PUBLIC SECURITY IN PEACE OPERATIONS:

THE INTERIM ADMINISTRATION OF JUSTICE IN PEACE OPERATIONS AND THE SEARCH FOR A LEGAL FRAMEWORK

BY
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Submitted for the Degree of Doctorate of Philosophy in the School of Law of the University of New South Wales
1998
CERTIFICATE OF ORIGINALITY

I hereby declare that this submission is my own work and to the best of my knowledge it contains no materials previously published or written by another person, nor material which to a substantial extent has been accepted for the award of any other degree or diploma at UNSW or any other educational institution, except where due acknowledgement is made in the thesis. Any contribution made to the research by others, with whom I have worked at UNSW or elsewhere, is explicitly acknowledged in the thesis.

I also declare that the intellectual content of this thesis is the product of my own work, except to the extent that assistance from others in the project's design and conception or in style, presentation and linguistic expression is acknowledged.
**Abstract 350 words maximum: (PLEASE TYPE)**

This thesis investigates the problem of the maintenance of public security in peace operations by military forces intervening in collapsed or disrupted States pursuant to a UN mandate. At issue is the proper legal framework for dealing with this problem and as a basis for the regulation of the relationship between the civil population and the intervening force. The problem was analysed primarily by using the case study of the UN authorised and commanded operations in Somalia between December 1992 and March 1995, including in particular the experience of the Australian forces which were present in the Bay Province of Somalia as part of these operations. Investigation and research was conducted in Israel, the United States and Canada. Relevant literature, cases and documents were surveyed and utilised, including the author's personal records and Australian Department of Defence files. Interviews were conducted with key personnel with first hand knowledge in the Israeli Defence Force and academic communities, the US Government, Military and NGO communities, the UN, and the Canadian Defence establishment. Conferences were attended which analysed the Somalia experience and aspects of the legal subject matter. The research produced relevant perspectives and reference material to enable a proper theoretical analysis and also the range of practical considerations to which the theory was applied. In this respect the material obtained from the lessons of the NGO and military personnel in Somalia, and the Israeli experience in the occupied territories was particularly instructive. It was concluded that there is a definite need to provide a proper legal framework for interventionary operations where military forces will be dealing with public security issues and that such interventions are likely to continue to occur. It was further concluded that the Fourth Geneva Convention of 1949 Relative to the Protection of Civilians can apply *de jure* to many such intervention scenarios, including the Somalia operations at certain stages, and that rather than being feared because of the obligations it imposes, it should be appreciated for the utility it offers. In this respect the Fourth Geneva Convention is the only currently available framework to address the identified need.
PREFACE

1. In January 1993 the personnel of Headquarters Australian Forces Somalia and a battalion group based on the 1st Battalion Royal Australian Regiment, began deploying to Somalia. The deployment was part of what the United States termed Operation Restore Hope, and Australian planners designated Operation Solace. The force being assembled under US command was to be known as the Unified Task Force or UNITAF. While not a UN commanded operation it was carried out under a Security Council mandate, Resolution 794. It was a Chapter VII peace enforcement operation into a collapsed state for humanitarian purposes; a humanitarian intervention. It also became a state rehabilitation mission when Resolution 814 was added to the equation. This was a new development in international affairs although aspects of the situation were reminiscent of various past peace operations, including those in the Congo in the 1960s, Northern Iraq in 1991 and Cambodia from 1991 to 1993.

2. When UNITAF arrived it encountered suffering Somalis, warlords, numerous NGOs, the UN and its agencies and a complete civil authority vacuum. After two years of civil war there were absolutely no state institutions in operation. There were, for example, no state port authorities, air traffic controllers, education and health facilities, sanitation, power and water utilities, or law and order agencies functioning. There was no authority with whom to negotiate a Status of Forces Agreement. This situation presented the most
acute legal problems. It was reminiscent of the circumstances Allied occupation armies found themselves in during and after World War II. From this situation the commanders and their legal advisers (for those contingents that had legal advisers) attempted to make some sense and establish a means of operating to achieve the mandate set for the force. As the military legal adviser to the Australian contingent I was part of this effort and learned a great deal from the experience. It was clear that a number of issues of international law needed to be explored for the benefit of any future action of this type. As a result this work was undertaken. In the course of the research one passage stood out, coming from the writings of Lord Rennell of Rodd on the British occupation experience in Africa during World War II:

> It will perhaps only be when an International lawyer is himself called upon to take part in the legal affairs of a Military Administration as an Army officer that he will truly appreciate the multifarious difficulties which can arise and seek to provide an answer to them in a text-book which one may hope that he will write.1

3. Having had something approximating this experience I can say that I can "truly appreciate the multifarious difficulties which can arise" as can my colleagues in the US military legal services with whom I was privileged to work in Somalia. What I have attempted to do is analyse some of the key aspects emerging from that operation in relation to the law and order issues where the

1 Lord Rennell of Rodd, "British Military Administration of Occupied Territories in Africa During the Years 1941-1947", His Majesty's Stationery Office, 1948., p. 322.
assumption of, or intrusion on, aspects of sovereignty by the peace force occurred. I have also tried to record and analyse the opinions and approaches that were adopted in dealing with the "multifarious difficulties" faced in Somalia. From this process I have tried to draw out the main legal lessons. It is hoped that this will serve as a basis for the further study of such issues.
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<td>First Battalion Royal Australian Regiment</td>
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<td>AAR</td>
<td>After Action Report</td>
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<td>ADF</td>
<td>Australian Defence Force</td>
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<td>AFP</td>
<td>Australian Federal Police</td>
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<tr>
<td>AHC</td>
<td>Australian High Commission</td>
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<tr>
<td>AMGOT</td>
<td>Allied Military Government of Occupied Territories</td>
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<tr>
<td>APC</td>
<td>Armoured Personnel Carrier</td>
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<td>ASF</td>
<td>Auxiliary Security Force</td>
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<td>ATS</td>
<td>Australian Treaty Series</td>
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<td>AWSS</td>
<td>Agreed Weapons Storage Sites</td>
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<td>Bn Gp</td>
<td>Battalion Group</td>
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<td>CAFS</td>
<td>Commander Australian Forces Somalia</td>
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<td>CENTCOM</td>
<td>Central Command</td>
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<td>CI</td>
<td>Counter Intelligence</td>
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<tr>
<td>CID</td>
<td>Criminal Investigation Division</td>
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<td>CIVPOL</td>
<td>Civilian Police Component of UN Operations</td>
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<tr>
<td>CJTF</td>
<td>Commander Joint Task Force</td>
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<tr>
<td>CMOC</td>
<td>Civil/Military Operations Centre</td>
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<td>CMOT</td>
<td>Civil/Military Operations Team</td>
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<tr>
<td>CO</td>
<td>Commanding Officer</td>
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<td>CTF</td>
<td>Combined Task Force</td>
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<td>DPKO</td>
<td>Department of Peace Keeping Operations (UN)</td>
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<tr>
<td>ECOMOG</td>
<td>ECOWAS Ceasefire Monitoring Group</td>
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<td>ECOSOC</td>
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<td>ECOWAS</td>
<td>Economic Community of West African States</td>
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<td>FAA</td>
<td>Foreign Assistance Act</td>
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<td>FYR</td>
<td>Former Yugoslav Republic</td>
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<td>HQ AFS</td>
<td>Headquarters Australian Forces Somalia</td>
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<td>HRS</td>
<td>Humanitarian Relief Sector</td>
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<td>ICAO</td>
<td>International Civil Aviation Organisation</td>
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<td>International Covenant on Civil and Political Rights</td>
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<tr>
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<tr>
<td>ICITAP</td>
<td>International Criminal Investigative Training and Assistance Program</td>
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<td>Joint Chiefs of Staff</td>
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<td>LNTS</td>
<td>League of Nations Treaty Series</td>
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<tr>
<td>MAT</td>
<td>Mixed Arbitral Tribunal</td>
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<td>NATO</td>
<td>North Atlantic Treaty Organisation</td>
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<td>NFD</td>
<td>Northern Frontier District (Kenya)</td>
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<tr>
<td>NGO</td>
<td>Non-Governmental Organisation</td>
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<td>OC</td>
<td>Officer Commanding</td>
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<td>OAS</td>
<td>Organisation of American States</td>
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<td>OAU</td>
<td>Organisation of African Unity</td>
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<td>OSCE</td>
<td>Organisation for Security and Cooperation in Europe</td>
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<td>PCIJ</td>
<td>The Permanent Court of International Justice</td>
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<tr>
<td>POR</td>
<td>Post Operation Report</td>
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<td>RIAA</td>
<td>Reports of International Arbitral Awards (UN)</td>
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<td>ROE</td>
<td>Rules of Engagement</td>
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<td>RPG</td>
<td>Refugee Policy Group</td>
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<td>SACB</td>
<td>Somali Aid Coordination Body</td>
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<td>SC</td>
<td>Security Council</td>
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<td>SDM</td>
<td>Somali Democratic Movement</td>
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<td>SFOR</td>
<td>Stabilisation Force</td>
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<td>SG</td>
<td>Secretary General (UN)</td>
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<td>SJA</td>
<td>Staff Judge Advocate</td>
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<td>SLA</td>
<td>Somali Liberation Army</td>
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<td>SNA</td>
<td>Somali National Alliance</td>
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<td>SNC</td>
<td>Supreme National Council (Cambodia)</td>
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<td>SRSG</td>
<td>Special Representative of the Secretary General (UN)</td>
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<td>SRC</td>
<td>Supreme Revolutionary Council</td>
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<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
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<tr>
<td>Abbreviation</td>
<td>Full Name</td>
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<tr>
<td>UNAMIR</td>
<td>United Nations Assistance Mission in Rwanda</td>
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<td>UNAVEM</td>
<td>United Nations Operations in Angola</td>
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<td>UNESCO</td>
<td>United Nations Educational, Scientific and Cultural Organisation</td>
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<td>UNHCR</td>
<td>United Nations High Commissioner for Refugees</td>
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<td>UNITAF</td>
<td>Unified Task Force</td>
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<td>UNMIH</td>
<td>United Nations Mission in Haiti</td>
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<td>UNOSOM</td>
<td>United Nations Operations in Somalia</td>
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<td>UNPROFOR</td>
<td>United Nations Protection Force (Bosnia)</td>
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<td>UNREO</td>
<td>United Nations Rwanda Emergency Office</td>
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<td>UNSCR</td>
<td>United Nations Security Council Resolution</td>
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<td>UNSF</td>
<td>United Nations Security Force (West Irian)</td>
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<td>UNTAC</td>
<td>United Nations Transition Authority in Cambodia</td>
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<td>UNTEA</td>
<td>United Nations Temporary Executive Authority</td>
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<td>UNTS</td>
<td>United Nations Treaty Series</td>
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<td>USC</td>
<td>United Somali Congress</td>
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<td>USG</td>
<td>Under Secretary General (UN)</td>
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<td>USLO</td>
<td>United States Liaison Office</td>
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<td>USMC</td>
<td>United States Marine Corps</td>
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<td>WFP</td>
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INTRODUCTION

1. The following work explores the issue of managing the public security function in a civil authority vacuum as emerged from the international peace operations in Somalia from December 1992 to March 1995. In particular, it is concerned with the problems that arose from the imperatives of providing for an interim administration of justice, of regulating the relationship between an intervening military force and the population and of adopting measures which look towards the rehabilitation of national law enforcement and justice institutions. As the impetus for the work originated from the Australian military involvement in the UNITAF operation in Somalia in 1993 that experience, and the Somalia intervention generally, will serve as the vehicle for eliciting key facets of the problem and the possible solutions. This will be set out in the first section of the thesis.

2. Following this elucidation of the problem there will follow a section dealing with the background, application and utility of the laws of occupation, including the Fourth Geneva Convention of 1949, the Hague Regulations of 1907, Additional Protocol I of 1977 and customary international law. This analysis will include a study of non-belligerent occupation, particularly pacific occupation, as a subset of the law, tracing its geneology and relationship to modern developments in the laws of occupation following the introduction of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12 1949 (hereafter the Fourth Geneva Convention). While a
significantly related issue is the interplay between the laws of occupation and
the international human rights regime it is, of necessity, beyond the scope of
the study.

3. The thesis of this work is that the laws of occupation, as represented in
the above named instruments and custom, apply to a broader range of
situations than international armed conflict and that they in fact applied *de jure*
to the circumstances of the intervention in Somalia for most of its duration. It is
asserted that the laws of occupation will apply to all such circumstances,
including to many so-called 'safe haven' operations where they are conducted
in the absence of an agreement with a recognisable state entity in the territory
in which the intervention takes place. It is submitted that it is both desirable and
useful for this body of law to be applicable to these situations in order to cope
with the public security function dilemma. In addition the laws of occupation
provide a mechanism for addressing the issue of accountability in the
management of the public security function by the intervening force. It will be
further asserted that the law of pacific occupation as a subset of the law of
occupation continues to exist and apply to certain interventions, conducted in
accordance with an agreement with recognisable state entities, and that the law
of pacific occupation may assist in dealing with security issues not covered by
such agreements.
4. The determination of the *de jure* application of the laws of occupation is based on a factual test, which emerges from the analysis contained in Chapter 5, could be expressed as follows:

are there military forces in control of territory, which is not part of the territory of the state or states to which they belong, so that they have in effect temporarily supplanted or assumed the authority of the sovereign state in that territory they control?

In order to prove the thesis of this work, therefore, the facts of the Somalia intervention will be examined so as to show that both UNITAF and UNOSOM II forces had supplanted or assumed the authority of the sovereign state of Somalia in territory they controlled, for a time, which was part of that state. To prove that the laws of occupation have utility in addressing the particular issue of the public security function on peace operations, specific public security problems will be described from the Somalia intervention for which it will be demonstrated that the laws of occupation provide an answer. As proof of the continuing relevance of the law of pacific occupation reference will be made to the international interventions in Cambodia and Bosnia and their respective framework agreements.

5. These issues have arisen in the context of 'humanitarian interventions' in particular, as an emerging sub-type of peace operations, and it is therefore necessary to evaluate the problem in this context. The underlying premise of the work is that such interventions are likely to occur at indeterminate intervals
in the future to prevent or stop, for example, a genocide, massive loss of life or widespread and serious human rights violations that shock the conscience of the international community. Such interventions may be dependent on the national interests of one of the permanent five members of the UN Security Council being involved, the consent of all or most of the factional elements engaged in the conflict, or on the preparedness of a regional organisation to take action with Security Council approval. These interventions may occur under Chapter VII of the UN Charter, probably by a UN authorised coalition force rather than a UN commanded force in the light of recent experience. It is further the premise of this work that genuinely humanitarian interventions are legitimate and desirable, provided they are carried out under UN authority in accordance with the purposes and principles of the UN Charter.

6. It is my conclusion that while the potential for such operations exists there will be a need for a proper legal framework to regulate the presence of the intervening force, its relationship to the civil community and sources of threat. At present the best available framework would appear to be the law of occupation. Other frameworks for dealing with collapsed States will be considered in Chapter 4 with particular reference to the potential that exists in the existing Trusteeship Council. These alternatives all pose their own problems and in the final analysis it is the law of occupation that is currently functional and may have application, at least as an interim mechanism.
Part I

The Problem
CHAPTER ONE: THE US LED UNITAF INTERVENTION - INTO THE BREACH

...a full direct Administration, including judicial system, had to be established from first principles. Complete disorganisation reigned in the country... The Legal Department's work was not so much concerned with... wide issues, as with efforts to reinstitute law and order. Apart from the inherent lawlessness of the Somali... the wholesale desertion... complete with rifles, automatic rifles and pistols, hand grenades, and in some cases even machine guns, together with large quantities of ammunition, resulted in the whole countryside from Kismayu to Dante and from Jiggiga to Kismayu being in a state of turmoil and feudal warfare... It was immediately clear that the first necessity in Somalia was a strong and well organised police force, upon which the institution of courts and judicial machinery could wait.

Lord Rennell of Rodd, 1941

Introduction

1.1 What follows is not intended to be a comprehensive analysis of all the issues arising from the Somalia intervention; rather, only those matters of central importance to this work and what is necessary for context. The two international intervention operations which are to be considered in this and the following two chapters are:

a. UNITAF - The Unified Task Force, which was a UN authorised but US led coalition force that deployed into Somalia in December 1992 and remained, nominally, until 4 May 1993, and

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1 Lord Rennell of Rodd, British Military Administration of Occupied Territories in Africa: During the Years 1941-1947, His Majesty's Stationery Office, London, 1948., pp. 333-334. Describing the British occupation of Italian Somaliland in World War II.
b. **UNOSOM II** - The United Nations Operations in Somalia II, which was a UN commanded or 'blue helmet' force that assumed responsibility for international operations in Somalia from 4 May 1993 until its withdrawal in March 1995.

1.2 This chapter will set out the background to the international intervention in Somalia and highlight the factual circumstances necessary for an examination of the UNITAF intervention in relation to the laws of occupation. It will also set out some of the particular problems of the UNITAF operation in relation to the public security function. UNITAF was not under the authority of the UNOSOM operation that was present when UNITAF arrived and acted pursuant to the authorising Security Council resolution. It was led by the US, which provided the bulk of the forces, though many nations made significant contributions, including Australia. This study will focus on the status of the UNITAF deployment under international law and the issue of managing the public security threat.

1.3 Before considering the UNITAF intervention, it is necessary to briefly set out what brought Somalia to the circumstances which so shocked the conscience of mankind.

**The Setting**

1.4 The comment of Lord Rennell cited above could have as well applied to the situation in Somalia that UNITAF, UNOSOM and relief agencies
encountered in the 1990’s. The degree of misery, starvation, destruction and social disintegration in Somalia from 1991 to 1992 has rarely been equalled in this century. Lord Rennell’s comment concerning the "inherent lawlessness of the Somali" also highlights the difficulty those coming from a European sense of order have in comprehending and adapting to social systems springing from a totally different environment, particularly where colonial and superpower overlays have been involved.

