at 291.
99 Id at 298.
100 Christopher Greenwood, 'International Humanitarian Law and United Nations Military Operations' (1998) 1 *Yearbook of International Humanitarian Law* 17.

The Secretary-General's Bulletin[101] sheds little light on the question. While it applies to 'blue helmet' UN operations when engaged as combatants, it lists fundamental principles of international humanitarian law, but does not refer to the laws of occupation.[102] It picks up the previous obligation under model Status of Forces Agreements that UN peace support missions would observe the *1949 Geneva Conventions*.[103] This obligation may well have existed prior to the Bulletin.[104] As early as 1971, the Institute of International Law declared that 'the humanitarian rules of the law of armed conflict apply to the UN as of right and they must be complied with in all circumstances by UN forces which are engaged in hostilities.'[105]

The following section examines the laws of occupation, related Conventions and *opinio juris* to determine when the laws of occupation might apply to UN forces.

It is submitted that consent is a key concept in determining the *de jure* legal regime to apply. While consent is a foundation principle for traditional peacekeeping, it will not be present for all authorized UN forces. For 'peace enforcement' actions, such as the US-led operation Desert Storm, and for some other operations established under Chapter VII of the *UN Charter*,[106] the host State will not consent to the UN presence. For other Chapter VII operations, the host State will consent to the presence of the UN forces.[107] In between these extremes of consent and non-consent, there are a range of circumstances where consent will be less clear. What of collapsed States, where no body can consent on behalf of the State? What of situations where the consent for a UN presence is withdrawn, or a new government is formed?[108] What of situations of military intervention under the emerging doctrine of the 'responsibility to protect'?[109] While it is beyond the scope of this article to examine all of these scenarios in detail, it is hoped that the test for valid consent outlined above will assist in assessing such situations.

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101 See Secretary-General, *Bulletin on Observance by United Nations Forces of International Humanitarian Law*, UN Doc ST/SGB/1999/13 (1999).

102 Faite, above n27 at 73.

103 Kelly, above n28 at 180.

104 Christopher Greenwood, 'Protection of Peacekeepers: The Legal Regime' (1997) 7 *Duke Journal of Comparative and International Law* 185 at 187.

105 Institute of International Law, *Resolutions and voeux adopted by the Institute at its Zagreb Session (26 August–3 September 1971): I. Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in which United Nations Forces May be Engaged*, cited in Greenwood, above n104 at 187.

106 For example, UNMIK: see Gray, above n4 at 231.

107 For example, the INTERFET force in Timor Leste under SC Res 1264, UN SCOR, 54th sess, 4045th mtg UN Doc S/Res/1264 (1999).

108 Benvenisti, above n26 at 183.

109 International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (2001). See also General Assembly, *2005 World Summit Outcome*, [138]–[140], UN Doc A/60/L.1 (2005). Benvenisti, above n26 at 166 considers the example of Vietnam's intervention into Kampuchea, and declares that measures taken to secure the well-being of the community would be justified. He immediately notes the problem with this test; it is likely that an occupier could justify almost any actions.

(i) Coercive Operations without Host State Consent

It is almost universally accepted that during 'peace enforcement' missions, when UN forces engage as combatants and occupy territory, the laws of occupation will apply *de jure*. For example, the laws of occupation applied to areas of southern Iraq controlled by Coalition forces after their repulsion of Iraq's invasion of Kuwait in 1991.[110] This is also evident from article 2 of the *Convention on the Safety of UN and Associated Personnel*[111] which concedes that the law of international armed conflict applies to enforcement actions under Chapter VII of the *UN Charter* in international armed conflicts in which UN personnel are engaged as combatants. The *Statute of the International Criminal Court*[112] also recognizes that personnel in a UN peacekeeping operation can lose their protection as civilians.[113]

It should be noted, however, that the laws of occupation do not allow the occupiers to make institutional changes in the occupied territories.[114] This presents a dilemma for UN forces seeking to create the foundations for new democratic institutions in the State-building enterprise. The Security Council has recently had to face this situation in relation to the US-led coalition's occupation and reform of Iraq. Roberts[115] argues that the Security Council resolutions in relation to Iraq are re-formulating the concept of occupation to allow State-building reforms contrary to the letter and spirit of *GCIV*.

The power of the Security Council to override treaty obligations in determining the legal regime to apply will be discussed in more detail below. However, it should be noted that *GCIV* specifically contemplates the raising of civilians' conditions by the occupying power,[116] and prohibits civilians from being deprived of the benefits accruing to them under *GCIV*.[117] Hence, it is open to the occupying power to initiate an improvement in the conditions of the occupied people, and open to the Security Council to resolve to improve their protection.