1.5 The Somali people are highly ethnically homogeneous. Having taken root in the eastern Horn of Africa around 100 AD, they were largely insulated against contact with other parts of the Horn and Africa by the arid band of territory that surrounded them on one side and by the sea on the other. For most of their habitation in this area they have been nomadic camel herders, traversing the country for grazing and water, both in very short supply. With the growth of Islam they were to eventually adhere almost exclusively to the Sunni sect. In fact there has traditionally been only one significant factor that distinguishes one Somali from another, their clan. There are over one hundred clans and sub-clans in Somalia and every Somali is taught from an early age to memorise their lineage. A strong warrior ethos prevailed among the males while

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2 Ibid., p. 333.
3 There has been very little written on Somali history or any other aspect of the country and people outside of the modern political crises. Unless otherwise stated, the following historical and social background is obtained from the US Army Area Handbook, which is provided through UM - St. Louis Libraries. It can also be obtained from the National Trade Data Bank CD-ROM, SuDoc C1.88:994/1V.2. or the US Department of the Army. It is a highly detailed work compiled by a number of authorities and is periodically revised. The version used for this work was updated as at 17 December 1993. Additional background information was obtained by the author in the course of investigations conducted in Somalia and in numerous interviews with various Somalia experts, including former Peace Corps workers, diplomats and expatriate Somalis.
the people were hardened by, and inured to, the harsh nature of their existence. A system of order developed within the clans based on the 'elders' and a strong democratic tradition of communal participation, discussion and sense of individuality developed within these communal cells. Relations between clans were also ordered utilising the gauge of the single most important factor in their existence, the camel. Where a member of one clan caused damage to another clan through the death of one of its members the 'Dia' or blood compensation had to be paid. For a dead male the clan had to be compensated 100 camels by the offending clan while a dead female was worth 50 camels. This system extended to individual relations within the clan.4

1.6 The nomadic social order was varied when two clans, the Rahanweyn (also known as the Mirifle) and Digil, opted for an agricultural existence exploiting the more fertile areas of the Jubba and Shabeeele regions in the South of Somalia.5 These two clans came to constitute around 20% of the population of Somalia. The Rahanweyn and Digil also differed from other Somalis in their ethos, largely rejecting the warrior mentality in favour of devoting attention to the raising of corn and sorghum. Gradually a degree of urbanisation developed in Somalia centred on Mogadishu but with other significant centres in Hargeysa, Berbera, Kismayo, Baidoa and Merca and numerous smaller villages.

4 This system was delineated by Somali cultural advisers and elders to UNITAF officials (including the author) in the process of establishing a civil claims regime to compensate for losses incurred by UNITAF in the absence of the civil infrastructure. See also US Army Area Handbook - Somalia, Chapter 2.04 "The Segmentary Social Order".

The complicating factor, as with so many of the State 'entities' that now exist in Africa, was the coming of the Europeans and the "Scramble for Africa". The Somali people found themselves divided by arbitrary lines drawn on maps as the competing powers settled their spheres of interest. In the North the French acquired the port and territory of Djibouti, while the British took a strip of territory on the Gulf of Aden. In the South the Italians took the bulk of Somalia down to the Gedo and Jubbada regions. The British digested a significant Somali community by pushing the north-easterly boundary of their Kenyan colonial territory in an area termed the Northern Frontier District (NFD). In the West the Ethiopians, under Emperor Menelik II, took control of the Ogaden. In this the seeds were planted for a century of turmoil. On independence the Somalis adopted a flag incorporating a five pointed white star on a blue background, reflecting their rejection of this division, as the five pointed star represents these five regions united in one Somalia. The 1960 constitution also made reference to the irredentist objective, albeit limiting the methods of attainment to peaceful means. From the beginning the free roaming Somalis did not respect these boundaries, particularly the Ogadenis, and the colonial administrators were unable to do much about it.

7 See *US Army Area Handbook - Somalia*, Chapter 1.04 "From Independence to Revolution" (sub-heading "Pan-Somalism") op cit.
9 Somali social and cultural tradition being based on clan relations that overlapped these boundaries and nomadism mitigated against adaptation to these boundaries, particularly given they were imposed by external agencies that would have offended their strongly independent self-image. See *US Army Area Handbook - Somalia*, Chapter 2.03 "Population and Settlement Patterns" and Chapter 2.04 "The Segmentary Social Order" *Ibid.*
1.8 The Italians introduced some industry but were mainly concerned with cash crops, such as banana and sugar cane, harshly exploiting Somali labour. A significant number of Italians were settled in the coastal southern areas, in particular. The British in northern Somalia found themselves dealing with a rebellious population of more committed Muslims, who severely taxed their security resources. In particular the guerilla war waged by Sayyid Muhammed Abdullah, known to the British as the "Mad Mullah", dragged on for 20 years between 1900 and 1920, greatly embarrassing the Colonial 'experts'. It is estimated that 200,000 Somalis lost their lives in the struggle. Following the conclusion of this conflict the British administration became very unobtrusive with activities confined to the coastal areas of their territory. Throughout the period of British rule the development of infrastructure and institutions was nowhere near as extensive as in the Italian area. The British mainly used the colony for meat supply to Aden.

1.9 In 1935 the Italians invaded and acquired Ethiopia, thereby relieving the tension in the Ogaden as this area was placed within a single administration and entity. Further consolidation occurred in August 1940 when the Italians invaded British Somaliland and also incorporated this area into their Somalia administration. This administration did not last very long as the British were back in 1941, not only recovering their own lost territory but all other Italian possessions in the Horn including Ethiopia. Initially the British changed nothing in terms of treating all the Somali people of three of the five colonial areas

(French Djibouti and the Kenyan NFD being excluded) under one administration.¹¹

1.10 Britain remained in control until it was determined by the UN that Italy would resume administration of its former Somali territory as a Trustee until independence, which was scheduled to occur in 1960.¹² Eventually in 1956, following local political protests, the UK accepted that the British territory in the north would be joined with the south at independence. In the meantime Britain, due to its relationship with Ethiopia’s Emperor Hailie Salassie and strategic considerations, acquiesced to the request by Ethiopia to have the Ogaden handed back.¹³ This naturally was the cause of great resentment among the irredentist Somalis.¹⁴ While the Italians pressed ahead with action to facilitate the assumption of independence the British did very little in this respect in their territory while there was also little coordination between the Italians and British.¹⁵ This resulted in a disjointed 'reunification' that was to have serious consequences in later years. Much pressure was also exerted by the emerging Somali political leadership for the Kenyan NFD to be included in the unification


¹² UN GA Res 289 B (IV) of 21 Nov 1949.

¹³ This was based on the Tripartite Accord of 1894 among Great Britain, Italy and Ethiopia which, inter alia, recognised Ethiopia's claim over the Ogaden region. Britain had been in temporary administrative occupation of the area under a 1942 military convention with the exiled emperor Haile Selassie. See Blaustein and Flanz, op cit., "Chronology", p. 1-2.

¹⁴ J.M. Ghalib, "The Cost of Dictatorship: The Somali Experience", Lilian Barber Press, New York, 1995., p. 28-29. (Ghalib was a police official who rose to high ranks in the Barre and Aideed "administrations". Since the death of Aideed senior he has continued to serve as a “minister” under Aideed's son, Hussein). US Army Area Handbook - Somalia, Chap 1.03 "Imperial Partition - Trusteeship and Protectorate: The Road to Independence".

¹⁵ An exception was the British training of the police force which left a solid legacy that was respected by the Somalis of the North and those who received the training. Ghalib, op cit., p. 16.
at independence. The British however rejected this pressure claiming that the federalised structure they intended for an independent Kenya would adequately address the concerns and needs of the Somalis in that area. In the event the Kenyan's rejected the Federal option and instituted a far more centralised form of government.

1.11 From independence in 1960 two factors characterised Somalia's existence, the tension created with its neighbours as a result of the irredentist objective\(^{16}\) and the superpower contest.\(^{17}\) At first relations with the neighbouring states remained civil if suspicious as Somalia concentrated on establishing itself. The Somalis took to democracy with a passion, bringing to the experience their traditions of communal participation and individualism. The years from 1960-1969 were years of progress as Somalia seemed to be addressing independence better than many third world nations at the time, although the country experienced some difficult moments, mainly stemming from the lack of cohesion between the north and south.\(^{18}\) Outside influences began to have an effect, however, as many military officers went to the Soviet Union for training and came back greatly influenced by ideas of social reform, progress and politics quite alien to Somali tradition. Soviet influence as a whole steadily grew in Somalia from 1962 on as a result of Somali resentment of the US arming of Ethiopia.\(^{19}\)


\(^{17}\) Ibid., pp. 51-58.

\(^{18}\) North and South had wide differences in, inter alia, legal systems, education, taxes and languages. H.A. Dualeh, "From Barre to Aideed: Somalia, the Agony of a Nation", Stellagraphics Ltd., Nairobi, 1994., pp. 16-18. Ambassador Dualeh served as a minister in the Barre government and an Ambassador to Kenya.

1.12 Political parties in Somalia proliferated and in March 1969 64 parties contested the elections. Outside aid was readily available as the strategic position of Somalia at the head of the Gulf of Aden ensured that its sympathies would be competed for. The Somali police force was one beneficiary of this as the US, Germany and Italy became involved in equipping and training them. At the same time there was a degree of corruption permeating the political and civil offices. All this changed however (except for the corruption) on 15 October 1969 when President Shermaarke was assassinated by one of his bodyguards and a military coup occurred on 21 October involving, predominantly, the military officers who had been trained and influenced by the Soviet Union. One officer in particular emerged to take a predominant place in the Supreme Revolutionary Council (SRC) that was subsequently formed, Major General Muhammed Siad Barre.

1.13 The SRC proceeded to rapidly undo the democratic institutions that had been established and so embraced by Somalis to that point. Democratic leaders were arrested, the constitution suspended and political parties banned. Pursuing a modernisation strategy the Somali language was given a written form and steps were taken to eliminate the old 'elders' system. A new branch

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21 Ibid., p. 52.
23 The elders system was based on the natural authority exercised by senior members of a clan community who achieved their position of respect and authority from a combination of age, demonstrated wisdom and competence, but was not 'elective' in the western sense. This leadership would be exercised in clan meetings of the seniors and respected intellectuals. The authority of the system was based on tradition and acquiescence and was strongly patriarchal. K. Menkhaus, "International Peacebuilding and the Dynamics of Local and National Reconciliation in Somalia" in W. Clarke & J. Herbst ed., "Learning from Somalia: The Lessons of Armed Humanitarian Intervention", Westview Press, 1997., pp. 42-60. Also as observed by and
of the justice system was created to deal specifically with political crimes, administered by judges appointed by the SRC sitting in special courts, supported by a security service separate from the police force. The regime declared itself to be Marxist and heralded in a program of 'scientific socialism'.

Also signalled was a more militant attitude to the irredentist objective. Bolstering of the armed forces with principally Soviet support occurred apace. Through the early years of the 1970's Siad Barre increased his personal position and power within the SRC. Although originally declaring an intention to destroy 'tribalism' in Somalia, he would soon come to depend on it. In fact the government was eventually to become known as the MOD for the Mareehaan clan of Barre, the Ogaden clan of his mother and the Dulbahante clan of his son-in-law as an indication of the dominance of government positions by these three clans.

1.14 While resentment grew towards the regime, Somalis were not driven to armed revolt, and in fact some of the Barre initiatives were popular. What particularly assisted the SRC however was its militant stance on reunification. This blossomed into the Ogaden War with Ethiopia from 1977-1978. The war resulted in a dramatic shock to Somalia as their Soviet advisers deserted them, transferring wholesale to Ethiopia with all the information they had gleaned from their time in Somalia. With the Cubans and Soviets supporting the Ethiopians, Somali forces were badly beaten after some initial success. Many thousands

explained to author in dealings with Somali authorities, clan elders and Somali experts.

24 Ibid., pp. 45-47. This phrase was meant to convey the ideology of progressing towards socialism in the context of a society that in most respects did not meet the pre-conditions for doing so. The absent pre-conditions under Marxist theory included a fully industrialised society with a delineated class struggle based on a significant bourgeoisie and a broad proletariat.

25 Makinda, op cit., p. 20.

died and two hundred thousand Ogadeni refugees crowded into Somalia. The effects of the war were compounded by drought and famine causing the deaths of many thousands. This presaged two things. First, Barre turned to the US, not surprisingly, for his future support and rearmament of the badly depleted forces. Secondly, the bitter resentment felt by the people following the defeat and the subsequent humiliating reconciliation by Barre with Ethiopia was focused on Barre, and from this point on resistance to the regime was to become serious and eventually widespread. Barre's misdirection of aid, designed to relieve the suffering of the refugees to support his army and enrich his governing clique, also resulted in donor distrust in Somalia that had consequences for later aid efforts.

In 1982 dissident Somalis with Ethiopian air support invaded from Ethiopia, capturing border towns and nearly splitting the country in two. Arms were forthcoming from the US to repel the threat but were principally used to suppress domestic opponents. Progressively the Barre regime became more ruthless with widespread human rights violations forcing the US Congress to sharply reduce aid to Somalia in 1987. Barre was forced to fall back more and more on his own clan base as all other sections of the community became alienated. Drawing on his experience as an intelligence officer with the Italian Army in World War II he adopted divide and rule tactics, playing clan off against

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27 Ibid., pp. 29-43.

28 Ibid., p. 57.


31 Ibid., p. 7.
clan and creating a special praetorian guard from his own clan, the Mareehan, to terrorise opponents. Murderous campaigns against the Majeerteen, Daarood, Isaaq and Hawiye clans led to formidable organised armed resistance, particularly on the part of the Hawiye. The northern cities of Hargeysa, Burao and Berbera were devastated by Barre in 1988 to repress disturbances by the Isaaq, resulting in 15-60,000 civilian casualties and causing 300,000 Isaaq to flee to Ethiopia.\textsuperscript{32} By 1990 Barre had effectively lost control of most of the country and by alienating the Hawiye his last stronghold in Mogadishu was in 'enemy' territory. Mogadishu by now had become a city of torture and murder with Barre giving his Red Berets a free hand. By 1990 the US had ceased to render effective support to Barre as his regime worsened.\textsuperscript{33}

1.16 Barre and his forces were forced out of Mogadishu by the Hawiye's United Somali Congress (USC) organisation in 1991, indulging in an orgy of destruction and looting as they left the city. He established a base at Baidoa, mercilessly exploiting the unfortunate Rahanweyn people of the area.\textsuperscript{34} From here he launched an unsuccessful counter offensive and then was forced out of the country completely by USC forces under the command of Mohammed Farah Aideed.\textsuperscript{35} Back in Mogadishu the businessman Ali Mahdi Mohammed was nominated as provisional president, which resulted in great resentment on the part of Aideed who felt, as the victor over Barre, that his credentials for

\textsuperscript{32} Ibid., p. 8.
\textsuperscript{34} J. Drysdale, "Foreign Military Intervention in Somalia: The Root Cause of the Shift from UN Peacekeeping to Peacemaking and its Consequences", in W. Clarke & J. Herbst ed., op cit., p. 124.
\textsuperscript{35} Ibid., p. 5.
leadership were superior. Fighting eventually broke out between the competing factions within the Hawiye and USC and Mogadishu became a devil's cauldron.\(^{36}\) Throughout the country arms proliferated as government arsenals were emptied. Drought and famine compounded the scenario and once more hundreds of thousands of refugees crowded into camps across the borders or within the country. To make matters worse, heavily armed and ill disciplined bandit gangs roamed the country side stealing food, extorting money and food from aid agencies and terrorising the people.\(^{37}\)

1.17 By late 1992 it is estimated that 300,000 people had died in the fighting and famine and that a further 1.5 - 2 million people were so weakened by malnutrition as to be at immediate risk of dying.\(^{38}\) There was no effective government of any kind at any level, with all forms of service broken down or ransacked. Social authority and communal order had been thoroughly eroded. Somalia became a geographic entity only within which random killings, rape and pillage where the daily routine, punctuated by fierce contests between the more organised factions. In these circumstances the individual citizens who were not part of the organised factions either armed themselves or risked dying a slow death of starvation, being shot to death on a whim or being incidentally killed or wounded from factional conflict. The large scale relief effort that


\(^{38}\) Ibid., p. 15. It was estimated that over half the population, about 4.5 million people, were threatened by severe malnutrition and related diseases. "The United Nations and the Situation in Somalia", United Nations Department of Public Information Reference Paper, April 1995., p. 1.
attempted to address the situation, faltered as relief materials were intercepted by the bandits and warlords.\textsuperscript{39}

1.18 The UN had attempted to address the problem firstly through an arms embargo\textsuperscript{40} then with the deployment of a technical team to seek an effective ceasefire\textsuperscript{41} and finally with the deployment in April 1992 of an observer mission and an intensive political effort by the first Special Representative of the Secretary General (SRSG) Mohamed Sahnoun.\textsuperscript{42} This observer mission was designated United Nations Operations in Somalia (UNOSOM). It was to remain in place although changing in shape and role\textsuperscript{43} until overhauled in March 1993 by UNOSOM II. In the context of the chaotic Somali environment and the lack

\textsuperscript{39} Somewhere between 50-80% of relief materials were being looted. Natsios, "Food Through Force: Humanitarian Intervention and US Policy", \textit{The Washington Quarterly}, 1994, vol 17, no 1., p. 135. Sommer, \textit{op cit.}, (n 17) p. 28. "By December 1992 the ICRC had spent one-third of its worldwide budget to bring a hundred thousand tons of food to Somalia." C. Onyango-Obbo, "Somalia: From Purgatory to Hell", \textit{Dissent}, Winter 1993., p. 11. Natsios claims 50% of the ICRC budget was being consumed in Somalia in what was their biggest operation since World War II. Natsios, \textit{op cit.}, p. 4. A.S. Natsios (World Vision Relief and Development), "Humanitarian Relief Interventions in Somalia: The Economics of Chaos", in W. Clarke & J. Herbst ed., \textit{op cit.}, p. 81. J.C. Ingram, "The Politics of Human Suffering", \textit{The National Interest}, Fall 1993., p. 62. "Lives Lost, Lives Saved: Excess Mortality and the Impact of Health Interventions in the Somalia Emergency", Refugee Policy Group (RPG), Center for Policy, Analysis and Research on Refugee Issues, November 1994., p. 3. Note the four principal reasons for food insecurity stated by the RPG were, "(1) fighting destroyed the harvest, (2) militia took household assets necessary for planting and sowing, (3) bands effectively closed off transport of foods to markets and eliminated any positive incentive for farmers to produce, and (4) since building household food stores might incite further looting attacks, this fear discouraged farmers from growing anything even for their own households." In the urban areas the principle cause was unemployment. All this was caused by the conflict, compounded by a short duration drought. The fears of the farmers were not groundless. Investigations by the author revealed that many killings took place without even a request to hand over goods. The owner would simply be shot and his body left in the street for the ICRC or other NGOs to collect. Those using the markets were particularly vulnerable. In one incident 16 people jammed into a utility vehicle were murdered as they returned from market and the vehicle looted of the proceeds. A. de Waal & R. Omaar, "Doing Harm by Doing Good? The International Relief Effort in Somalia", \textit{Current History}, 1993, May, p. 199.

\textsuperscript{40} UNSCR 733, 23 January 1992, UN SCOR (1992).

\textsuperscript{41} UNSCR 746, 17 March 1992, UN SCOR (1992).

\textsuperscript{42} UNSCR 751, 24 April 1992, UN SCOR (1992). Sahnoun, \textit{op cit.}

\textsuperscript{43} In August 1992 it was increased by the addition of a Pakistani Battalion which was supposed to secure the port and airport for relief supplies, a task which was well beyond them, UNSCR 775, 28 August 1992, UN SCOR (1992).
of military support for the operation it was not producing progress towards stabilising the situation nor in ameliorating the humanitarian crisis.\textsuperscript{44} Something more robust was clearly required to bring the massive mortality waves to an end.

\textbf{The UN and US Decision to Intervene}

1.19 The situation in Somalia constituted a large scale violation of humanitarian standards which shocked the conscience of the world and the potential, as well as actual, mortality was used to justify a military intervention. An added regional security element was the large scale refugee movements across all the borders of Somalia. The armed factions were in many cases also operating across the borders in hiding weapons caches and conducting illegal weapons and trade dealings. In the case of the Rahanweyn people there was a deliberate effort on the part of Barre and the USC successors to him to destroy that community and so a potential genocide was also averted by the intervention.\textsuperscript{45} The military intervention was necessary and successful in


reducing and preventing excess mortality from famine, war and genocide. The debate over where the military intervention went wrong goes to matters beyond this fundamental core of the mission.

1.20 It was in fact NGO adviser/experts as well as their operators in the field that prompted the US and UN to act after there had been initial marked reluctance to do so on all sides from the Pentagon to President Bush's political and security advisers. The decision by President Bush to take a more robust stance was based on humanitarian imperatives, the political pressure mounting from Congress and pleas for action from the UN. This led to the adoption of UNSCR 767 which called for a massive humanitarian airlift. The first stage of US action, Operation Provide Relief, resulted in the employment of an extensive military airlift of relief supplies to the refugee camps and to selected sites in Somalia. As it became clear that this effort was falling prey to diversion by bandits and warlords, pressure mounted for direct military intervention. It was Secretary General Boutros-Ghali who made the military proposals and placed them before the Security Council. It was the Secretary General's endorsed option of a UN authorised operation led by the US that was

46 J.G. Sommer, "Hope Restored?" op cit., pp. 5, 32.
47 H. Johnston & E. Dange, "Congress and the Somalia Crisis", in W. Clarke & J. Herbst ed., op cit., pp. 191-196. Mr Johnston is a US Congressman who is a senior member of the House International Relations Committee and former chairman of the Subcommittee on Africa (1993-1994). He participated in the Congressional and Committee debates on Somalia and provides a good first hand account and summary of these debates and the role of Congress in the crisis.
50 Sommer, "Hope Restored?", op cit., p. 32.

1.21 This resolution represented the full flowering of humanitarian intervention as a UN role, utilising Chapter VII and the authority of the Security Council to make a broad assessment that the situation constituted a threat to international peace and security under Article 39.\textsuperscript{52} There is no mistaking from the language of the resolution that it was to be a humanitarian intervention. The opening preamble stated:

Determining that the magnitude of the human tragedy caused by the conflict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance, constitutes a threat to international peace and security.

Gone was any reference to a broader threat to regional security or to cross border refugee flows, although these were present. This resolution asserted squarely that the humanitarian crises in Somalia together with "widespread violations of international humanitarian law" were matters of international concern and thus within the jurisdiction of the UN. It also indicated that those who committed or ordered the commission of such acts would be held individually responsible for them, constituting an assertion of international


jurisdiction to place such persons on trial. It was the first time that the internal affairs of a state alone had been accepted as constituting a threat to international peace and security.\textsuperscript{53} The resolution authorised a volunteer member state, the US, to organise and command\textsuperscript{54} a coalition force and use "all necessary means to establish as soon as possible a secure environment for humanitarian relief operations." The US troops were joined by contingents from 20 other countries in what was to be designated the Unified Task Force (UNITAF). There were over 38,000 troops in Somalia at the peak of the UNITAF deployment. The area of Somalia eventually controlled by this force is set out at Annex A.

UNITAF Operations

The Deployment

1.22 From 8 December 1992 the US force component of UNITAF began deploying into Mogadishu following groundwork done by US diplomatic and NGO activity which obtained acceptance of the initial deployment amongst all the main factions there.\textsuperscript{55} After consolidating in Mogadishu and securing the

\textsuperscript{53} There was no mention of refugees, cross border incursions or regional stability at all in UNSCR 794 as there had been in UNSCR 688, which dealt with the situation in Northern Iraq, for example. It focused entirely on the internal issues of the humanitarian crisis, breaches of international humanitarian law and attacks on the relief agencies and materials. This indicates the wide range the Security Council has in determining what constitutes a "threat to the peace" under Article 39 of the UN Charter. See S.D. Murphy, "Humanitarian Intervention: The United Nations in an Evolving World Order", University of Pennsylvania Press, Philadelphia, 1996., pp. 76-79, 282-334, Y. Dinstein, "War, Agression and Self-Defence", Cambridge University Press, 2nd ed, 1994., pp. 278-279. See also Chapter 8 paras 8.1-8.5.

\textsuperscript{54} It was therefore not to be a UN commanded (blue helmet) operation.

\textsuperscript{55} Hirsch & Oakley, op cit., pp. 49-54. Ambassador Oakley was the principle US diplomat involved in the liaison process with the factions and was to continue to be involved in the Somalia operations in different roles until the final US withdrawal. Mr Hirsch was a US political adviser to the coalition forces in Somalia from December 1992 to March 1993.
airport and port facilities the forces began to move into the countryside with careful advance preparation. By mid December the first of the non-US troops began to arrive in the form of the French and Canadians. These were quickly followed by troops from Belgium, Italy, Morocco, Australia and Pakistan as the main force elements.\(^56\) Eventually southern Somalia was divided into nine Humanitarian Relief Sectors (HRS) as set out at Annex A. Throughout the UNITAF deployment the original UN mission, UNOSOM, continued to function, although it underwent changes of force, administration and mandate.\(^57\) The UNITAF force did not come under command of the UN Special Representative of the Secretary General (SRSG) but liaised with UNOSOM and was concerned principally with military operations. The UNITAF force commander, Lieutenant General R. Johnston (US Marine Corps), officially handed over control of military operations in Somalia to the UNOSOM force commander, Lieutenant General C. Bir (Turkey), on 4 May 1993.\(^58\) Throughout the period from December 1992 to May 1993 the troop composition of UNITAF changed as countries were added, withdrew, scaled down operations or transferred after 4 May to UNOSOM command.\(^59\) The UNOSOM mission after 26 March became known as UNOSOM II and after 4 May became responsible for all military as well as civil operations in Somalia.\(^60\)

\(^{56}\) The national contingents comprising UNITAF and UNOSOM at its peak were Australia, Belgium, Botswana, Canada, Egypt, France, Greece, India, Italy, Kuwait, Morocco, New Zealand, Nigeria, Pakistan, Saudi Arabia, Sweden, Tunisia, Turkey, the United Arab Emirates, the USA and Zimbabwe. \textit{Ibid}., p. 64-66.


\(^{58}\) Hirsch & Oakley, \textit{op cit}., pp. 101-114.


\(^{60}\) See \textit{Comprehensive Report, op cit.} (n. 50)
The Problems

1.23 UNITAF was soon to discover that to "establish a secure environment for humanitarian relief operations" as set out in UNSCR 794 involved many more issues than was suggested by this simple wording. They would be required to evaluate the need to act to deal with a wide range of issues including how to handle hostile elements of the local media, disarmament, air space and ports control, detainee handling, and re-establishing a policing and judiciary function. Questions that resulted were how far did the UN mandate extend, what was the authority for the action needed to address these things, what processes and standards should apply to detainee handling?

Mission "Creep" or Mission Confusion?

1.24 By mid-January 1993 UNITAF had consolidated in the regions south of the Galguduud Province. At that point the force had the capacity to exert a measure of control over this territory and assume many of the prerogatives of the sovereign, and in fact did so in a broad variety of areas. From the beginning there was some discomfort as to how far the exertion of this authority would go, what provisions of international law governed the situation if any, and how the relations with the civilian community were to be regulated. To understand the approach that was taken to these issues by the US some background political factors must be understood. Initially, it appeared that the UNITAF mission would encompass further issues than simply ensuring that food was delivered

61 See Annex A.
to the starving. One such issue was that relating to disarmament. It had been the understanding of the UN SG that disarmament was implied in the mandate and would be undertaken by the force. In fact UN involvement in Somalia had begun with UNSCR 73362 which implemented an arms embargo on Somalia under Chapter VII. The SG believed President Bush would support this although the President indicated a restrictive interpretation of the mandate in a letter to the SG the day after Resolution 794 was adopted.63 As the US troops went in the SG attempted to promote a much more expanded mission, writing to the President that he saw coalition forces not only disarming the factions but defusing mines, setting up a civil administration and re-establishing civilian policing.64 There appeared to be no initial hostility to the idea of some form of disarmament activity65 within the State Department or among the President's advisers but there was certainly to be no commitment to long term 'nation building' as the desire was to have the troops home no later than the inauguration of President Clinton on 20 January 1993. Notwithstanding this the new Clinton administration was prepared to go along with a much more expansive operation which included the nation building dimension.66

63 The letter stated, "I want to emphasise that the mission of the coalition is limited and specific: to create security conditions which will permit the feeding of the starving Somali people and allow the transfer of this security function to the UN peacekeeping force... (US) objectives can, and should, be met in the near term. As soon as they are, the coalition force will depart from Somalia, transferring its security function to your UN peacekeeping force.", J.R. Bolton, "Wrong Turn in Somalia", Foreign Affairs, vol 73, no 1, p. 60. Bolton was Assistant Secretary of State for International Organisations in the Bush Administration and was closely involved in these communications.
64 Ibid., p. 61.
65 Sommer, "Hope Restored?" op cit., p.34.
transition to a nation building operation occurred with UNSCR 814\textsuperscript{67} and was sign posted by the comments of the US Permanent Representative to the UN, Madeleine Albright who stated:

"With this resolution, we will embark on an unprecedented enterprise aimed at nothing less than the restoration of an entire country as a proud, functioning and viable member of the community of nations."\textsuperscript{68}

While this transition related strictly to UNOSOM it was hoped that the remaining UNITAF forces would help to pursue UNOSOM objectives before scheduled departure dates and that some US forces might remain as part of UNOSOM to enable the expanded mandate to be effected.

1.25 The minimalist approach to disarmament and security issues that was adopted by the UNITAF command reflected an overall caretaker approach but also uncertainty over the authority that could be exercised. When the Australian advance party arrived in early January 1993 their legal interpretation of the situation was that the laws of occupation applied \textit{de jure}.\textsuperscript{69} While there was no immediate response to this it seemed from documents circulated concerning the handling of detainees that this would also be the position of the US, referring as they did to the "occupied territory". This was not to prove the case, however, as advice was later received that the application of all the laws of

\textsuperscript{67} Adopted on 26 March 1993, UN SCOR (1993).
\textsuperscript{68} Bolton, "Wrong Turn in Somalia", \textit{op cit.} (n 35), p. 62. Reporting her comments to the media following passage of the resolution on 26 March 1993.
\textsuperscript{69} This interpretation was communicated in a paper handed by the author to UNITAF HQ on 24 January.
occupation was rejected.\textsuperscript{70} It was stated that there was concern over the responsibilities that might flow from acknowledging the application of the law in the context of the extremely minimalist approach dictating the shape of the mission.\textsuperscript{71} This did not prove to be a problem for the Australian contingent as there was great latitude given to the contingents generally, operating in distinct quasi independent zones.

\textbf{Rights of the Sovereign Assumed}

1.26 Another key issue that arose from UNITAF operations under the UN mandate was the control of Somali airspace, and Mogadishu's airport and port. It was clear that some form of regulatory regime was essential as heavy demands on the airport and port facilities, together with traffic through Somali airspace, became problematic. The UNITAF command desired and intended to assert control over these aspects of what is normally within the purview of the sovereign.\textsuperscript{72} The legal advisers at HQ UNITAF turned to the Chicago Convention on International Civil Aviation of 1944 as well as other sources of international law regulating maritime affairs and could find no guidance for this unique situation. Meetings were held in Nairobi from 14-16 January 1993 with representatives of UNOSOM, the International Civil Aviation Organisation (ICAO), UNITAF, the Kenyan Civil Aviation Authority and commercial carriers.

\textsuperscript{70} This position was advised by the Staff Judge Advocate (SJA) of HQ UNITAF, Colonel F.M. Lorenz, in briefings to the author as the Australian legal officer.

\textsuperscript{71} \textit{Ibid.}

UNITAF asserted that control of the airspace and ports was capable of falling within the mandate established by UN SCR 794 by virtue of the authorisation to use all necessary means to establish a secure environment for humanitarian relief operations in Somalia.

1.27 Such an interpretation placed pressure on the elasticity of the mandate, albeit not beyond breaking point. This left much to be desired as the framework for a regulatory regime. Significant, however, for the purposes of this study is that the assertion of authority over these aspects of government by the force is an important fact in determining the issue of the application of the laws of occupation.\(^\text{73}\) By assuming these rights the force was demonstrating its intention and ability to exercise a highly significant level of authority and control. It was a clear illustration of the fact that UNITAF was the only organisation capable of exercising such authority.\(^\text{74}\)

1.28 From 1 February 1993 an Airspace Control Authority for Somalia was established by UNITAF and placed under the control of Brigadier General Zinni as Director of Operations. Other UNITAF officers were nominated to flesh out the Air Control organisation with a representative of UNOSOM included.\(^\text{75}\)

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\(^\text{73}\) "In order to provide for the safety of all aircraft flying in Somali territorial airspace, the Commander of the Unified Task Force has asserted, on behalf of the country of Somalia, airspace control authority over all Somali Territorial airspace effective the 9th day of December, 1992. This authority shall continue until further notice". Lieutenant General (Lieutenant General) R.B. Johnston, Memorandum for the Record to "Potential Users of Somali Airspace", at TAB U (1), UNITAF, Staff Judge Advocate, After Action Report/Lessons Learned (hereafter UNITAF, SJA AAR), 10 April 1993.


\(^\text{75}\) Brigadier General A.C. Zinni, Memorandum of Introduction, 1 February 1993, UNITAF SJA AAR, TAB U (7).
ICAO representative was employed, using a UN Development Program grant to ICAO, as an "Interim Appropriate Air Traffic Services Authority for Somalia"\(^{76}\) to work with this group under the command of UNITAF. Included in his duties was the development of a plan to reconstitute the Somali airspace legal regime.\(^{77}\) In exercising his authority Lieutenant General Johnston promulgated regulations prohibiting the carriage of certain drugs and weapons for distribution or sale. These regulations provided that prohibited items would be confiscated and aircraft carrying this contraband could be seized. The company or individual involved would be prohibited from conducting future operations in Somalia. Aircraft not complying with air traffic control directions and flow control procedures would be reported to ICAO and other agencies and prohibited from operations at UNITAF controlled airfields.\(^{78}\) ICAO was to provide assistance in the regulatory regime established by UNITAF by facilitating the publication of Notices to Airmen (NOTAMS) promulgated by the UNITAF Commander and UNOSOM once it assumed responsibility.\(^{79}\) This exercise of control was also extended to the sea ports. Some elements of these measures clearly went beyond the UNSCR 794 mandate.

\(^{76}\) UNITAF, SJA AAR., p. 50.

\(^{77}\) Ibid.


\(^{79}\) J. Reardon, Memorandum for the Record, to ICAO, "Proposed Coordination for the Reconstitution of Somali Airspace", 15 January 1993., UNITAF, SJA AAR, TAB U (3).
The Media Factor

1.29 A critical aspect of the mission was the problem of the radio stations controlled by Aideed and Ali Mahdi and the means of communication between UNITAF/UNOSOM and the Somali community. The Somalis are avid radio listeners and Aideed’s control over the national radio station facility was important to his authority over, and ability to mobilise, his own clan group. The radio station had belonged to the state but was captured by Aideed during the civil war. Through this medium he could call his southern Mogadishu community into the streets in an instant and propagate the most distorted fictions. UNITAF’s limited Somali radio broadcasts, leaflet drops and newspaper, while useful in many ways and productive in sympathetic areas, were in no way an effective counter to Aideed’s radio within his community.