(ii) Peace Support Operations with Consent

Most UN peace support operations will be carried out with the consent of the host State;[118] 'consent' is one of the three guiding principles of traditional UN peacekeeping. The precedent was set by UN Emergency Forces ('UNEF'), established in 1956 'with the consent of the nations concerned'[119] and withdrawn in

110 Benvenisti, above n26 at 181; Greenwood, above n100 at 28.

111 *Convention on the Safety of UN and Associated Personnel*, opened for signature 9 December 1994, 2051 UNTS 391 (entered into force 15 January 1999).

112 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90, (entered into force 1 July 2002) ('*ICC Statute*').

113 Id at arts 8.2(b) and 8.2(e)(iii).

114 *GCIV*, art 47; *cf* Benvenisti, above n26 at 183, who claims that in some circumstances, such as US interventions in Grenada and Panama, the occupier would be 'entitled to transform fundamentally the local political institutions'.

115 Roberts, above at n46.

116 *GCIV*, art 7.

117 Id at arts 7, 8 and 47.

118 Fleck, above n69 at 491.

119 GA Res 998, UN GAOR, ES–I, 563rd plen mtg, UN Doc A/Res/998 (1956).

1967 when Egypt withdrew consent for UNEF.[120] The Secretary-General found that the UN had no option but to withdraw if it did not enjoy the 'continuous affirmative consent' of the host State.[121]

Consent is usually formally expressed by the host State in a Status of Forces Agreement ('SOFA') drawn up between the UN and the host State to govern the operation of UN forces within the host State's territory.[122] Generally, the Security Council resolutions establishing the operation emphasize the consent of the host State.[123] The Model Agreement for troop-contributing nations[124] provides that UN forces shall observe 'the principles and spirit of the general international conventions applicable to the conduct of military personnel',[125] but express no specific opinion on when the laws of occupation may be triggered.

Except for Australia, States have been reluctant to recognize the applicability of the laws of occupation to UN-mandated missions.[126] In Somalia, the Australian Defence Forces held that *GCIV* was applicable, and acted accordingly. However, no action by the UN in Somalia indicates that it held the same view,[127] and subsequent Canadian[128] and Belgian[129] courts-martial held that the laws of occupation did not apply.

The more general view was supported by a UNESCO 1993 Meeting of Experts on the application of the *1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict*.[130] In considering 'occupation' in the context of that treaty, it found that, '[a]s long as the United Nations peacekeeping forces operate with the consent of the host State, such operations were not regarded as an occupation under the Convention.'[131]

Applying the test above, if the host State has the right to call for the withdrawal of the UN forces, then the laws of occupation are not applicable *de jure*. From the precedent of UNEF in Egypt, it appears that host States can call for the withdrawal of UN forces. Thus, agreeing to UN forces on a State's territory is an exercise of sovereignty, rather than an invalidation of it.[132]

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120 Anonietta Di Blasé, 'The Role of the Host State's Consent with Regard to Non-Coercive Actions by the United Nations', in Antonio Cassese (ed), *United Nations Peace-Keeping* (1978) at 72.

121 David Wippman, 'Military Intervention, Regional Organisations and Host-State Consent' (1996) 7 *Duke Journal of Comparative and International Law* 209.

122 See, for example, General Assembly, *Model Status of Forces Agreement for Peacekeeping Operations*, UN Doc A/45/594 (1990).

123 See, for example, SC Res 143, UN SCOR, 873rd mtg, UN Doc S/4387 (1960); SC Res 189, UN SCOR, 19th sess, 1126th mtg, UN Doc S/5741 (1964).

124 General Assembly, *Model Agreement between the UN and Member States Contributing Personnel and Equipment to the UN Peacekeeping Operations*, UN Doc A/46/185/CORR.1 (1991).

125 Id at [28].

126 Faite, above n27 at 74–75; Zwanenburg above n50 at 198.

127 Boss, above n39 at 29.

128 *Regina v Brocklebank*, Court Martial Appeal Court of Canada, File No. CMAC–383, 2 April 1996, cited in Faite, above n27 at 74.

129 Cited in Faite, above n27 at 74.

130 *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, opened for signature 14 May 1954, 249 UNTS 240 (entered into force 7 August 1956).

131 At [6.1], cited by Zwanenburg, above n50 at 196.

132 Di Blasé, above n120 at 80.

(iii) Where Consent is Unclear

There are a number of scenarios where a UN peace support mission may be operating and the status of the consent is unclear. In a civil war, the government might consent, but the warring factions may not. In a failed or failing State, the consent of the government may not be a valid indicator of the State's consent. When a government collapses but the UN forces remain, it is unclear whether the consent also remains to validate their presence.

Gray points out that in Somalia, the UN relied upon the consent of the government to establish UN Operations in Somalia ('UNOSOM'), even though the government was not in effective control of the whole territory at the time.[133] From whom should consent be sought in the absence of an identifiable government, such as in Somalia? Need all warring factions consent?[134] Can consent be extracted from the citizenry, who might well welcome UN forces to control the warring factions?[135] Does duress void any treaty based on consent?[136] What if consent is withdrawn or forfeited by the actions or mandate of the UN forces?[137] How does the model of 'consent' apply to UN forces in the context of future military interventions under the 'responsibility to protect' doctrine, which may be hostile to the host State?