1.30 From the beginning Aideed perceived UNITAF and UN involvement as a threat to his position. Aideed’s radio broadcast constant attacks and rumours against UNITAF and the UN almost immediately. He claimed that UNITAF was working with the warlord ‘Morgan’ against his ally Jess in the Kismayo area and on 23 February 1993 he called his supporters out to attack UNITAF in the streets, carefully withholding the commitment of his own armed forces. There followed three days of demonstrations, sniping, fires and mob

81 Hirsch & Oakley, op cit., p. 62.
83 Ibid., pp. 39-40.
84 This and the following information was obtained at intelligence briefings including translations of the radio broadcasts of Aideed’s radio station.
85 Intelligence briefings attended by author, 24-26 February 1993
attacks which had personnel at UNITAF compounds (such as the former US Embassy) virtually under siege. There was a particularly heavy attack on the Nigerian troops in the K4 roundabout area. Later Aideed's radio station was to broadcast incitements to murder the Somali interpreters working with UNITAF and to propagate false accusations against the contingents.

1.31 A solution to that problem might have been to seize all the radio stations from the commencement of operations, when the initiative was with UNITAF, without distinction as to who controlled them. This would have maintained an impartial image. The SRSG in Somalia from March 1993, Admiral Jonathon Howe, would have been much happier had this been done in the UNITAF phase, as the attack on the Pakistani troops of 5 June 1993 arose in relation to a perceived threat to the radio station. This in turn led to the gradual disintegration of the whole mission. What however would have been the legal basis for doing so?

Restoring and Maintaining Order?

1.32 The area of most difficulty for the force was the handling of detainees and regulating relations with the community in maintaining order and providing security for relief operations. In this respect the UNITAF Commander was given a framework of rules of engagement which addressed this issue in broad terms. From this he was to produce policy guidance and procedures. The rules of

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86 Hirsch & Oakley, op cit., pp. 77-79.
87 Intelligence briefings attended by author during March 1993.
88 Interview with Admiral J.T. Howe, Washington DC, 10 January 1995.
engagement specified that "detention of civilians was authorised". This was permitted where persons were interfering with the accomplishment of the mission or where persons otherwise used or threatened deadly force against UNITAF members, relief material, distribution sites or convoys. Persons who committed criminal acts in areas under the control of UNITAF members could also be detained. Persons detained were to be handed over to the US Military Police. This was qualified in the case of the Australian contingent, as a matter of national policy, by restricting detention to serious crimes such as rape and murder or crimes against the person.89 These qualifications were later adopted by HQ UNITAF also. Most property related crimes were excluded except for theft of relief material such as was necessary to provide a secure environment for humanitarian relief operations in accordance with UNSCR 794.90 There was no reference in either UNSCR 794 or the Rules of Engagement as to what the overall legal framework was to be for this action or for relations with the community in general, given there was no government to negotiate with and hence no Status of Forces Agreement or Memorandum of Understanding.

1.33 Subject to this broad authority the UNITAF Commander was then obliged to produce clearer guidelines and procedures.91 The detainee handling

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89 Instructions passed from Headquarters Australian Defence Forces to Commander Australian Forces Somalia, 21 December 1992.
90 The rules of engagement have not been published in any public document and as a complete document are yet to be de-classified although the elements referred to were not classified and were verbally communicated to the Somali community and to the media. The author has access to the original classified document.
91 "Civilians are authorised to be detained only in exceptional circumstances. Those circumstances are categorised as either civil crime detention or hostile endangerment detention. A civil detention includes detaining persons suspected of murder, rape, torture, or other crimes for which failure to detain would be an embarrassment to UN forces." Memorandum to Australian Forces Liaison, "Detainees", Lieutenant Colonel J.M. Smith SJA, 29 January 1993.
regime that was put in place by HQ UNITAF was tailored to the circumstances. It was determined that the standard of the facilities must be of at least the minimum required for Prisoners of War for the temporary holding of no more than 48 hours. The standards were based on accepted principles of international law and, in particular, those specified in the Fourth Geneva Convention. The process for handling detainees was eventually crystallised as follows:

a. detainee held for no more than 48 hours in the contingent locality,

b. basic evidence to establish prima facie case obtained,

c. detainee backloaded to UNITAF detention facility at Mogadishu University for no more than 72 hours,

d. "probable cause" report prepared by legal officer,

e. report submitted to UNITAF Staff Judge Advocate (SJA),

f. SJA reports to UNITAF Commander as to whether probable cause made out, and

g. if probable cause made out detainee moved to Mogadishu central prison to await trial.

92 UNITAF, SJA AAR., p. 16, TAB E (1) & (2).
For the Australian contingent this system no longer applied once a justice administration was re-established in Baidoa, but it worked well as a streamlined means of processing detainees with appropriate legal checks built in. Within the policy would be seen a number of contra-indications to the official US position that the laws of occupation did not apply. In the second policy guideline issued 24 December 1992 it was stated that:

The obligation of CTF (Combined Task Force) personnel to protect the population and detain civilians varies with the location of the incident...

Civilian detainees are categorised as either criminal or hostile in nature.

For areas under military control..., a commander shall protect the population not only from attack by military units, but also from crimes, riots, and other forms of civil disobedience.94 (emphasis added)

This was further evidenced in the US Army Military Police Special Operating Procedure for Operation Restore Hope, which outlined the authority...

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94 Signal from Commander Joint Task Force (CJTF) Somalia, "Commander’s Policy Guidance, Civilian Detainees, Vehicle accidents, Medical Care and Reporting Requirements", 24 December 1992. Other specifications included, "Civilians shall be detained only in exceptional circumstances....

Exceptional circumstances should include the detention of civilians:

(1) who are suspected of crimes of a serious nature (i.e., wilful killing, torture or inhumane treatment, rape, wilfully causing suffering or serious injury to body or health, etc.) That the failure to detain would be an embarrassment to the US, or

(2) whose release immediately following a hostile encounter would likely endanger CTF forces or persons under the protection of CTF forces.

Civilians will not be detained solely for interrogation purposes. However, civilians who have been detained under exceptional circumstances may be interrogated provided the atmosphere remains entirely voluntary.
for detention and procedures to be followed. Under the paragraph headed "Authority to Detain" the guidance stated:

Detainment of local nationals is authorised and directed once it is determined by competent authority to be necessary for imperative reasons of security to the US Armed Forces in the occupied territory.95

(emphasis added)

This document outlined the treatment of detainees and in effect constituted a summary of the provisions of the Fourth Convention regarding internment and detention.

1.36 The major flaw, however, was that there was no system put in place for dealing with detainees against whom 'probable cause' was made out and who were taken to the Mogadishu Prison. Prior to deployment the SJA had raised this issue with the UNITAF command, stating, "there may be a requirement for a system of tribunals that operate in the absence of a host nation government. There may be a need to establish some kind of civil code and promulgate it in the native language."96 Neither of these points were addressed in the event. At one point plans had been made by the US Judge Advocates for the convening of 'Article Five' Military Tribunals with the material and guidelines being sent from the US Third Army SJA at Fort McPherson Georgia to HQ UNITAF.97 The

96 UNITAF, SJA AAR, TAB A (1).
The purpose of these tribunals is merely to determine the status of a person as to whether he is entitled to be designated as a Prisoner of War with the consequent treatment and privileges attaching to that status. It was originally intended that such tribunals would be able to deal with detainees who had threatened the security of the force or the relief effort and possibly against the faction leaders and their forces who were hostile to UNITAF. It was determined that the Article Five tribunal format would not be appropriate and would be too cumbersome in the circumstances of Operation Restore Hope for simple criminal offenders, or even to determine the status of those attacking UNITAF forces.

1.37 Following serious accusations against the faction leader Omar Jess and his subsequent apprehension by UNITAF there was some speculation that a 'war crimes' tribunal may be convened to deal with him. This was based in particular on evidence that his forces had been responsible for the massacre of a large number of civilians just prior to UNITAF deploying into the Kismayo area. A political decision was made, however, not to proceed against Jess and he was released. It was also determined that there would be no tribunals

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Prisoners of War of 12 August 1949.
98 Interview with Colonel F.M. Lorenz, op cit.
99 UNITAF, SJA AAR, p. 43
100 Memorandum for the Record, "Kismayo Incident", Lieutenant Colonel F.R. Moulin Deputy SJA HQ UNITAF, 26 December 1992., UNITAF, SJA AAR, TAB Q (2). J. Perley, "Somali Clan Killed Dozens of Rivals, US Officials Say", New York Times, 29 December 1992, p. 1. Memorandum for the Record, from Task Force Kismayo Surgeon Major T.P. Pfanner, "Observations at gravesite Near Kismayo Airport, 3 January 1993., UNITAF, SJA AAR, TAB Q (2).", "Given the similar times of death of the bodies and their conditions, it would seem logical to conclude that this scene represents a site of mass murder and probable torture. The involved persons appeared to be prominent members of their society or at least affluent by local standards. I personally observed at least 14 bodies and suspect many more are present to include possibly mass graves."
101 Briefing by HQ UNITAF Judge Advocates attended by author on 8 February 1993.
convened to deal with the local community due specifically to uncertainty over the legal basis for the exercise of such jurisdiction resulting from the reluctance to acknowledge the application of the laws of occupation.102

1.38 The desire not to have to deal with offenders was perfectly understandable. The alternative however was to throw the problem over to UNOSOM who were never to be in a position, either in terms of having a legal plan or capability, to do anything about the detainees. By not having a plan UNITAF was in breach of all acceptable human rights standards.103 It was an aspect of the operation that none of the contingents had given any thought to or made any preparation for. The other alternative was to re-establish some form of local justice administration which would have satisfied all obligations and avoided any burden on the force. Initially there were some attempts at reconstituting an indigenous law enforcement regime based on the desire to relieve the patrolling and security burden on the force.104 The US was under domestic legal constraint in this respect as its Foreign Assistance Act (FAA) prohibits the training, advice or financial support of foreign police, prisons or other law enforcement agencies, (except in Central America and the Carribean).105 Ironically, had the application of the laws of occupation been


103 That is the requirement to follow detention action with a fair trial as specifically required by Article 71 of the Fourth Geneva Convention. See also Articles 9-11 of the Universal Declaration of Human Rights (UDHR), G.A. Res. 217(III)A, UN Doc. A/811, at 56 (1948) and Article 9 of the International Covenant on Civil and Political Rights (ICCPR), U.N.T.S. no. 14668, vol. 999 (1975), p. 171. Even if the extent of the plan was to work vigorously towards enabling the local justice system to try offenders this would have satisfied the requirements of Article 71 which states that offenders be brought to trial as rapidly as possible.


105 UNITAF, SJA AAR, TAB S (1). Foreign Assistance Act of 1961 (United States).
acknowledged this could have been used to distinguish the situation from the coverage of the FAA.\textsuperscript{106} It would also have been possible to seek an exemption for the circumstances that applied in Somalia but Lieutenant General Johnston, CENTCOM, the Joint Chiefs of Staff (JCS) and Washington were all against involvement on the basis that it represented more 'mission creep'. This attitude changed as the realisation dawned of the importance of putting effort into such an initiative.\textsuperscript{107} The expedient adopted to allow some limited involvement and to partially circumvent the restrictions of the FAA was to term this group the Auxiliary Security Force (ASF). The main efforts in organising the ASF were, in fact, exerted by the UNITAF Provost Marshall Lieutenant Colonel Spataro,\textsuperscript{108} although serious restrictions remained as to how far the US could get involved. It was hoped by UNITAF that UNOSOM would fill this breach by providing most of the logistic support with help from donor countries specifically volunteering for this task.\textsuperscript{109}

1.39 The police reconstruction objective in Somalia had one other constricting element: lack of UN vision and support.\textsuperscript{110} The efforts of Mr Mohamed Sahnoun, the Special Representative of the UN Secretary General in Somalia from March to October 1992, to raise this as a priority, failed to attract a response from UN Headquarters.\textsuperscript{111} The missed opportunities go back even

\textsuperscript{106} Even had the domestic legal restriction not been a factor there was no real enthusiasm in the senior levels of command for getting involved with the local police beyond getting something on the streets of Mogadishu to control the crowds so that UNITAF troops didn’t have to. Anything else was considered ‘beyond the mission’. Interview with Colonel Lorenz, op cit.
\textsuperscript{107} Hirsch & Oakley, \textit{op cit.}, pp. 87-89.
\textsuperscript{108} UNITAF, SJA AAR, p. 46. Also personal observations of author in dealings with LTCOL Spataro.
\textsuperscript{109} Hirsch & Oakley, \textit{op cit.}, pp. 88-92.
\textsuperscript{110} \textit{Ibid.}, p. 88.
\textsuperscript{111} These were aired by Sahnoun at the Geneva donor’s conference on 12 October 1992.
further. In mid 1991 the police force was attempting to reactivate and had even identified a commander acceptable to both Ali Mahdi and Aideed. This was Brigadier Ahmed Jama, who had been the former commander of police. Jama proposed to use the police for food escorts, demobilisation of the militias and disarmament, requiring only food aid and some technical assistance. Jama’s efforts received no support from the UN or the international community. Jan Westcott is particularly critical of the failures of UNITAF and the UN in this regard:

For at least one year prior to the decision to send troops, Somalis were requesting international assistance to form and support regional police forces. The USG (Under Secretary General for Peacekeeping) and UN should have looked at the option of sending military police or civilian police with uniforms and equipment to Mogadishu, Baidoa, Belt Weyne, Kismayo, Garoe, etc., to recruit, train, equip, and supervise local and regional police forces.

While there was reluctance to attempt to establish a national police force in the absence of national reconciliation it was felt that recruitment of guards to assist in maintaining the security of relief operations was necessary and that these could form the basis of a Somalia wide police force at a later date. This would not however have involved the use of the ‘technical’ bandits. The term ‘technicals’ was used to describe those bandits who had adapted vehicles by mounting crew served weapons on them. The organised factions also relied, and continue to rely, heavily on these improvised weapons systems. Sahnoun, “Somalia: The Missed Opportunities”, op cit. (n 36), pp. 25-37.


Ibid., p. 37. She also stated:

"If UNOSOM would have focused initially on the biggest problem in Somalia, security, and establishing regional police forces, UNOSOM would have had a better chance at success and been seen in a different light by both Somalis and outside observers today". (Ibid., p. 43.)
1.40 The recruitment of the ASF during UNITAF was based on the criteria that the applicant had to have served in the Somali Police Force for at least two years prior to the outbreak of the civil war, be of sound mind and body and be guilty of no crime. Recruitment was facilitated by the fact that 3,000 police had gathered together, on their own initiative, looking for assistance to recommence operations. The Somali Police Force had enjoyed a high reputation with the community as it was separate from Barre's security police and focused purely on enforcing the basic penal code. Archives of former police employees had survived, although in a battered state, and prospective applicants could be checked against these archives. At least that was the theory. A Police Committee was constituted in Mogadishu but this was to become plagued by factional differences. The mistake made was that political representatives were allowed on the Committee rather than confining membership to former senior police commanders and administrators. Material gradually came in to equip the ASF including uniforms that belonged to Somalia but had been languishing in a warehouse in Kenya from before the civil war. There were three key deficiencies in relation to the ASF. First, the factional problem in Mogadishu as mentioned above. Secondly, the ASF were unarmed. They had no chance of re-establishing order in the armed camp that was Somalia without being themselves armed, and at the same time a disarmament campaign waged. Thirdly, if the ASF did apprehend someone there was still no judiciary to hand them over to and therefore the overcrowded prison would become more

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Interview with Brigadier Ahmed Jama, Washington, 3 January 1995. BRIG Jama was approached to join the committee but declined due to the policy of allowing non-police officials on the committee, which he claimed politicised it.
overcrowded and the violation of human rights standards only exacerbated. Even the Police Committee had pressed for a judiciary to be reconstituted side by side with the efforts to get the ASF going as, "without a judicial system, the police could not be effective".  

1.41 The next step was therefore to attempt to get a judiciary functioning. Moves began in an unplanned way from two separate sources. The UNITAF SJA Colonel F.M. Lorenz had been contacted by some former judicial officers from southern Mogadishu who had a plan to reconstitute a judiciary. At the same time the US Liaison Office (USLO) representative Mr Phillip Ives had been in contact with some former jurists in northern Mogadishu. As a result of this contact a meeting between the two groups and all former Somali jurists who could attend, was arranged for 3 March 1993 at UNOSOM Headquarters. The meeting was well attended and produced some concrete results. It appeared that the legal profession, consisting of some very highly educated and intelligent people, were united more by their education and profession than they were divided by the clan conflict. Some significant decisions were made at the meeting. It was decided that a steering committee would be formed to work on the creation of a broad based Law Association to take justice reconstruction issues further but also to examine aspects of constitutional reform and the shape of the new Somalia. The general consensus was that the basis of the justice administration should be the 1962 Somali Penal Code and further meetings were agreed upon.  

116 Report by J. Hirsch of USLO to US State Department, "Somali Jurists Meet at
Difficulties were soon to emerge, however. The Political Committee in Mogadishu, made up of the factional heads, was highly suspicious and did not wish to encourage such uncontrolled interest groups developing, particularly if they cut across clan and factional certitudes. Their suspicions may have been well founded as the jurists asked to be permitted to send representatives to the Addis Ababa peace conference. They felt they were better qualified to discuss the future shape of Somalia than "the thugs who will run the meeting", as one of them stated. While there was some support for re-establishing the police force there was never any commitment to assisting a judiciary to complement it on the part of UNITAF or the UN in these crucial early days. The Steering Committee languished due to this lack of support and the hostility of the faction leaders. There was one positive result from the meeting in relation to the Australian efforts in the Bay region which will be detailed in the next chapter. The failure of UNITAF and UNOSOM to support these developments and the Steering Committee or to take any measures at all to establish an efficacious justice administration at that time was not only a missed opportunity but, it is submitted, an abrogation of the obligations of international law.


Interview with Dr Abdullahi Ossable Barre, former judge of the Supreme Court of Somalia, 3 March 1993, UNOSOM Headquarters Mogadishu.

Once again this was considered 'beyond the mission'. The initiatives in this direction came from pro-active individuals such as Phillip Ives and Colonel Lorenz. There was no official encouragement of their efforts but only "mild scepticism". It was questioned as an unnecessary involvement. Because of this attitude as Colonel Lorenz states, "Other than meeting and talking these things through I guess we really did not provide any substantial support... we didn't do a lot". Interview with Colonel Lorenz, op cit.
That failure also had serious consequences for the morale of the troops and their relationship with the community.\textsuperscript{119} This was clearly illustrated in a number of incidents of which a few indicative cases will be recounted here. Because there was no system of justice or framework for dealing with offenders against the security and property of the troops they found themselves in an invidious position. On the one hand it was highly corrosive of morale for the troops to apprehend bandits responsible for mass murder and robbery and be forced to let them go or hand them over to village elders who had no power to do anything with the more serious bandits. Even for Somalis who killed members of the force there was never a means of bringing them to trial. On the other hand the troops lost face with the community and the bandits when this was realised.\textsuperscript{120} In Mogadishu UNITAF and UNOSOM troops were targeted by street looters who would grab anything they could from vehicles or the persons of the troops, including cameras from around necks or glasses being worn.\textsuperscript{121} Often troops in Mogadishu would be derisively stoned and sniped at with rifle fire as they drove by. Grenades were sometimes thrown at vehicles such as in the case of five Belgian troops injured this way in Kismayo.\textsuperscript{122} There was nothing that could be done with intruders into the encampments but hand them over to the elders or let them go.\textsuperscript{123} Even in Mogadishu the central prison proved to be unreliable with key bandits being able to secure release. As a

\textsuperscript{119} Most troops deployed with a sense of mission and goodwill but soon became disillusioned with the inactive operation in those places where local commanders did not engage in civic action, succumbing to the laager mentality. M.J. Mazarr, "The Military Dilemmas of Humanitarian Intervention", \textit{Security Dialogue}, 1993, vol 24, no 2, pp. 157-158

\textsuperscript{120} Lorenz, "Will the Rule of Law...", \textit{op cit.}, p. 2. Also personal observations of author.

\textsuperscript{121} \textit{Ibid.}, p. 4.

\textsuperscript{122} Briefing HQ Australian Forces Somalia, 6 February 1993.

\textsuperscript{123} Lorenz, "Will the Rule of Law...", \textit{op cit.}, pp. 7-8.
result the prison was abandoned in favour of the temporary detention facility at the Mogadishu University compound. In effect, given the limited scope of the UNITAF detention facility, long term detentions effectively ceased.\textsuperscript{124} In this environment of frustration and tension there were some troops who determined that their only option was to administer rough justice themselves or who snapped under the strain and used inappropriate lethal force in cases of simple theft.\textsuperscript{125}

1.44 Australian troops in Baidoa had the unpleasant task of reporting the actions of some members of another UNITAF unit who were seen mistreating Somali children they had apprehended straying into their area. These offenders were also court martialled.\textsuperscript{126} The most notorious incident occurred in Belet Weyn where a Somali who was caught within the perimeter of the Canadian contingent was tortured and beaten to death.\textsuperscript{127} The consequences of that event are still being felt in Canada where there have been numerous courts martial and inquiries and the unit itself has been disbanded. This was only the most severe of what was not an uncommon practice of administering some form of physical punishment to those caught stealing or breaching perimeters as a means of discouraging further attempts and seeing some 'justice' done. As will be expanded in later chapters it is submitted that the laws of occupation

\textsuperscript{124} Ibid., pp. 5.
\textsuperscript{126} The incident occurred on 21 January 1993 near the Baidoa airfield. The author conducted an investigation on behalf of the contingent to which the offenders belonged. The detailed statements of the Australians resulted in guilty pleas by the accused persons.
\textsuperscript{127} P. Cheney, "Canada... Canada", \textit{The Sunday Star}, Toronto Canada, 10 July 1994, Section F. Report of the Board of Inquiry: Canadian Airborne Regiment Battle Group, Phase I, Volumes XI & XII, National Defence Headquarters, Ottawa, 31 August 1993.
were designed to prevent this very situation by providing a basis for regulating the maintenance of order and the relations between the force and the civilian community. It was incumbent on those who put the troops in such a position to provide a proper framework for handling criminal activity. It is submitted that not only was the failure to establish a proper law enforcement regime a breach of the obligations of laws of occupation but it also seriously threatened the morale, safety and standards of the troops.

Conclusion

1.45 The UNITAF force was the sole organised entity capable of exercising authority in the areas it occupied. There was no widespread uprising that cast any doubt on this status and the force asserted authority in relation to many aspects of traditional sovereign powers. The force greatly facilitated and enhanced the work of the 50 NGOs and additional UN agencies that were operating in Somalia, which was the central feature of the mandate. Significant problems emerged, however, relating to the maintenance of order during the presence of the force which undermined the success of the mission and led to human rights violations. These problems were largely a consequence of not providing a proper legal framework or plan for the interim administration of justice. The US command adopted a restrictive view of the mission which predisposed them to oppose the application of the laws of occupation. The US advisers were apprehensive as to the potential obligations which the law might impose.\textsuperscript{128} In particular they were concerned that occupation of a part of

\textsuperscript{128} "Although we would not seek to enter as an occupying force, recent experience in Iraq
Somalia meant accepting obligations for all of the country under the law and that the law would require them to remain in Somalia until order was restored.¹²⁹ demonstrates that if we establish control over an area with no government infrastructure, we may be held to occupation force standards. Under international law, an occupying force is responsible for the public welfare, to include safety, sanitation and a whole host of other requirements. We have to make every effort to limit our responsibility in these areas, to ensure that we act within our capabilities, and be certain that the primary mission is still accomplished.” 

Memorandum from UNITAF SJA to Commanding General, “JTF Legal Issues and Legal Office Staffing”, 1 December 1992., UNITAF, SJA AAR, TAB A (1). Interview with Colonel Lorenz, op cit. This modified initial US legal opinions as indicated by a document dealing with “Special Command Responsibilities and Obligations Concerning the Somali Population.”, dated 18 December 1992 and faxed to Australia for the guidance of the Australian contingent on 21 December 1992. This was an annex to a general guidance and directive document to be provided to commanders at relevant levels in UNITAF. It stated that the operation would:

"...impose special responsibilities on commanders concerning legal actions and legal responsibilities toward the Somali population in areas under the commander’s control. Commanders should ensure their level of legal and civil affairs staffing is sufficient in light of these special and unique considerations.

2. Command Responsibilities:

A. Safety and Security of the local population. In the area under his control, a commander must protect the population not only from attack by military units, but also from crimes, riots, and other forms of civil disobedience. To this end, commanders will:

(1) Demand and enforce such obedience as may be necessary for the security of his forces and the maintenance of law and order.

(2) Where necessary, establish rules of law necessary to fulfil this obligation.

(3) Detain those accused of criminal acts or other violations of public safety and security.

(a) Such detention shall include reasonable due process for the detainee under the circumstances.

(b) Persons so detained will not be detained or incarcerated together with persons entitled to Prisoner of War (POW) status.

(c) The period of detention will continue until the accused person, along with available evidence of his crime, can be turned over to authorities of a follow-on peacekeeping organization or a properly constituted local government.

B. Hygiene and Public Health. To the fullest extent possible, the commander has the duty of ensuring and maintaining, with the cooperation of international, national, and local authorities, medical services and public health and hygiene in the area under his control.

(a) In particular, commanders must apply those prophylactic and preventative measures necessary to combat the spread of contagious diseases and epidemics among those refugee populations that can be expected to gather in secure areas.

(b) The absence or ineffectiveness of international, national, or local medical or health organisations does not relieve the commander of this responsibility.

C. Food and Medical Supplies. It is the specific purpose of (the Operation) to provide and allow the passage of food, medical supplies, and other necessities of life to the Somali population. In those areas under the commander’s control, it is his responsibility to ensure that required goods are in fact provided to the fullest extent of his ability. Ideally, this function will be fulfilled in cooperation with International Relief Organizations, but failures on the part of those organizations do not relieve the commander of this responsibility”.

Clearly later policy deliberations resulted in the dramatic scaling back of this directive, although no official modification was passed on to the contingent commanders. This document was in effect an acknowledgment of the applicability of the laws of occupation as "legal responsibilities".

¹²⁹ The deployment of UNITAF into the southern areas of Somalia only was a point of some controversy. The mandate in UNSCR 794 clearly authorised the intervening force to deploy and exert authority throughout Somalia. The worst affected famine areas and fighting were occurring
It will be submitted that the law of occupation did apply to the UNITAF deployment and that these concerns were either incorrect or exaggerated. Had this position been accepted and the inclination been present during the UNITAF phase to play a more constructive role in Somalia it is asserted that much could have been achieved and confusion in critical areas avoided. With the correct approach to the crisis and armed with the clear provisions of the law of occupation, issues of disarmament, relief and reconstruction management, the maintenance of order, police and judiciary revival, the exercise of necessary functions of the sovereign, the facilitating of political participation and marginalisation of the warlords could all have been addressed with a much greater probability of success. This would have circumvented the delicate political issue debated at various stages as to whether Somalia should become a 'Trusteeship' as a means of providing the framework for more interventionary reconstruction. In Chapter Three it will be shown how the UNOSOM mission suffered from this frustrated beginning. To gauge the merits of an alternative approach to the overall UNITAF policy, the Australian experience will now be examined.
CHAPTER TWO: THE AUSTRALIAN EXPERIENCE IN SOMALIA

I have just returned from Baidoa, Somalia, a town 100 miles west of the capital, Mogadishu. What I witnessed there will haunt me for the rest of my life. I decided to go against the advice of my friends in the Department of State... The women of Baidoa and the children they revere are so weakened from prolonged famine they have endured that without urgent medical attention, all the food in the world would not save them... relief workers told me that the death rate there was between 200 and 300 people a day.

United States Congressmen Mervyn Dymally

Introduction

2.1 Having seen the difficulties faced by UNITAF and examined the legal status of the operation as a whole we will now turn to the specific experience of the Australian contingent, which served predominantly within UNITAF (8 January - 3 May 1993) and then for a short period within UNOSOM II (4-20 May 1993). The purpose of this exposition is to highlight the alternative approach to the public security function taken by the contingent and the practical difficulties and issues that emerged from this approach. Through this will be illustrated the key aspects of this thesis regarding the application of the laws of occupation, the utility of these laws and the questions that arise to be answered by them.

The Setting

2.2 About 240 km north west from Mogadishu lies the town of Baidoa, one of the larger urban centres of Somalia. Baidoa was the capital of the Bay

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1 Opening remarks to House Africa Subcommittee, 16 September 1992 of which he was chair.
Region before the civil war. At the time of the UNITAF intervention the
population was approximately 50-60,000 including about 20,000 displaced
persons. What became known as the Baidoa Humanitarian Relief Sector
(HRS), designated by HQ UNITAF, corresponded roughly with the old provincial
boundaries with an estimated population of 180,000. During the crisis Baidoa
was the centre of NGO operations in the area.

2.3 Prior to the arrival of UNITAF in Baidoa the situation had been
desperate. It was estimated that 40% of the overall population and 70% of the
children had perished. The Rahanweyn had no significant armed organisation.
Baidoa in particular suffered greatly under the Barre regime as he and his ally
Hersi Morgan developed their plans in 1987 for the gradual annihilation of the
Rahanweyn and Issak but this was intensified during the period when Barre's
forces fled to the region from Mogadishu in 1991. Barre was evicted from
Baidoa by the USC under the command of Aideed but it soon turned out that
these 'liberating' forces were as bad as, if not worse than, Barre's.

2.4 During the civil war that followed Barre's eviction, the break up of
factions occurred along clan lines. The USC was centred on the Hawiye which
is comprised of sub-clans from the Mogadishu area. The unity in the USC soon
degenerated into sub-clan allegiances. With respect to the two main

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2 LTCOL D. Hurley, Testimony to Joint Standing Committee Inquiry on Australia's Participation in Peacekeeping (JSC Inquiry), Official Hansard Transcript, Friday 8 April 1994, p. 531.
5 See Chapter 1 supra, para 1.18, & n. 25.
protagonists, Aideed was of the Habir Gedir sub-clan, while Ali Mahdi was Abgal. It was forces loyal to Aideed who remained in control of Baidoa. These forces acted as a 'branch office' of Aideed's USC faction the Somali National Alliance (SNA). They called themselves the Somali Liberation Army (SLA), an armed element of the SNA. The elements who established the SLA in Baidoa were primarily of the Duduble sub-clan in Mogadishu. They were able to provide an ongoing flow of funds to Aideed in Mogadishu from the proceeds of their activities in the Bay region, while enriching themselves in the process.

When the Australian forces arrived in the Bay region and Baidoa during January 1993 the SLA attempted to present themselves as the legitimate political leadership for the Bay region.

2.5 'Technical' bandits had plagued the area, raiding out of Mogadishu and from the southern area of Kismayo/Bardera. They would pillage whatever was left over by the more organised factions. Baidoa became the epicentre of the 'famine', being described as 'the city of death'. NGO operations in the area had been subjected to a highly organised extortion operation. This was based principally on control of the airfield where the SLA would charge each relief plane USD$2,000 for landing in addition to 'protection' money or payment in kind for the safe conduct of the material to the NGO compounds and security

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6 K. Menkhaus & T. Lyons, "What Are the Lessons to be Learned From Somalia", CSIS Africa Notes, No 144, January 1993., p. 6.
7 Ascertained through investigations by Australian Intelligence, the author and a Military Police investigator.
8 CI Report Interview with Hussein Barre Warsame and SLA Supporters, 28 January 1993.
9 The term 'technicals' was used to describe those bandits who had adapted vehicles by mounting crew served weapons on them. The organised factions also relied, and continue to rely, heavily on these improvised weapons systems.
once there. Occasionally the compounds were attacked and looted, while material was diverted from the planes and convoys attempting to get to the remote areas outside Baidoa were raided.\(^\text{10}\) This overt security problem was terminated by the arrival of UNITAF.

2.6 The 950 troops of the Australian Battalion Group, centred on 1st Battalion Royal Australian Regiment (1 RAR), began arriving in early January 1993 and took formal control of the Baidoa HRS on 19 January.\(^\text{11}\) The challenges that were left to the Australian contingent were the underlying security threat posed by the SLA and the entrepreneurial bandit elements. The Australians were able to determine the general criminal nature of the SLA soon after arrival and it was decided that they should not be conceded any political authority in the region. Ultimately their standing would be left to regional elections to resolve. To this end the security and relief committees received no recognition and an alternative framework was created that incorporated the responsible elements of the community as an interim measure.\(^\text{12}\)

**The Australian Civil Affairs Strategy**

2.7 The nature of the Australian operations in Somalia was first of all dictated by the UNSCR 794 mandate, to use all necessary means to establish a secure environment for humanitarian relief operations. The force was,
however, deployed by the Australian Government for a set period, with
redeployment scheduled for late May 1993. The Australian contingent was
therefore intended to serve under UNITAF command while that operation lasted
and then transfer to UNOSOM. As events transpired the UNITAF operation
continued through to 4 May 1993 so that the period which the Australians
actually came under tactical control of UNOSOM was only two weeks.
Operating, however, on the understanding that it may come under UNOSOM at
any time from January 1993 onwards, the Australian contingent was responsive
to broader UNOSOM goals throughout the mission, particularly with the
introduction of the ‘nation building’ mandate through UNSCR 814 on 26 March
1993. The mission therefore involved, in essence, applying the military
strategy appropriate in a low intensity conflict or peace enforcement
environment with long term national rehabilitation in mind.

2.8 The legal dimension of the strategy adopted by the Australians was to
occupy a central role in this mission. Using the provisions of international law as
a guide, the task of reconstructing an effective justice administration was
undertaken. Lieutenant Colonel David Hurley, the battalion group commander,
later stated, "It was critical in Somalia to re-establish the law and order system

13 D. Hurley & J. Simpson, "In the Service of Peace", in "Still the Same: Reflections on
Active Service From Bardia to Baidoa", G. Pratten & G. Harper ed., Australian Army Doctrine
Centre, 1996, p. 250.
14 Another factor in the broader Australian approach was the policy vacuum. COL Hurley
was to say in this respect:
"It is evident from the... list of CMOT's tasks that "mission creep" - in some cases
"mission stretch" - had occurred. In some instances this was by default, in others deliberate
decisions were made to widen the scope of operations. The decision to take on tasks outside
the original mission reflected the pace at which developments were happening on the ground
and UNITAF's and the UN's inability to provide timely advice and policy direction". D.J. Hurley,
quite quickly, because no system existed. Policing-type jobs soaked up my soldiers, whereas I could have been using them elsewhere.\textsuperscript{15}

2.9 LTCOL Hurley ensured that the elders were consulted as much as possible, particularly with regard to civil affairs initiatives. The people of Baidoa were encouraged to organise and take matters into their own hands with the result that a communal meeting was held on 23 February 1993 with a view to sending representatives to the Addis Ababa Peace Conference for Somalia, to be held in March 1993. The force also provided security for the meeting in Baidoa by having two companies patrolling the town with highly visible armoured personnel carrier (APC) support.\textsuperscript{16} This discouraged any attempt to disrupt the conference by outside elements or the SLA. Unfortunately the representatives elected at the conference were not permitted by UNOSOM to attend the Addis meeting which was to be confined to representatives of the major factions. This rebuff did not discourage the locals, however, and the elected leadership was later to form the basis for the creation of a democratic regional council for the area.\textsuperscript{17}

\textsuperscript{15} Ibid., p. 546.
\textsuperscript{16} Ibid., p. G-5.
\textsuperscript{17} Interview with Ms Elizabeth Lindenmeyer, Department of Peace Keeping Operations United Nations Headquarters New York, 19 December 1994. See also, "Local Administrative Structures in Somalia: A Case Study of Bay Region", Life & Peace Institute, Horn of Africa Program, Nairobi, June 1995., pp. 5-22.
Application of the Laws of Occupation

General Assessment of Application

2.10 The legal assessment made by the Australian contingent was that the presence of UNITAF forces in southern Somalia was governed by the laws of occupation. An examination of the mission and the provisions of these laws revealed that they could, in effect, serve an extremely useful purpose and provide the force with the guidelines it needed in the approach to be taken to securing the environment. At the same time they could assist in achieving longer term reconstruction objectives. Although the laws of occupation require that the force attempt to restore and maintain public order the Battalion commander regarded this as both implicit in the mission and desirable in any event.18

2.11 The most important factor in arriving at this assessment was that there was no government in Somalia. The force deployed under a Security Council mandate but it had not been 'invited' into the country or deployed pursuant to a treaty or agreement with the 'host' state.19 Both UNITAF as a whole and the individual national contingents had occupied a clearly distinguishable area and

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18 Conference between LTCOL Hurley and author, Battalion Headquarters Baidoa, 13 February 1993. He was later to say: "A facet of command relationship that I had never experienced before existed in the personal authority given to the HRS commander. In the absence of any form of civil government at any level and the failure of the UN to provide resident local UN political officers, HRS commanders became military governors". Hurley, "Operation Solace", op cit., p. 31.