As can be seen, even the consent-based test leaves many contentious areas where the legal framework will be uncertain. This gives more reason for action to clarify the relevant frameworks.

(iv) Conclusion

It seems beyond dispute that the laws of occupation apply *de jure* when UN forces have gained effective control of territory from a State with whom they had engaged in armed conflict. Similarly, most commentators assert that when the host State has clearly consented to UN forces on their soil, the UN forces will not be occupiers.

This still leaves a lacuna when the consent of the host State is not clear, creating some scenarios of UN peace support operations when the question of applicability of the laws of occupation is still open to doubt. It will be argued below that Security Council mandates should include clear instructions as to the legal regime that should apply to UN peace support operations.

D. Consequences of the Application of Laws of Occupation to UN Forces

There are some benefits in applying the laws of occupation framework to UN peace support missions, however it is submitted that these are outweighed by its disadvantages. One major benefit is that the laws of occupation are well known to, and

133 Christine Gray, 'Host State Consent and UN Peacekeeping Yugoslavia' (1997) 7 *Duke Journal of Comparative and International Law* 241 at 244.

134 Zwanenburg above n50 at 196; Wippman, above n121 at 235.

135 Kelly contends that this was the case in Somalia: Kelly, above n28 at 69.

136 Yugoslavia's consent to KFOR may have been procured by the use of force during Operation Allied Force; *VCLT*, art 52 provides that a treaty is void if its conclusion has been procured by the threat or use of force: see Zwanenburg above n50 at 197; Faite, above n27 at 74.

137 The Secretary-General implies that the mandate of UNOSOM II led to the forfeiture of consent of the parties: *An Agenda for Peace*, S/1995/1 at [34], cited in Zwanenburg, above n50 at 197.

understood by, the military forces which make up any UN peace support operation,[138] and have been elaborated into specific codes by military manuals.[139] Thus, there would be little need for specialized training before implementing the laws of occupation on the ground.

Similarly, Kelly contends that the laws of occupation were designed specifically for situations similar to collapsed State situations, and therefore are a suitable framework for restoring law and order.[140] They provide practical solutions to problems that forces face in the field.[141] Further, it has been contended that the laws of occupation can apply free of controversy, because they do not impugn the motive of the intervening State,[142] and indicate a willingness to stay only temporarily.[143] Finally, the laws of occupation require local laws to be respected and retained as far as possible.[144] This is consistent with the preservation of State sovereignty, helps to ensure national ownership, and aims towards a hand-over of power to national authorities.[145]

However, the disadvantages outweigh these benefits. First, activation of the laws of occupation *de jure* would also activate the application of the other *1949 Geneva Conventions*, with undesirable consequences. UN forces would become legitimate targets for resistance as lawful combatants.[146] Detained UN force personnel could arguably be prisoners of war, which would be clearly contrary to the intention of States evidenced in their discussions leading towards the *Safety Convention*.[147]

Secondly, the language of occupation has *increasingly* become pejorative.[148] Most nations seek to avoid it, even while admitting that it may be applicable.[149] UN forces may be obliged to apply the law and language of occupation during enforcement actions,[150] but should seek to avoid it elsewhere.

Thirdly, the laws of occupation envisage the occupier as a caretaker, respecting the pre-existing laws and customs of the State, and preparing to eventually surrender sovereignty to the pre-existing power.[151] There is an obligation on the occupier not

138 *ICRC Experts Meeting Report*, above n7 at 13; Faite, above n27 at 77.

139 von Glahn, above n20 at 12.

140 Kelly, above n28 at 216: 'the provisions are in effect designed for the very crises of order, disruption and human needs that characterise the environment in a humanitarian intervention or peace enforcement operation'.

141 *ICRC Experts Meeting Report*, above n7 at 13.

142 Ibid.

143 Kelly, above n28 at 88.

144 *1907 Hague Regulations*, art 43; Kelly, above n28 at 126 points out that these obligations did not prevent the Allies from abrogating Nazi law in occupied Germany.

145 Kelly, above n28 at 43; Oswald, above n6 at 10.

146 Boss, above n39 at 30.

147 See generally Joseph Bialke, 'United Nations Peace Operations: Applicable Norms and the Application of the Law of Armed Conflict' (2001) 50 *The Air Force Law Review* 1.

148 Benvenisti, above n26 at 182, referring to international opprobrium attached to the Israeli occupation of territory captured in 1967.

149 The US/UK letter of 8 May 2003 addressed to the President of the UNSC does not use the word 'occupation': Roberts, above n46 at 31; Benvenisti, above n26 at 181 also notes that in 1991, the areas of southern Iraq controlled by US-led UN forces were euphemistically referred to as 'safe havens'.