19 These points are relevant to assessing what if any aspects of the law of occupation applied to the deployment, as will be discussed in Part II and Chapter 6, infra, in particular. The principal issue in this respect is whether the deployment is with or without the consent of the sovereign.
discrete areas of responsibility. In the case of the Australian Battalion Group the Humanitarian Relief Sector (HRS) boundaries were clearly defined by HQ UNITAF, as noted above, relating roughly to the old provincial boundaries.\textsuperscript{20} Within this assigned territory and the UNITAF Area of Operations as a whole there was no question that there was any other force able or prepared to challenge the authority of UNITAF or to exert authority themselves, even in the absence of UNITAF. The force was capable of exercising control and, as noted above, in fact staked out clear areas of authority that are traditionally exercised by the sovereign. In relation to the analysis of the legal framework for such operations in Part II of this work, it appears that this could readily be described as the partial occupation of the territory of one High Contracting Party by another\textsuperscript{21} within the meaning of Article 2 of the Fourth Geneva Convention. There was no widespread disorder or rebellion that cast any doubt over Australian or UNITAF control or authority, an authority that was accepted by the vast majority of inhabitants of the occupied area. In fact through their elders and by their clearly demonstrated reaction to the force the people of the Bay region not only welcomed the intervention but repeatedly petitioned the Australian contingent and UNOSOM to have the troops remain.\textsuperscript{22}

\textsuperscript{20} See Annexes A and B.

\textsuperscript{21} Somalia had ratified the Conventions in 1969. All contingents of UNITAF were from States which had ratified the Fourth Geneva Convention. See the discussion of the test for the application of the Fourth Geneva Convention in Chapter 6 \textit{infra}.

\textsuperscript{22} The SDM representatives and the elders of the Bay Region presented a petition to Admiral Howe when the SRSG visited Baidoa on 11 April 1993, requesting that the Australians be retained in the area beyond the scheduled departure date of 20 May 1993. (Observations of the author at the conference held in Baidoa courthouse with Admiral Howe and the Bay leadership on 11 April 1993.)
Community Consultation and Claims

2.12 Perhaps the most important of the Australian activities was the formation of a committee of 12 representatives of the 41 elders, led by the Chief Elder. This committee met regularly while the Civil Military Operations Team (CMOT) met at least once every two days with the Chief Elder to discuss community issues. The CMOT was also responsible for providing air traffic control over the Baidoa airfield. The contingent had an open door policy so that any Somali who had a complaint concerning any matter was permitted to come to the airfield and see CMOT representatives.

2.13 A claims regime was also established whereby any person who had suffered property damage or injury as a result of battalion activity could put their case to the contingent's legal officer who would then investigate it and provide an assessment of liability. In the absence of a civil authority in Somalia, such a mechanism was clearly necessary but it was determined that it would also meet obligations under the laws of occupation. These include the obligations under the 1907 Hague Regulations pursuant to Article 43 to maintain order and respect the local laws, Article 46 requiring that private property be respected and Article 27 of the Fourth Geneva Convention requiring respect for local manners and customs. The compensation scales which were adopted were

23 1 RAR POR, Enclosure 4, pp. 4-5.
coordinated with the Americans so that there would be a standardised approach within UNITAF.\textsuperscript{26}

2.14 There were 17 claims made altogether, out of which nine were accepted. Some claims were resolved through using battalion resources, the engineers in particular, to repair damage.\textsuperscript{27} The assessment of death claims involved the most salient example of the inclusion of cultural considerations. Under Somali custom, the death claim had to be paid in terms of the "Dia" or blood money which involved the provision by one clan to another of either 100 camels for the loss of a male or 50 camels for the loss of a female, caused by the compensating clan.\textsuperscript{28} Not having a stock of camels to facilitate such a settlement, an assessment was made as to the value of the camel. It was eventually determined that the camel was worth USD$100.\textsuperscript{29}

**Restoring and Maintaining Order**

2.15 With respect to the steps taken to reconstruct the justice administration in the Bay Region, pursuant to the requirements of the Hague Regulations Article 43, the key elements of the Australian force were: the CMOT; the Counter Intelligence (CI) team which was responsible for attempting to ascertain the exact nature and structure, if structure there was, of the security threat; the engineers who engaged in key construction tasks in relation to the

\textsuperscript{26} Minute HQ Australian Forces Somalia (AFS), FA 157/93, 21 April 1993.
\textsuperscript{27} 1 RAR POR, \textit{op cit.}, Enclosure 5, p. 2.
\textsuperscript{29} \textit{Ibid.}
regional prison, cells, police stations and courts; an MP Sergeant, and a legal officer.

The Auxiliary Security Force (ASF)

2.16 The ASF was established by drawing on former members of the Somali police force using old nominal rolls in Mogadishu. From the beginning the re-establishment of a police force in the area was a high priority of the Australians\(^\text{30}\) and detailed intentions in this respect were communicated to HQ UNITAF on 8 February 1993.\(^\text{31}\) Working towards this objective was implied in the mission to establish a secure environment for humanitarian relief operations and was part of efforts to meet the Hague Regulations obligation to restore law and order. Apart from previous service in the police force, the criteria for selecting the ASF were based on: no past commission of crimes against the Somali people; no physical handicaps; and having served at least two years in the police force before the outbreak of the civil war. Prior to raising the force a meeting was held with the community leaders on 18 February 1993 to advise them of the plan and elicit their support and input. Represented at the meeting were the Chief Elder, local head of the Somali Democratic Movement (SDM), religious leaders, representatives of the teacher's and women's groups and even an SLA representative at this early stage. The SLA, sensing an opportunity to maintain their armed dominance under the ASF guise staged a march of 300 of its troops through the town to impress the Australians, offering

\(^{30}\) Ibid., p. 546.

themselves in effect as an 'instant' ASF. The Australians rejected this 'offer' and indicated that any demonstrations of that kind would not be tolerated again.\textsuperscript{32} The position of commander of the ASF was obviously crucial and a person was nominated by LTCOL Hurley who proved acceptable to all parties.\textsuperscript{33} The ASF commenced operation in Baidoa on 15 February 1993 with an initial force of 20 personnel.\textsuperscript{34}

2.17 The equipment for the ASF was paid for by the UN and member country donations. The uniforms that were distributed to the ASF were in fact owned by the Somalis as they had been ordered before the civil war from Italy and had been sitting in a warehouse in Kenya for two years. The ASF in Baidoa were supplied with two vehicles, communications equipment, a generator, batons, berets, uniforms, lanyards, boots, whistles, handcuffs, belts, badges, typewriters, filing cabinets, stationery and weapons. Authorisation was given for the issue of weapons to the ASF and this commenced with three M16s from the stock of weapons confiscated by the battalion. This was expanded by the end of the deployment to the point that 25\% of the force was equipped with weapons, a limit set by HQ UNITAF.\textsuperscript{35}

\textsuperscript{32} Vercammen, "Auxiliary Security Force..." op cit. (Chap 2, n 11 supra).
\textsuperscript{33} 1 RAR POR, op cit., Enclosure 4, p. 6.
\textsuperscript{34} MAJ R.H. Stanhope (OC CMOT), Minute to ARFOR SJA, 8 February 1993.
\textsuperscript{35} CJTF Signal, 010308ZMAR93, "Commander's Policy Guidance #6 (Weapons Issue and Use by the Auxiliary Security Forces (ASF))", p. 3, para 4. This signal contained the unrealistic assessment that, "Inherently, ASF members, like most police officers worldwide, can perform their duties unarmed. In fact, the majority of the ASF do not require arms to accomplish any of their assigned missions". (p. 1 Remarks.) This showed a lack of appreciation for the long term policing demands based on a security threat that was likely to remain in Somalia for quite some time, with or without UNITAF and UNOSOM.
Eventually 260 ASF were recruited and distributed throughout the Bay region.\textsuperscript{36} The largest number of ASF were based in Baidoa, being the largest of the towns and where most of the potential problems were. Also, with the vehicles located at the police station in Baidoa, a reaction capability existed to deploy to problems occurring in the surrounding areas, as Baidoa was in a central position in the region.\textsuperscript{37} Towards the later stages it had been ascertained that the checking of names by the police committee in Mogadishu against the record was not as thorough as had been suggested. This necessitated greater interrogation of police recruits by the force to ensure veracity. Initially the ASF was remunerated on a food for work basis with the assistance of the World Food Program (WFP) and the ICRC.\textsuperscript{38} Later they were paid intermittently in Somali shillings by UNOSOM.

Copies of the old police regulations and police handbooks were obtained and distributed as it had been a long time since the police had worked or trained and they were in need of refreshing.\textsuperscript{39} Training was of particular concern, as it became apparent that the force needed to return to a professional routine to encourage the right frame of mind. A training regime was therefore established by identifying ASF members who had been at the police academy in Mogadishu and putting them to work in accordance with a training schedule. This schedule included drill and discipline, ethics, community

\textsuperscript{36} CAPT S. Bagnall, Australian Liaison Officer, Minute to Provost Marshall's Office, 16 April 1993.

\textsuperscript{37} See Annex B.

\textsuperscript{38} Vercammen, "Auxiliary Security Force..." op cit. (Chap 2, n 11 supra)

\textsuperscript{39} These materials were supplied by LTCOL Spataro in English. Also included were extracts of the Criminal Procedure Code.
relations, training in investigations, and instruction in the law by surviving judges. The training regime was commenced on 26 April 1993. Supplementary training was also given in the course of ongoing investigations by the Australian contingent into bandit activity through a Military Police Sergeant and legal officer. New recruits for the outlying areas were required to be trained in Baidoa before assignment. By the end of the deployment the benefits of this training regime were starting to show. In the beginning members of the ASF were taken with the Australian troops on a number of operations and activities to raise their profile and build the confidence of the people in their capability and presence.\(^{40}\) Australian troops would also be positioned at outlying stations to send the message that the ASF could call on substantial support. Towards the end of the Australian presence the ASF were left to perform most of the policing within Baidoa. On the other hand it became necessary to remove the ASF second in command as he was clearly attempting to reach accommodations with criminal elements.\(^{41}\)

**Police Cells and Prisons**

2.20 The Australian contingent was also responsible for the supervision of the police cells and prisons. This was a humanitarian responsibility which rested with the force but was in effect shared with the ICRC. The ICRC provided food for the prisoners and also for the ASF and prison guards in a food for work arrangement, while the contingent refurbished the cells and


\(^{41}\) Ascertained by CI team and legal officer’s observations.
prison to bring them up to an acceptable humanitarian level. The contingent also had a responsibility to monitor the treatment of prisoners and the security of the prison.

2.21 The prison itself was solidly built but not many of the cells were in a condition to be used so that initially there were a number of inmates per cell. Although this was better than the circumstances of many of their compatriots on the outside who were living in stick or plastic shelters it was still a cause of concern. Overcrowding would clearly become a major problem without some form of judiciary and trial process to deal with these persons. Early in the deployment no resources were being provided by UNOSOM to assist in this rebuilding program so the Australian contingent applied what resources were available and commenced work without waiting. The engineers deployed all over the Baidoa HRS, restoring prisons, police cells and courts.

The Judiciary

2.22 The next key aspect of the reconstruction process involved the judiciary. The re-establishment of the judiciary posed unique problems, however: who had survived from the judiciary; who could be trusted; who had the appropriate qualifications; would they be prepared to sit in judgement on key bandit and warlord figures; how would they be received by a community which had become used to anarchy? The reliability of the judges and their qualifications was an important point as in the later years of the Barre regime
judges had been appointed who had no legal training but who were persons upon whom Barre could rely. The fact that someone had been a judge was therefore insufficient by itself for them to be accepted for service by the force.

2.23 The Australian contingent's legal officer had been working with the Americans on this issue and attended meetings held by the Staff Judge Advocate Colonel Lorenz at HQ UNITAF with the group of jurists from south Mogadishu referred to in Chapter 1.\textsuperscript{42} The key figure in that group was a Dr Abdullahi Ossable Barre, a former professor at the University of Mogadishu and Judge of the Supreme Court. He was very familiar with the judiciary personnel of Somalia. At one meeting with Dr Ossable and former Ministry of Justice official Mr Dali Warsame Mohamed on 22 February 1993, a list was obtained of former court workers and judges from the Bay region down to the administrative assistants with details of specific appointments and structures. Dr Ossable was able to advise which of these people were still alive. This list was sent down to the CMOT in Baidoa who proceeded to track the individuals down.

2.24 Following the meeting at HQ UNOSOM between the northern and southern Mogadishu Somali jurists on 3 March 1993, an 8 person Technical Committee was formed to determine the process of re-establishing a court hierarchy. Elected to a key position on this committee was Dr Ossable. Dr Ossable had maintained at the meeting the position that the laws created by the Barre regime should be considered a nullity and that the courts could proceed on the basis of the old criminal code as it had existed in the period of

\textsuperscript{42} See Chap 1, para 1.41 \textit{supra}. 
democracy prior to Barre. This position was supported by attendees at the meeting and the Steering Committee. These were significant developments but, inexplicably, UNOSOM declined to have a representative at the meeting, was very reluctant to allow the use of UNOSOM HQ for the meeting, and did not encourage or participate in the process subsequently. Nor was there a representative present from the UNITAF contingents other than the HQ UNITAF SJA office and the Australian legal officer.

2.25 Taking advantage of the situation created by the meeting, the Australians met with Dr Ossable and other members of the Steering Committee. From this meeting agreement was obtained that Dr Ossable and another former judge from Mogadishu, Mr Mohamed Mohamed Isgow, would travel down to Baidoa as representatives of the Steering Committee to meet with the surviving judges that had been located. The meeting took place on 6 March 1993 and included the Australian Commanding Officer, the Officer Commanding the CMOT, the legal officer and the UNOSOM political representative at the political representative's residence in Baidoa. At this meeting it was determined: (a) who was to be nominated to positions in the various courts; and (b) that the old Somali penal code, as it existed in 1962, would be applied, without the political crimes created by the Barre regime.

2.26 The key judicial appointment arising from the meeting was the President of the Court of Appeal, Sheekh Barre Cali Ibraahim. The President

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43 Observations by author at the meeting, later confirmed by Dr Ossable and Mr Mohamed Mohamed Isgow of the committee at a meeting in Baidoa on 6 March 1993 (see para 2.25 infra).
was to be responsible for the selection, administration and monitoring of the judiciary. He was also nominated by the Steering Committee representatives as the final point of pardon or commutation for the region during this interim period of national reconstruction. This meant that he could not sit on cases involving charges carrying the death penalty. Also to prove vitally important was the appointment of the Chief Prosecutor (or Xeer ilaale), Mohamed Haji Cabdiqaadir. From the Australian point of view the strategy of promoting observation of the Somali penal code was threefold: (a) the judges were familiar with it; (b) this approach was in accord with the requirement under the laws of occupation to respect the local law; and (c) it would help to forestall elements from outside the country moving into the vacuum and establishing a legal regime that would be based on a political agenda rather than justice and the interests of the community.

2.27 These outside interests were Islamic fundamentalists who were receiving backing from elements in Saudi Arabia, Sudan and Iran. They were not in a position to assert any authority at that stage but some of these had already been engaged in armed confrontation with the force, operating under the guise of the Islamic Relief Agency. Their agenda was to undermine any western presence and cause casualties where they could. This threatening element was removed after a final confrontation on the night of 21 February 1993 when an Australian soldier was wounded during an attack on a night patrol through the town of Baidoa. The detained persons were removed to

44 Information obtained by Intelligence.
Mogadishu following the detention process outlined in Chapter 1, and were later delivered to the Mogadishu main prison.46

2.28 It was not problematic to disregard the political crimes created by the Barre regime as these had been imposed via separate legislation, special courts and security police distinct from the civil police and courts.47 Barre's introduction of these laws was considered by the surviving Somali legal authorities represented by the Steering Committee to be unconstitutional in any event and the agreement with the reconstituted judiciary to ignore them was based on that presumption which they themselves had highlighted.48 These authorities asserted that the Barre laws could not be considered as part of the local law which either Somalis or the interventionary force were obliged to respect. As a result of the meeting the courts were delineated in terms of personnel and structure for the Bay region based on the pre-civil war model. This structure was as follows:

1. Maxamada Degmada - District Courts for each of the main towns,

2. Maxamada Gobolka - Regional Court located in Baidoa for the Bay region, and

45 See Chapter 1, paras 1.33 - 1.35 supra.
47 M. Ganzglass, "Evaluation of the Judicial, Legal, and Penal Systems of Somalia", Report to the Special Representative of the UN Secretary General (SRS) UNOSOM II, 22 April 1993., pp. 4-5, 35.
48 Discussions between author and Baidoa judiciary as well as Dr Ossable and other members of the Mogadishu Steering Committee.
3. Maxamada Rafkaanka - Court of Appeal located in Baidoa for the Bay region.