150 Although Kelly proposes an alternative formulation: 'the international law regulating military presence in foreign territory': Michael Kelly, *Peace Operations* (1997) at 4.

to introduce institutional or legislative changes.[152] It may be difficult to reconcile these obligations of the occupier with the mandate of a mission which attempts to create democratic institutions, for example in transitional authorities.[153] The laws of occupation thus are an ill-fitting garb for a UN force which is creating the security pre-conditions for a transitional authority.[154]

4. The Role of Human Rights Law

A. What are the Human Rights Obligations of UN Forces?

UN forces have international human rights obligations stemming from their status as UN forces *per se*, and from the national obligations of the troop-contributing countries.

(i) UN Bound by Customary International Law

The main source of legal obligations on the UN *per se* is customary international law.[155] To the extent that human rights have become customary norms, the UN as an organization is bound to adhere to them. While the UN cannot be a party to the *1949 Geneva Conventions*, it is bound by norms of international humanitarian law and human rights law that have become customary.

There is a great field of debate over the scope of customary human rights law, which is beyond the scope of this article. Suffice to say that, to the extent that human rights norms expressed in instruments such as the *Universal Declaration of Human Rights*,[156] the *International Covenant on Civil and Political Rights*[157] and the *International Covenant on Economic, Social and Cultural Rights*[158] have become custom, the UN is bound by them. Further, it may be implied from the centrality of human rights to the UN's purposes,[159] that UN forces operating under a Security Council resolution are obliged to observe international human rights norms via the *UN Charter*.

(ii) Troop-Contributing Nations

UN forces will be bound by their contributing nation's international human rights obligations in places where they exercise effective control.[160] Troops sent by nations to participate in UN forces carry their nations' human rights obligations with them,

151 Marcus, above n54 at 113.

152 *GCIV*, arts 47, 64; *1907 Hague Regulations*, art 43.

153 Faite, above n27 at 75.

154 Sylvain Vite, 'Applicability of the International Law of Military Occupation to the Activities of International Organisations' (2004) 86 *International Review of the Red Cross* 9.

155 Fleck, above n69 at 500.

156 *UDHR*, GA Res 217A (III), UN GAOR, 183rd plen mtg, UN Doc A/RES/217A (1948).

157 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

158 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

159 'Promoting and encouraging respect for human rights and for fundamental freedoms' is one of the purposes of the United Nations listed in the *Charter of the United Nations*, art 1.

and nations have the obligation to prosecute individuals for any breaches of their national laws.[161]

B. When and Where Do Human Rights Obligations Apply?

A consensus has been growing amongst international legal scholars that has broadened the application and existence of human rights obligations. Human rights obligations are no longer extinguished in times of armed conflict or limited to a State's own territory. These two important principles have been encapsulated by the Human Rights Committee's General Comments 29[162] and 31[163] respectively.

General Comment 29 asserts that rights continue in times of armed conflict, subject to lawful derogations permitted by the relevant treaty. Article 4 of the *ICCPR* allows for derogations from certain rights when a 'public emergency … threatens the life of the nation'. The Comment sets a very high standard for the triggering of the derogation provisions,[164] and specifies that derogations should be of 'an exceptional and temporary nature'.[165]

General Comment 31 asserts that human rights obligations are not limited to the territory of the signatory State, but extend to any area under its 'effective control'.[166] The Comment specifically notes that human rights obligations of States extend to their troops participating in peacekeeping.[167] Thus, the human rights obligations of a signatory State bind a State in occupied territories, a conclusion more recently supported by the ICJ[168] and the British High Court in relation to British prisons in Iraq.[169]

The Committee against Torture has supported this view, finding that States' obligations extend to all areas under the '*de facto* effective control of the State party's authorities'.[170]

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160 Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004) ('*GC31*'); Hampson & Salama, above n35 at 19.

161 See *Model Agreement between the United Nations and Member States Contributing Personnel and Equipment to United Nations Peacekeeping Operations*, UN Doc A/46/185 (1991).

162 Human Rights Committee, *General Comment 29: States of Emergency (Article 4)*, UN Doc CCPR/C/21/Rev.1/Add.11 (2001).

163 Human Rights Committee, *General Comment 31*, above n160.

164 *ICCPR*, art 4(2): 'the situation must amount to a public emergency that threatens the life of the nation'.

165 *ICCPR*, art 4(1).

166 Human Rights Committee, *General Comment 31*, above n160 at [10].

167 Ibid. The Belgian Courts-Martial acknowledged this in relation to their contribution to UNOSOM II: Jeremie Labbe Grennier, 'Extraterritorial Applicability of Human Rights Treaty Obligations to United Nations-Mandated Forces', in *ICRC Experts Meeting Report*, above n7 at 82; see also Zwanenburg, above n50 at 230.

168 *Wall Advisory Opinion*, above n50.

169 *R (Al Skeini and Others) v Secretary of State for Defence* [2004] EWHC 2911 (Admin).

170 Committee Against Torture, *Consideration of Reports Submitted by States Parties under Article 19 of the Convention: United Kingdom*, UN Doc CAT/C/CR/33/3 (2004).

The ICJ held in the *Wall Advisory Opinion*[171] that while *ICCPR* obligations are 'primarily territorial', the *ICCPR* reaches and covers 'acts done by a State in the exercise of its jurisdiction outside of its own territory.'[172] Further, the ICJ found that human rights obligations do not 'cease in case of armed conflict' unless specifically derogated from using provisions similar to those in article 4 of the *ICCPR*,[173] thus affirming the reasoning in the *Nuclear Weapons Case*,[174] and the Human Rights Committee's views in General Comments 29 and 31.

In times of armed conflict, human rights obligations continue to apply, but are modified by the *lex specialis* of international humanitarian law.[175] The two bodies of law are acknowledged to be 'complementary, not mutually exclusive.'[176] However, the interface between these two bodies of law in a UN force operation is difficult to determine. It is clear that the two frameworks are not consistent; at the heart of international humanitarian law is the right conferred on privileged combatants to kill, which is fundamentally inconsistent with the right to life.[177] Most statements acknowledge that international humanitarian law will override human rights law in some circumstances, but are vague on specifically when and how this might occur.[178] Some commentators say that human rights obligations need to be interpreted 'in light of' the law of armed conflict.[179] This type of uncertainty creates problems for military lawyers, planners, strategists and commanders.

What can be concluded is that the continuous operation of human rights obligations in areas over which signatories have effective control provides a safety net of protections for civilians, whether or not the laws of occupation are applicable to a particular territory. Human rights protections might be preferred to laws of occupation protections by the civilians themselves, as human rights norms provide a generally higher level of protection, and an individual-centric set of rights. The challenge is in translating human rights obligations into specific, detailed and robust rules of engagement.

C. *Can Human Rights-Based Rules of Operation Provide Robust Rules of Engagement for the Public Security Function?*

The rapid restoration of law and order is important to ensure the security of the UN forces and the local population, and to ensure that the rule of law is respected.[180] Further, allowing a security vacuum to develop endangers the human rights of civilians, allowing them to take the law into their own hands, which in turn undermines the rule of law, and possibly also the legitimacy of the larger project.[181]

171 *Wall Advisory Opinion*, above n50.
172 Id at [111].
173 Id at [106]; see also Human Rights Committee, *General Comment 29*, above n162 at [11].
174 *Nuclear Weapons Case*, above n50 at [25].
175 See, for example, Kelly, above n28 at 93; Commission on Human Rights, Resolution 2005/63, *ICRC Experts Meeting Report*, above n7 at 20.
176 Human Rights Committee, *General Comment 31*, above n160 at [11].
177 *ICCPR*, art 6.
178 See, for example, Human Rights Committee, *General Comment 31*, above n160.
179 Hampson & Salama, above n35 at 19.
180 Oswald, above n6 at 5.

Hence the framework should provide sufficient robust powers for UN forces to restore law and order rapidly.

Advocates of the laws of occupation point out that, as a legal framework they can provide for robust action in exercising public security function.[182] They maintain that as one of the purposes of the laws of occupation is the restoration of law and order, they are uniquely suited to this purpose, and are to be preferred over other legal frameworks.[183] However, *GCIV* specifically contemplates a situation where an occupier wishes to provide a higher standard of protection for the occupied civilians.[184] Can human rights-based standards of conduct for the military provide robust rules of engagement for UN forces engaged in the restoration of law and order?

One commentator[185] asserts that human rights-based rules of engagement can be equally robust to those based on the laws of occupation in the exercise of the public security function. Assuming that derogations can be made, human rights-based rules of engagement allow a UN force to shut down a radio station that is inciting civilians to violence.[186] The British forces in Iraq have been bound by their *ICCPR* obligations while acting as an occupying power, and have not had their military effectiveness unduly hampered.[187] Indeed, it is arguable that by behaving in accordance with human rights norms, they have been more successful in their mission of 'winning hearts and minds' than their American colleagues.

In many ways, the key challenge is to create agreed guidelines that have sufficient detail to form the basis for military action.[188]

5. Proposal for a New Framework for UN Peace Support Operations

A. Why is a New Framework Needed?

This article proposes that a new legal framework for UN forces, based on the observance of human rights, should be instituted. There are a number of reasons for this.

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181 Chesterman, above n9 at 12.

182 Jakobsen, above n6 at 15.

183 Kelly, above n28 at 91, 216: 'the provisions are in effect designed for the very crises of order, disruption and human needs that characterise the environment in a humanitarian intervention or peace enforcement operation.'

184 *GCIV*, arts 7, 8 and 47.