2.29 Jurisdiction between the District Courts and Regional Court was distinguished by the seriousness of the crime, in that District Courts could only hear matters which carried a maximum sentence of under 3 years in prison. Five District courts were to be established initially in the major towns of Dinsoor, Qansaxdhere, Berdaale, Buurhakaba and Baidoa. As there was no Somali Supreme Court functioning, and there was no likelihood of it being re-established in the near future, it was agreed between the Steering Committee and the local judges, with the contingent’s concurrence, that the regional curial system would have to be autonomous for the interim and that the Regional Court of Appeal would be the final appeal court for the Bay region until further notice. The next step was to get the courts working as soon as possible. A building was therefore identified at the police compound which could be refurbished for use as a court. Co-location at the police compound had the added attraction of easing the burden on the contingent’s assets in terms of providing security. In the interim some tents were set up at the back of the police compound for the judges to commence working from. While ideally such facilities ought to be separated to preserve the image of impartiality the security situation did not permit this and also the old court buildings were too badly damaged to be used.

49 In the longer term it was envisaged that the courts would be able to move away from the police compound to emphasise the concept of separation between the police and judiciary. This had in fact been the case prior to the civil war.

50 The first case was heard on 19 March 1993 and dealt with a car thief who was given five years imprisonment. (Field notes by author).
for most of the deployment an infantry section was based at the police
station to man an observation post and to provide security. With this umbrella
the courts commenced work within a few days of the meeting, despite early
teething problems. The engineers refurbished the court building utilising their
own materials and materials that were obtained through UNOSOM from Kenya.
By the time the contingent departed the Court House was fully functional with
its own lighting powered by a generator from stock donated by Canada.

Apart from the reconstruction of the court house other administrative
and logistic support was also provided. This included procuring typewriters,
filling cabinets and stationery. Official stamps were drawn up according to the
descriptions provided by the judges and made to order by artisans in Mombasa,
Kenya. Legal texts were also provided including an English version of the
Somali Penal Code, together with cases, commentary and examples, which the
US JAGs had obtained from the US Library of Congress. This enabled the legal
officer to provide advice on, and monitor the application of, the law. Close
involvement continued with the selection or transport of personnel and
co-ordination between the various courts and towns, sometimes involving the
use of helicopters. Significant involvement of the force occurred in the initial
period of court activity in the scheduling of trials, and co-ordinating and
transporting witnesses and judges. Consultation over security was also an
important factor. By the end of the deployment the judiciary was functioning
well and was independent of the contingent or UNOSOM. The courts were not
only able to deal with criminal matters but also family and civil disputes and continued to do so after the forces left.  

2.32 Apart from possible international humanitarian law and human rights obligations, the logic for complementing a police force with a body to process the alleged criminals they apprehended seemed obvious. The Baidoa effort in this regard, however, was to receive no substantive support from either UNITAF or UNOSOM. UNITAF considered it beyond the mission, as we have noted, while UNOSOM were unable to formulate an opinion at all during the UNITAF phase. One example of UNOSOM's indecision was that although the police were eventually to receive pay there was never any acceptance of the Bay judiciary personnel as also being worthy of remuneration, despite their small numbers. The Australian solution to this was to put their names down on the police pay rolls at the highest pay scale and they were paid accordingly.  

Criminal Investigation Division (CID)

2.33 In the later stages of the deployment further enhancement of the police effectiveness occurred with the establishment of the CID. The ordinary police or ASF were not trained for or capable of careful investigations of major crimes or gathering reliable criminal intelligence. There had been a CID prior to the civil war which was assigned this role. There was however a reluctance to approve


52 This measure was subsequently adopted by UNOSOM and then a separate scale for judges was set when UNOSOM established a Justice and Police Division.
the re-establishment of the CID within the Police Committee in Mogadishu. It will be remembered that this committee was constituted from political nominations by the warlords of the two main armed factions in Mogadishu and only some former Somali police officials. The hostility of the Committee appeared to be based on a jealousy of the progress of Baidoa and the hostility of the Mogadishu factions to the Rahanweyn. The Committee asserted that they did not want Baidoa to get too far ahead of the country in that no other area had managed to establish a CID unit. Given the uncertain future of the Mogadishu based Police Committee and its questionable legitimacy it was determined that this opposition should be ignored and the force pressed ahead with its plans.

2.34 The re-establishment of the CID was to some extent incidental. Former CID personnel had been encountered in the course of conducting investigations into key bandits in the area. As the investigations proceeded these people were asked to render assistance and in this way their loyalty and effectiveness could be evaluated. As confidence in them grew they were requested to seek out additional reliable and capable CID survivors who were also tested and carefully observed in the same process. From an initial group of five a formal sub-unit of the police was eventually created of 20 hand picked personnel. The original policy for assembling the ASF required that the recruits have no disabilities or handicaps. For an effective CID force, however, courage, integrity

and intelligence were the key qualities sought and physical handicaps did not preclude recruitment.

2.35 It was important to ensure that the CID was above interference and able to operate with a degree of independence. The importance of this lay in the mission statement given the CID which included monitoring any corruption in the judiciary and police force. The independence of the CID was achieved by acquiring for them separate arms, handcuffs, communications, office equipment and stationery and a dedicated vehicle. They were also given a vehicle which had been confiscated from one of the imprisoned bandit figures.\(^{54}\) They were put directly under the command of the police commander. A conference was then arranged between the UNOSOM political representative and the CID commanders. The commanders were introduced and the representative advised that if these men came to him with a complaint he could rely on their information and should take immediate action against any public official for whom UNOSOM had responsibility, in other words judicial or police personnel.

2.36 The CID were provided with initial direction from, and assigned specific investigations by, the Australians in the areas and matters the force was primarily concerned with. They were tasked first with investigating major crime such as murder, rape and organised crime. Next, came the corruption monitoring role mentioned above. They were also to monitor major crime figures held in the cells and prison to ensure they were securely held and that

\(^{54}\) The bandit was Ali Salaad otherwise known as 'James Bond' as he had inscribed the legend '007' on the number plate space on the vehicle. Ali Salaad was arrested in early April 1993 by the Australians for, among other things, his part in the murder of an MSF nurse.
their cases were ready for trial. They were then tasked to support the prosecutor in the actual conduct of trials in marshalling witnesses and safeguarding evidence. Finally they were to provide information to UNITAF, principally in relation to the location of weapons and the doings of the SLA or other outside elements attempting to penetrate the area. An oath of office was drafted for them which gave them a more general mission statement and code of conduct for the future, which they swore on the Koran in a formal ceremony at the police station.\textsuperscript{55}

2.37 Effective teamwork and coordinated activity was established comprising the CID, the Battalion, the CI team, the MP Sergeant and the legal officer. In this way information would come in to the legal officer at the police station then notes would be compared with the CI team to put together a picture from all sources. The transition to the French forces did not present any difficulties for the continuing success of the CID as they were operating independently by the time of the departure of the Australian contingent. The French would only be needed if the situation arose where the CID required the assistance of greater fire power.

Prosecutions

2.38 As mentioned earlier\textsuperscript{56} in discussing the re-establishment of the judiciary one of the key elements in the negotiations was the acceptance that

\textsuperscript{55} The oath focused on personal standards, community relations, clan bias and methods of investigation.

\textsuperscript{56} See paras 2.24 & 2.25 supra.
the system would continue to operate on the basis of the 1962 Somali Penal Code. Somali criminal law was based on the Italian penal code of 1931 known as the 'Rocco Code' after Professor Arturo Rocco who chaired the Italian commission which drafted it.\(^57\) The Somali version also included some elements of Islamic law and Somali custom.\(^58\) The Somali Criminal Procedure Code of 1963 was based upon an amalgamation of the pre-independence Italian Criminal Procedure Code of 1935, the British Criminal Procedure Ordinance of 1956, and the Indian Evidence Act of 1872 which in turn is derived mostly from British criminal procedure.\(^59\) This reflected the amalgamation of the British and Italian colonial territories. The civil laws were based on Egyptian civil law.\(^60\)

2.39 Texts on Somali law were confined to Arabic, Italian and English.\(^61\) The only English text and commentary on the Somali penal code was that written in 1969 by Mr Martin Ganzglass.\(^62\) Mr. Ganzglass was a U.S. Peace Corps Volunteer in Somalia, serving as Legal Adviser to the Somali National Police Force and Legal Assistant to the Ministry of Justice and Religious Affairs for two years from 1966-1968.\(^63\) Direct advice was also obtained from Mr Ganzglass when he came to Somalia later in the deployment.


\(^{59}\) ibid., p. 24.

\(^{60}\) ibid., p. 5.

\(^{61}\) ibid., p. 2.


\(^{63}\) Mr Ganzglass is currently a Washington Attorney with the firm O'Donnell, Schwartz & Anderson. He has maintained close links with Somalia over the years and is an authority on many aspects of Somali law and society.
2.40  It had been a priority of the Battalion to identify major bandit elements and war criminals within Baidoa and to try to eliminate them from the local scene by either having them dealt with in Mogadishu or processed through the local courts once these were firmly re-established. In the course of justifying the detention of certain individuals, investigations were necessary to support accusations and enable the detainees to go to trial. The most significant initial detention that was made was of the bandit Hussein Barre Warsame, whom the Australian CI team had identified as having been responsible for serious crimes against international humanitarian law during the civil war and who remained a significant intimidating factor in Baidoa.

2.41  Detailed investigations were conducted by the MP Sergeant and the legal officer from the Baidoa police station, building on the initial information supplied by the CI team. In the course of the Warsame investigation, given the time limitations, it was determined to proceed with charges based on 30 murders which had been committed personally by Warsame. There existed, however, evidence of countless other atrocities. The investigation accumulated 22 detailed eyewitness statements corroborated by hospital records and other physical evidence. Perhaps the most serious single incident to be included in the charges was what became known as the 'truck massacre'. In that single incident, 16 people were killed when Warsame attacked a truck returning from the markets with automatic fire and stole money from the vehicle.64 Other evidence concerning Warsame's crimes indicated the nature and extent of the

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64 Somali vehicles were notoriously overloaded and it was not unusual to have 20 or more people dangling from quite small utility vehicles.
threat he represented for the community. Warsame was the chief weapon in the regime of intimidation and terror established by the overall warlord of the SLA in the area, Hassan Gutaale Abdul (Gutaale), serving as his second in command.

2.42 Warsame was arrested on 13 March 1993 and processed in accordance with the procedure outlined in Chapter 1. He was then moved to the central prison in Mogadishu. While Warsame was interned the investigations progressed rapidly with many people coming forward to testify. Just as the investigation was concluded however it was found that Warsame had escaped custody. It became apparent that Gutaale had travelled to Mogadishu and was able to obtain Warsame's release by means of a loyal Aideed judge who certified on 20 March 1993 that there was no evidence

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65 "Two men were walking towards Warsame's house.... Warsame called out to the two people to stop walking past his house and that they were to change over to the other side of the street. The two people said to Ganey (Warsame's knick name), "This is our country and we are Baidoa citizens, and you come from far away. How can you order us?" After they said this, Ganey said, "I chased Siad Barre's soldiers away and I can do what I want". They said to him, "We don't obey your orders", and they refused to cross over to the other side of the street. Ganey then stood up where he was and raised the AK 47 rifle up and shot the two men dead. He shot his rifle at the men until he ran out of bullets. He then removed that magazine and replaced it with another.

Some days later, about the same time, I was walking home from the ICRC warehouse, when I had to pass by Warsame's place. I used to go past his place every day. I saw an old man who was carrying one bag of rice and two tins of oil.... Warsame was sitting down and he called out to the man with the articles to stop and put his load on the ground. He pointed his rifle at the man. The man put the articles on the ground and Warsame sent one little boy out to pick up the load. The man would not let the little boy take the rice. Warsame then told the little boy to get out of the way. Warsame then stood up and fired his rifle into the man. He fired at his head and then lowered the shots down the man's body. The man fell over dead and Warsame walked over to the man's body and helped the little boy pick up the articles and take them back to his house. I felt terrible to see the mess that the body was in. There was blood everywhere. I left the area straight away. Extracts from a statement by Mohamed Osman Ahmed, 22 March 1993. These single incidents illustrate the wealth of evidence of random killing that characterised the manner in which the regime of terror was maintained in the Bay region. Evidence also showed that this formed part of a deliberate pattern of attritional extermination through single and mass killings and starvation which opened up opportunities to resettle SLA clan members in the area.

66 See Chap 1, paras 1.31 - 1.33 supra.
against Warsame, that he was in poor health and was entitled to temporary freedom.

2.43 Warsame's release shattered confidence in the efficacy of the Mogadishu system and the responsible judge was arrested by the UNITAF Provost Marshall LTCOL Spataro, and held at the UNITAF detention facility. Subsequently an inquiry was conducted by the Somali Steering Committee. After receiving a response from the Australian legal officer the inquiry accepted that procedural irregularities had occurred and orders were made for the re-arrest of Warsame. Warsame had disappeared into his clan area in Mogadishu and was not seen again. Later information established that Warsame continued to have contact with the SLA from Mogadishu by radio. From that point on UNITAF would no longer entrust important detainees to the Mogadishu prison while the Australian force came to rely solely on the locally reconstructed cells and prisons in Baidoa.

2.44 There were a number of positive results from the investigation conducted into Warsame's crimes. The first of these is that the exact extent and nature of the organised banditry network in Baidoa came to light. It emerged that the SLA had systematically acquired all the hotels, brothels, tea rooms, taxis and khat dealing commerce, which had brought in a constant source of revenue for the gang and Aideed. It was therefore apparent that although the

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67 Report by Steering Committee, 1 April 1993.
68 With the exception of the Gutaale case, as described at para 2.49 infra.
69 Mild narcotic leaf chewed by locals.
70 An example of the method of property acquisition is provided by an extract from the statement of Ali Tabut Mohamed, 25 March 1993: "In early April 1992 I was in the Pharmacy when a man I know as Ganey... came into the
battalion had been confronting single and entrepreneurial groups of bandits, organised banditry in Baidoa had not been undermined. The other positive factor from the investigations was that Warsame was no longer able to operate in Baidoa and had to remain in hiding in Mogadishu. The prospect of him being able to return to Baidoa on his own was very remote, particularly by the end of the mission, as the CID would have been able to identify him and take action immediately. The material that had been gathered during the course of the investigation was deposited with the Baidoa Chief Prosecutor so that if Warsame were arrested, prosecution could commence immediately with probative evidence and identified witnesses.

2.45 With the revelation of the extent to which people in Baidoa and the Bay area had been dispossessed of their property, including homes and farmland, it was determined that one method of undermining the bandit organisation would be to encourage the dispossessed to commence reclamation action before the re-established courts, based in many cases on original title deeds still held by them. The dispossessed responded to this encouragement with the first case commencing on 8 April 1993 and soon the courts were making orders for the return of property. The Battalion was prepared to and did provide security backup to enforce these orders where necessary. Combined with the prosecution action this strategy resulted in the Bay area ceasing to be a source shop. He got two persons to tie me up and beat me with a stick. They broke my right small finger and they also broke one of my toes on my left foot. They then took me to the Police Station in central Baidoa when I was again beaten.... There Ganey told me not to ever go back to the Pharmacy as he would shoot me.

He took my lock to the door and replaced it with one of his own.... About ten days later I noticed that the Pharmacy was now a Tea Shop and the Tea Shop was run by Ganey's wife"
of funds for Aideed and wealth for his local bandit agents, and thereby reducing criminal activity to unremarkable levels.

2.46 It had also become clear that something should be done about the key figure in the bandit empire, Gutaale. It was Gutaale that had run the extortion operation of relief flights at the airfield. He had been responsible for the large scale attacks and looting raids on NGO compounds in which so many had died. It was Gutaale who directed the takeover of property and land and resettlement of Duduble clan elements in the area as the gradual Rahanweyn extermination progressed, bearing all the hall marks of genocide which he was instrumental in promoting.\footnote{The evidence uncovered in the investigations and supported by the observations of the NGOs satisfied the test outlined in Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide:}

\"In the present Convention, genocide means any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;\" Article 3 adds:
\"The following acts shall be punishable:
(a) Genocide;
(b) Conspiracy to commit genocide;
(c) Direct and public incitement to commit genocide;
(d) Attempt to commit genocide;
(e) Complicity in genocide.\"

Apart from the killings Gutaale attempted to use starvation as his key weapon, by raiding NGO warehouses, attacking convoys and a host of other tactics designed to prevent food reaching the Rahanweyn. He also pursued the Marehan/Barre/Morgan method of targeting women and children to choke off the next generation. Certainly \textit{a prima facie} case against Gutaale existed. Given the extent of the deaths (40% of the population including 70% of the children) his efforts to deny food, progressively slaughter the survivors, and to colonise the area with his own ethnic group, it could be inferred he intended to destroy the Rahanweyn. In any event the evidence indicated that he directed and participated in the destruction of a large "part" of the Rahanweyn in the region. In terms of legal responsibility under the Genocide Convention it should be noted that Article 4 states:
\"Persons committing genocide or any of the other acts enumerated in Article 3 shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."
Colonel Arabee, who paid occasional visits to Baidoa from Mogadishu.