185 Boss, above n39.

186 See Kelly, above n28 at 19–20.

187 During the Second Gulf War, the UK adhered to the *European Convention on Human Rights* concurrently with the international humanitarian laws of occupation: Michael Kelly, 'Legal Factors in Military Planning for Coalition Warfare and Military Interoperability' (2005) 11 *Australian Army Journal* 166.

188 von Glahn, above n20 at 12 points out that Military Manuals have provided 'detailed explanations … designed to guide officers in the field in the handling of a great variety of situations.'

UN force missions are endangered when their mandates and rules of engagement are not clear.[189] At present there are a number of sources of potential confusion. First, UN forces may be bound by some combination of their mandate, the Status of Forces Agreements, the Contributing Nations Agreement, human rights obligations, customary international law, international criminal law, pre-existing national law[190] and, according to some commentators, the laws of occupation. Further, there is some confusion as to exactly when the laws of occupation might apply, as opposed to human rights law, due to both the difficulties of the *lex specialis* doctrine and the contention about when the laws of occupation may apply to UN forces, particularly in situations of failed or failing States. Since rules of engagement should be fully consistent with the legal basis of the operation,[191] it is vitally important to clarify the legal foundations for any UN force.[192] Kelly argues that the UN's failure to support the establishment of courts in Somalia was due to doubt over their legal basis.[193]

As the UN becomes more involved in State-building, the laws of occupation no longer provide an appropriate legal framework. Premised on the need to retain the *status quo ex ante* of the occupied territories,[194] they obliged the occupier not change the 'institutions or government of the said territory'.[195] The Security Council has been forced to grapple with this situation in Iraq, simultaneously resolving that the laws of occupation apply, but that the US-led coalition is empowered to fundamentally re-shape the State apparatus.[196] One commentator proposes that the way around this conundrum is to impugn sovereignty in the people, not in the ousted government, thus allowing actions which align with the political interests of the people.[197] This rule would justify a very broad range of activities contrary to the basic principles of maintaining the status quo of the State, challenging some of the basic tenets of the laws of occupation. A full examination of this tension is beyond the scope of this article.

In the future, UN forces intervening under the emerging 'responsibility to protect' doctrine can be expected to find themselves grappling with a similar dilemma: how to balance the opposing imperatives of maintaining local laws while simultaneously attempting to address the 'causes of the harm the intervention was designed to halt or avert.'[198]

As a matter of policy, the legitimacy of UN forces requires that they observe human rights norms, both to ensure the legitimacy in the eyes of the nationals of the occupied territory and the international community,[199] and to be consistent with the

189 *ICRC Experts Meeting Report*, above n7 at 8.
190 Kelly, above n28 at 43.
191 SC Res 1327, UN SCOR, 55th sess, 4220th mtg, [2], UN Doc S/Res/1327 (2000).
192 Interview with Colonel Michael Kelly (Australian National University, 19 November 2005).
193 Kelly, above n28 at 71.
194 Faite, above n27 at 75.
195 *GCIV*, art 47.
196 SC Res 1500, UN SCOR, 58th sess, 4808th mtg, UN Doc S/Res/1500 (2003); SC Res 1511, UN SCOR, 58th sess, 4844th mtg, UN Doc S/Res/1511 (2003).
197 Benvenisti, above n26 at 183.
198 International Commission on Intervention and State Sovereignty, above n109 at XI.
199 Kelly, above n28 at 86; Chesterman, above n9 at 12, 15.

longer-term goals of any UN intervention. Such higher standards of behaviour should be supported with public procedures to address breaches of the standards, and to ensure that the precedent is set for accountability and observance of the rule of law.[200] Further, temporary orders and decisions made by UN forces should be subject to appeal to a future national judicial system.[201]

The promotion and protection of human rights and fundamental freedoms is one of the main purposes of the UN.[202] Human rights have flourished under the stewardship of the UN system. Most Security Council mandates proclaim the importance of human rights, and make their protection and promotion central to the UN's mission.[203] The Brahimi Report emphasized the 'essential importance of the United Nations system adhering to and promoting international human rights instruments'.[204]

It is broadly accepted that human rights standards provide a higher level of protection for individuals than the laws of occupation.[205] To take the example of arrest and detention powers, the *GCIV* obligates the occupier to observe some human rights standards, including information about the charges[206] and the rule against retrospective operation of offences.[207] However, under the *GCIV*[208] a person can be detained without infringing penal provisions if the occupier 'for reasons of its own, consider[s] them dangerous to its security'.[209] This would not be allowed under a human rights regime, which prohibits arbitrary arrest or detention[210] and deprivation of liberty without promptly informing the detainee of any charges.[211] It is submitted, for example, that UN forces should not administer or oversee the death penalty.[212]

A new legal framework to apply to all UN forces would help overcome difficulties of interoperability between troop-contributing countries with differing human rights

200 *ICRC Experts Meeting Report*, above n7 at 19.

201 This was the case with the INTERFET Detainee Management Unit in Timor Leste: Colonel Michael Kelly, interview with author (Australian National University, 19 November 2005).

202 *United Nations Charter*, art 1(3).

203 See, for example, SC Res 1244, UN SCOR, 54th sess, 4011th mtg, [11], UN Doc S/Res/1244 (1999).

204 *Report of the Panel on United Nations Peace Operations,* UN GAOR, 55th sess, Provisional Agenda Item 87, [6], UN Doc A/55/305–S/2000/809 (2000) ('Brahimi Report').

205 *ICRC Experts Meeting Report*, above n7 at 14; see also Kelly, above n28 at 94.

206 *GCIV*, art 71.

207 Id at art 67.

208 Id at art 78.

209 Faite, above n27 at 78.

210 *ICCPR*, art 9(1); *UDHR*, art 9.

211 Id at art 9(2).

212 Art 68 of *GCIV* allows occupiers to impose the death penalty in certain circumstances. Cf Kelly, above n28 at 59: the Australian contingent of UNTAF in Somalia facilitated a national court system which imposed, and carried out, the death penalty of warlord Gutalle. The prohibition on the death penalty may be an emerging norm of international law: see *Administration of Justice, Rule of Law and Democracy: Issue of the Administration of Justice through Military Tribunals,* Comm on Human Rights, 57th Sess, 3rd Agenda Item, [56]–[57], UN Doc E/CN.4/Sub.2/2005/9 (2005). See also Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, [10], UN Doc S/2004/616 (2004): 'United Nations Tribunals Can Never Allow for Capital Punishment'.

obligations, or different interpretations of the applicable law. It would also ensure a minimum level of human rights compliance for all contingents.

Finally, the laws of occupation no longer provide sufficient guidance and detail for an occupying force: in Timor Leste, the ADF referred to *ICCPR* principles to flesh out their rules of engagement.[213]

B. *What the New Framework Might Look Like*

The new framework would establish the legal foundations for future UN force operations and govern the conduct of UN forces in the re-establishment of law and order. It would be based on human rights law, and draw on previous attempts to create standards such as the *Standard Minimum Rules for the Treatment of Prisoners*,[214] the *Basic Principles for the Treatment of Prisoners*,[215] the draft *Guidelines for the Development of Rules of Engagement for UN Peacekeeping Operations*,[216] and the draft interim criminal code recommended by the Brahimi Report.[217]

The new framework should apply in all situations where UN forces enjoy effective control over a territory, with or without the consent of the host State. It would therefore displace the application of the laws of occupation when UN forces are engaged as combatants in armed conflict.[218] It should apply for as brief a period of time as possible: long enough to restore law and order, and to facilitate a rapid transfer to national laws and institutions.

This would have the effect of improving the conduct, and hence the legitimacy, of UN-authorized forces in the future. Such reforms could be expected to have powerful opponents. The US would likely be wary of any reforms which might limit their military operations in future UN-authorized actions; as a non-signatory of the Additional Protocols, any human rights-based approach might significantly raise the required standard of conduct for its troops. Further, the US does not acknowledge the extra-territorial application of its human rights obligations,[219] and would be unlikely to support a proposal that relied upon this proposition. However, given that the crisis of legitimacy of the US-led Coalition in Iraq stems in part from the human rights abuses perpetrated by US troops, it may be possible to persuade the US that any slight short-term inconvenience for its troops could, in the longer term, pay dividends in terms of legitimacy and force security.

The framework would need to be in sufficient detail to allow rules of engagement to be adduced from it. In particular, it would need to provide clear and specific guidance on human rights issues arising out of arrest and detention, drawing on

213 *ICRC Experts Meeting Report*, above n7 at 16.

214 See *First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva, 22 August – 3 September 1955: Report prepared by the Secretariat* (United Nations publication, Sales No. 1956.IV.4) at annex I.A; see also *Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice* (United Nations publication, Sales No. E.92.IV.1) at sect. C.

215 GA Res 111, UN GAOR, 45th sess, 68th plenary mtg, UN Doc A/RES/45/111 (1990).

216 See Chesterman, above n9 at 19.

217 Brahimi Report, above n204 at [83].

218 Zwanenburg, above n50 at 196.

219 Hampson and Salama, above n35 at 69.

human rights jurisprudence to ensure that the framework met high standards of conduct. It might be useful for 20 guidelines to be adduced for the use of troops in the field, governing issues such as arrest and detention, and search and seizure.[220]

It would also be useful for the framework to adopt a phased approach to the restoration of law and order, acknowledging that the powers required in the initial stages of restoring law and order might differ from those required in transition to national hand-over. Jakobsen has proposed three phases in the public security function: emergency; stabilization; and handover to national authorities.[221] The framework in the first phase should be based on *ICCPR* norms (subject to lawful derogations), so that forces would be able to, for example, close down radio stations inciting violence. The Human Rights Committee notes that the 'restoration of a state of normalcy … must be the predominant objective' of any derogation.[222]

C. *The Legal Authority for the New Framework*

Given the contention over when the laws of occupation might apply to UN forces, the inapplicability of the laws of occupation to re-building, and the importance of ensuring that UN forces should uphold and respect human rights standards, it is submitted that the Security Council can and should resolve to clarify the applicable legal frameworks.[223]

This could take the form of either a Security Council resolution,[224] declaring general legal principles to apply to UN peace support missions, or a model annex,[225] to be attached to relevant resolutions, outlining the law to apply to UN peace support operations. A declaration similar to the Secretary-General's Bulletin[226] would be a less desirable outcome, as its legal force is more questionable.

A Security Council resolution could not transform a hostile force into a friendly one, however it could exclude the *de jure* operation of the law of occupation and impose a different legal framework. Article 103 of the *UN Charter* provides that a Chapter VII Security Council resolution can override pre-existing treaty obligations,[227] such as those of the *1949 Geneva Conventions*, thus creating an alternative legal framework to govern UN forces in such situations.[228] Indeed, it has been argued that recent Security Council resolutions[229] relating to the situation in Iraq

220 *ICRC Experts Meeting Report*, above n7 at 17.

221 Jakobsen, above n6 at 5.

222 Human Rights Committee, *General Comment 29*, above n162 at [1].

223 While a General Assembly Resolution would be a worthy statement of intent, as only the Security Council enjoys Chapter VII powers, it is the most appropriate body: Kelly, above n28 at 101.

224 There are precedents for SC resolutions making general declarations of applicable legal standards: see SC Res 1261, UN SCOR, 54th sess, 4037th mtg, UN Doc S/Res/1261 (1999); SC Res 1265, UN SCOR, 54th sess, 4046th mtg, UN Doc S/Res/1265 (1999); SC Res 1325, UN SCOR, 55th sess, 4213th mtg, UN Doc S/Res/1325 (2000).

225 Kelly, above n28 at 98.

226 See, for example, Secretary-General, *Special Measures for Protection from Sexual Exploitation and Sexual Abuse*, UN Doc ST/SGB/2003/13 (2003).

227 See International Law Commission, *The Effect of Armed Conflict on Treaties: An Examination of Practice and Doctrine* at [143], UN Doc A/CN.4/550 (2005).

228 Zwanenburg, above n50 at 196; *ICRC Experts Meeting Report*, above n7 at 14–15.

have established a new doctrine of occupation, by simultaneously declaring that the laws of occupation exist, while upholding the rights of the occupiers to fundamentally reshape the institutions of the State.[230] However, the Security Council's powers are not unfettered: it is still bound to observe 'intransgressible' humanitarian norms.[231]

Such an undertaking would not be straightforward. The Brahimi Report called for a similar exercise: the creation of a uniform criminal code for application during the 'law and order vacuum'.[232] The initial attempt at drafting such a code was rebuffed by the Secretary-General. Attempts are on-going.[233]

There are further obstacles to such an endeavour. The Security Council has traditionally adopted an air of 'studied ambiguity'[234] in the drafting of resolutions. As discussed above, to be effective such resolutions would need to be sufficiently detailed, and would require the Security Council to abandon this air of ambiguity.[235] Further, political opposition from one or more of the permanent members of the Security Council would make these outcomes difficult to achieve. Those permanent members with the greatest military power and which impose the weakest human rights obligations on their military could be expected to be the strongest opponents.

6. Conclusion

UN forces are increasingly being deployed in situations where their first task is to restore law and order. In exercising this public security function, UN forces need a firm legal foundation for their rules of engagement and conduct. Currently, there is some debate as to whether the laws of occupation or human rights obligations should be the applicable legal framework.

Such debate causes confusion, and confusion in military engagements can be deadly. This article has argued that the legal situation needs to be clarified in order to provide certainty to UN forces. The Security Council has the power under the *UN Charter* to determine the applicable legal frameworks, and it should do so. Security Council resolutions to this end should be based on human rights obligations, and should be sufficiently detailed for rules of engagement to be adduced.

While this proposal will undoubtedly face political obstacles, it has the potential to ensure that future UN peace support operations have greater legitimacy, and are better aligned with one of the primary purposes of the UN: the promotion and protection of human rights.

229 Especially SC Res 1483, UN SCOR, 58th sess, 4761st mtg, UN Doc S/Res 1483 (2003).

230 Roberts, above n46 at 32.

231 *Nuclear Weapons Case*, above n50 at [79].

232 Brahimi Report, above n204 at [83].

233 See Secretary-General, above n212 at [30].

234 Chesterman, above n9 at 3.

235 Carsten Stahn, 'Justice Under Transitional Administration: Contours and Critique of a Paradigm' (2005) 27 *Houston Journal of International Law* 311.