Achieving Gutaale's removal could serve a number of purposes. First and foremost the force considered it was obligated to do something about the evidence of Gutaale's activities. This obligation, it was assessed, stemmed from the Fourth Geneva Convention and Hague Regulations. In addition it was believed that an obligation may have stemmed from Article 146 of the Fourth Geneva Convention to seek out and prosecute those guilty of committing grave breaches as detailed in Article 147 of the Convention. The assessment was made that common Article 3 to the Geneva Conventions of 1949, had applied to the widespread internal conflict in Somalia, and that the crimes alleged against Gutaale amounted to serious breaches in violating the provisions of Article 3. As to whether common Article 3 offences constitute grave breaches, a question relevant to the debate on universal jurisdiction over such crimes, the view was not certain. Regardless of the answer to that question it

Common Article 3 of the Geneva Conventions of 1949 lays down the fundamental standards applicable in non-international armed conflicts. These require that:

"(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the abovementioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(b) taking of hostages;
(c) outrages upon personal dignity, in particular humiliating and degrading treatment;
(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regular constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples."

The SLA, as part of Aideed's SNA forces, were part of the civil war being waged against Ali Mahdi and various other factions. It was, without question, party to the armed conflict which was continuing at the time of the offences. (See J.S. Pictet ed., "The Geneva Conventions of 12 August 1949: Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War", ICRC, Geneva, 1958., p. 36.) Additional Protocol II did not apply as Somalia had not become a party to the Protocols.
was believed that customary law has developed sufficiently to assert that international jurisdiction pertained to breaches of common Article 3 and crimes against humanity generally. Given the evidence suggesting genocidal activities by the SLA and Gutaale, it was felt the force could also have been open to claims that it bore prevention and punishment obligations under the Genocide Convention.

2.47 An implied obligation to facilitate law enforcement action against Gutaale arose from the mandate given the force in UNSCR 794, in that he had been a major threat to the relief effort. It will also be recalled that the Resolution warned that those guilty of violations of international humanitarian law would be held individually responsible, therefore implying a mandate to take action to give effect to this warning. This became a specific obligation with the introduction of UNSCR 814. As indicated above, with the Australian force committed to become part of UNOSOM, the objectives set out in that Resolution applied to the contingent. The Resolution noted:

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73 See the recent jurisprudence from the International Criminal Tribunal for the Former Yugoslavia (ICTY) emerging from the Tadic cases, Prosecutor v. Dusko Tadic A/K/A "Dule" (Decision on the Defence Motion on Jurisdiction) 10 August 1995, especially paras 65-83, 128-137 dealing with the issue of common Article 3 and criminal responsibility for customary law relating to internal conflicts. The thrust of the decision in this respect is that criminal responsibility exists for breaches of customary law governing internal conflicts and that international jurisdiction may be exercised over them. See also International Court of Justice in the Nicaragua case (Military and Paramilitary Activities (Nicar. v. U.S.)), 1986 I.C.J. 4 (Merits Judgement of 27 June 1986) relating to the customary law status of common Article 3.


...with deep regret and concern at the continuing reports of widespread violations of international humanitarian law and the general absence of the rule of law in Somalia... Convinced that the restoration of law and order throughout Somalia would contribute to humanitarian relief operations, reconciliation and political settlement, as well as to the rehabilitation of Somalia's political institutions and economy.

and therefore tasked UNOSOM:

To assist in the re-establishment of Somali police, as appropriate at the local, regional or national level, to assist in the restoration and maintenance of peace, stability and law and order, **including in the investigation and facilitating the prosecution of serious violations of international humanitarian law.**

The legal position then, with respect to mandate and obligations, seemed clear. On the one hand action could be taken against those posing a serious threat to law and order under law of occupation provisions and the Security Council Resolutions. On the other hand action was authorised in relation to those crimes which violated international humanitarian law. Gutaale's crimes may have fitted both categories as it could be argued that they had taken place in the context of a Geneva Convention common Article 3 conflict and also appeared to be part of a genocidal campaign against the Rahanweyn.
If a trial could be successfully mounted it could provide the vehicle for enabling the courts and investigation system to deal with serious crimes and major figures while at the same time promoting the courts in the eyes of the community. It was strongly felt that if Gutaale was removed from the scene it may hasten the downfall of the bandit organisation and reverse the colonisation of the area by his clan. A warning could also be transmitted to all the warlords of Somalia regarding their accountability.

It was therefore decided that Gutaale should be targeted for investigation to determine if it would be possible to put him on trial in the limited time remaining to the contingent in Baidoa. Initially, it was difficult to convince witnesses to come forward while Gutaale was still at large. Enough evidence did exist, however, to support detention action and it was decided to arrest him to encourage the witnesses. Gutaale was arrested on 29 March 1993 by members of the CI team upon his return from his Mogadishu trip to secure the release of Warsame. He was then processed back to Mogadishu where he was held at the UNITAF Mogadishu University facility. Gutaale was the only other detainee to be sent back to Mogadishu after the escape of Warsame, as all detainees could be held in the functioning cells in Baidoa and dealt with by the local courts by that stage. Gutaale was a special case, however, as it was felt that his forces may attempt to free him if he were held in Baidoa.

It was determined from the evidence gathered that two major incidents would form the basis of the prosecution. The first concerned the massacre of

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76 Extract from CI Summary 28-29 March 1993.
15 bush people in Baidoa at around 0700 hours on 20 August 1992, by use of a Fiat APC driven by Gutaale with which he intentionally ran over a group of displaced persons in the centre of the town. Of the 15 dead, 8 were women and 7 children. The incident occurred in front of a large number of townsfolk who recalled in graphic detail the result. The second incident involved an attack led by Gutaale on the Red Cross compound on or about 5 August 1992, in which 16 Somali Red Cross workers were killed. Altogether therefore, charges were framed involving 31 counts of murder with additional counts of robbery.

2.51 The trial of Gutaale would be a major test for the reconstituted system in Baidoa. No trials that they had conducted to date rivalled the complexity and magnitude of this trial. It was therefore necessary for close liaison and assistance, in terms of physical support, to be provided by the contingent to the defence counsel, prosecutor, police, CID and judiciary to ensure the probative and efficient running of the trial. At this stage the CID were proving particularly useful and effective in marshalling all the required witnesses, organising the trial and ensuring security during its conduct.

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"The APC drove down the market street very fast. People had to get out of its way or it would have run them over. The APC went past me, it then turned around up the street further and came back down the street at high speed. The APC then ran straight at a large group of people standing at the side of the road. I had to jump out of the way as I would have been run over. I looked and saw the APC run over a lot of people. They were bush people from the refugee camps. The APC then stopped a short distance away and then reversed back over all the people it had run over. There were dead people everywhere.

The APC then drove forward again and roared off up the road. The people on the APC were all laughing at this. I went over to help the people who had been run over. No one on the ground lived, they all died. I along with a lot of the commercial people (shop keepers), helped pick up the dead people. Altogether there were seven children killed and eight women. The bodies were all crushed, some had their heads run over, there was blood everywhere. We loaded all the dead people onto two trucks that came from the Red Cross." Extract from the statement by Hassan Isaak Ali of 5 April 1993. All the witnesses were able to identify the driver as Gutaale.
2.52 Gutaale was returned to Baidoa on 23 April 1993. The infantry section had been removed from the police station to ensure that the community understood the system was capable of operating independently and to emphasise that the Gutaale trial was a matter principally for the Somalis. The trial commenced on 24 April before the Maxamada Gobolka (Regional Court) sitting in Baidoa. Most of the town gathered that morning at the court, attempting to cram into the restored if rudimentary facility. It was important that the people have the opportunity to observe the proceedings, which was in any event a requirement under Somali law, to see that all was being conducted in accordance with due process and increase their faith in such processes.78

2.53 An initial difficulty emerged when the defending counsel that had been appointed for Gutaale did not turn up for the start of proceedings. A replacement therefore had to be appointed. This was important because under Somali law, and in accord with international law standards, for crimes of this seriousness the accused was required to have defence counsel.79 Gutaale had indicated from the beginning that he did not wish to have defending counsel and wanted to defend himself. He was advised that representation was required by Somali law for crimes carrying a greater sentence than 10 years imprisonment.80 During the Regional Court hearing not only did Gutaale's

78 Article 96 of the Criminal Procedure Code. Wekerele, op cit., p. 27., (n. 57).
79 It was obviously not ideal for a judge to be defending an accused person as this was not in accord with the strict principles of judicial independence. It was however the only option available and resulted in no unfairness to the accused, which was the main concern.
80 Article 15 of the Criminal Procedure Code:
   "(1) The accused may be defended by one or more defence Counsels.
   (2) In the cases indicated in sub-paragraph (b) of paragraph 2 of Article 14 of the Law on the Organisation of the Judiciary (crimes carrying sentences greater than 10 years), the Court shall appoint an ex-officio defence Counsel for the accused whenever the accused has not appointed his own defence Counsel." Singh & M.H. Said, "Commentary on the Somali
defence counsel cross examine the witnesses but Gutaale himself was permitted to do so and in every case did. In addition, following the inquisitorial nature of Somali courts, the bench also queried the witnesses. According to the provisions of Somali criminal procedure, based as they are on the British model, the presumption of innocence applied while the burden of proof was on the prosecution to establish guilt beyond a reasonable doubt.

2.54 Eleven eye witnesses gave testimony as to Gutaale's involvement in the murders and identified him in court. The judges indicated after the trial that they were apprehensive of applying the full measure of the law against Gutaale due to fears for their personal safety. As a result the regional court convicted Gutaale of all the charges but imposed only a 20 year prison sentence. Gutaale immediately indicated that he wished to appeal this decision to the Maxamada Rafkanka (Regional Court of Appeal). At the same time, after consultation with the Chief Prosecutor, it was decided that the prosecution would also appeal the decision, such action being permitted under Article 210 of the Criminal Procedure Code. The prosecution appeal would be based on the fact that it was not open to the Court under the Somali Penal Code to impose a prison sentence as the crimes of murder with which Gutaale was convicted carried the mandatory sentence of death under Article 434. The death sentence could

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81 The court has the power to examine witnesses, ask questions of counsel and order the inspection of places. The court also has the power to order the production of evidence on its own motion in order to ascertain the truth in criminal cases. Wekerele, op cit., p. 28, 30.
82 Article 13 (2) of the Criminal Procedure Code. "The accused is presumed innocent until the conviction has become final." Singh & Said, op cit., p. 22.
84 Ibid., pp. 11-12, 31-32.
only be reduced if certain specified mitigating circumstances as set out in Article 40 of the Code\textsuperscript{86} were proved, the burden of proof being on the accused under Article 165 of the Criminal Procedure Code.\textsuperscript{87} No such circumstances were indicated in the Gutaale case. In fact the specified aggravating circumstances under Article 39 of the Code\textsuperscript{88} were clearly applicable.

\textsuperscript{86} Article 40 \textit{Ordinary Extenuating Circumstances}

"1. The following shall be extenuating circumstances of an offence where
(i) they are not constitutive elements thereof, nor
(ii) special extenuating circumstances:
(a) having acted for motives having a particular moral or social value;
(b) having acted in a state of anger caused by an unlawful act of another;
(c) having acted under the influence of a mob, except in cases of meetings or assemblies forbidden by law or by the authorities, where the offender is not a habitual or professional offender;
(d) having, in the case of crimes against property, caused negligible damage to the property of the party injured;
(e) where, in addition to the act or omission of offender, (sic) an act committed with criminal intent by the party injured has contributed in causing the event;
(f) where, before trial, the offender has fully paid compensation for the damage, or where possible has effected restitution; or having, before the trial and apart from the case referred to in the last paragraph of Article 18, spontaneously and effectively taken measures to eliminate or reduce the injurious or dangerous consequences of the offence;
(g) any other circumstance that the judge considers to be such as to justify a lessening of the punishment.

2. The extenuating circumstances referred to in letter g of Paragraph 1 shall be considered as one circumstance which may coexist with one or more of the other circumstances previously indicated." \textit{Ibid.}, pp. 57-62. There was no comment passed by the judges as to any other circumstances they considered extenuating under 1(g) and no evidence of any was presented.

\textsuperscript{87} Wekerele, \textit{op cit.}, (n. 57) p. 31.

\textsuperscript{88} Article 39 \textit{Ordinary Aggravating Circumstances}

"The following shall be aggravating circumstances of an offense, where
(1) they are not constitutive elements thereof, nor
(2) special aggravating circumstances:
(a) having acted for abject or futile motives;
(b) having committed the offense in order to commit or conceal another offense, or to obtain or secure for oneself or another the benefit or impunity from another offense;
(c) in the case of crimes committed with culpa, having acted in spite of having foreseen the event;
(d) having used inhuman means or having acted cruelly toward persons;
(e) having taken advantage of such circumstances of time, place, or person as to hinder public or private defense;
(f) where the offender has committed the offense during the time when he was willfully evading the execution of an arrest warrant or an order of imprisonment issued for a previous offense;
(g) in the case of crimes against property, having caused serious damage to the property of the party injured;
(h) having aggravated or attempted to aggravate the consequence of the crime committed;
(i) having committed the act with abuse of power or in violation of the duties inherent in a
More physical assistance was then necessary to organise the Appeal Court hearing as there was a problem locating and transporting judges who were prepared to sit on this case. The CID had to obtain judges from Ufurow and Awdinle while three from Baidoa were prepared to sit to bring the bench to the required six. The President of the Court of Appeal determined he could not sit on the case as he would maintain an independent review position to ensure the process was properly conducted, as the case involved charges carrying the death penalty. Once again Gutaale was queried as to how much time he required to prepare his submission and once again he indicated that he was ready at any time and wished the trial to proceed immediately. He was asked if there was any further evidence he would like to call or witnesses that could be located for him but he indicated there would be no further evidence on his part. The hearing was based solely on legal argument, the questions of fact having been determined in the lower court and there being no new evidence. Once again both defence counsel and Gutaale were permitted to address the court.89

At the hearing the prosecution and defence put their case followed by amicus curiae submissions by the Australian legal officer, permitted under Article 83 of the Criminal Procedure Code,90 in relation to questions regarding

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89 Record of proceedings summarised in field notes taken by author during proceedings. The Somali transcript is not available.

90 During the court proceedings any party has the right to present statements and petitions to the court, the judge and the prosecuting attorney. Wekerele, op cit., (n. 57) p. 27.

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technical provisions of the code and the agreed upon approach of the Steering Committee in Mogadishu to these provisions. After an adjournment the Court determined that the original conviction should stand but that the sentence of 20 years imprisonment should be overturned as the Regional Court had erred in applying this sentence which was not as a matter of law open to them, and the sentence of death imposed. It being further determined that there were no extenuating circumstances made out as specifically enumerated under Article 39 of the penal code but that aggravating circumstances did exist as indicated under Article 40 of the Somali penal code, there were no grounds upon which to mitigate the sentence.\(^9\) It was decreed that the sentence was to be carried out forthwith in view of the security situation that would now arise, all avenues of appeal having been exhausted. The contingent's legal officer, in accordance with his responsibility to monitor the process, determined that the trials had been fairly conducted and, in accordance with the obligation under international law to respect the local law, there were no grounds which would necessitate or justify interference with the decision by the indigenous and properly constituted court. The President in exercising his final review function raised no objection to the conduct of the proceedings, which he had monitored closely, and rejected the final plea for pardon or commutation.

2.57 In terms of the legitimacy of the tribunals, the Somali argument that they preserved a continuing validity pre-dating the civil war, there having been no intervening act of a sovereign government to affect their operation, was

\(^9\) Under Articles 228-229 of the Somali Criminal Procedure Code the higher courts have discretion to raise or lower sentences in cases taken on appeal. Wekerele, \textit{op cit.}, (n. 57) p. 11.
concurred with by the Australians. It was felt that they also derived authority from the contingent's sanction, in accordance with the obligations and rights delineated by the laws of occupation relating to the restoration and maintenance of order and the Security Council Resolutions. The trials were assessed by the contingent as having been conducted in accordance with the standards prescribed by the laws of occupation. The execution was then duly carried out by the ASF, in accordance with the specifications of Article 94 of the Code, by firing squad in the regional prison. There was no intervention in the death sentence as it was felt it could not be asserted that the punishment was clearly disproportionate to the crime, within the terms of Article 67 of the Fourth Geneva Convention. It was also felt that the sentence adhered to other general principles of sentencing such as communal defence, given the fact that Gutaale would almost certainly have been freed from the regional prison by his force at some stage and resumed his activities with the added threat of revenge attacks. It was also considered to be consistent with the Security Council mandates to facilitate prosecutions and secure the environment for humanitarian relief given that Gutaale had been a major threat in this respect. In accord with the UN's Economic and Social Council (ECOSOC) rules on the death penalty, the execution was carried out with the minimum possible suffering. All aspects of this process had been discussed in consultation with

92 Affirmed in discussions with representatives of the Baidoa Judiciary and the Mogadishu Steering Committee on 6 March 1993 in Baidoa.

93 Article 94 Punishment of Death
"The punishment of death shall be carried out by shooting inside a penitentiary, or any other place prescribed by the Minister of Grace and Justice." Ganzglass, "The Penal Code...", op cit., (n. 27) p. 112.

"In countries which have not abolished the death penalty, capital punishment may be
the UNITAF SJA, UNOSOM officials and Mr Ganzglass the Somali criminal law authority, who agreed with the approach taken and provided important advice.

2.58 The effects of the trial were immediate and dramatic. Gutaale's clan, which were of the Duduble from Mogadishu, began to leave Baidoa immediately. His force also disintegrated and fled the next day. Confidence within the community began to rise visibly and within days gold could be seen on sale in the markets again. It was clear that the removal of this single individual was a major factor in re-establishing a satisfactory level of law and order within the Bay region. In addition during the course of the investigations other action was being taken against key figures in the bandit chain of command so that by the conclusion of Gutaale's trial, of the top six, all were imposed only for the most serious crimes, intentionally committed with lethal or extremely grave consequences.

Capital punishment may be imposed only for a crime for which the death penalty is prescribed by law at the time of its commission.

Persons below 18 years of age, pregnant women, new mothers or persons who have become insane shall not be sentenced to death.

Capital punishment may be imposed only when guilt is determined by clear and convincing evidence leaving no room for an alternative explanation of the facts.

Capital punishment may be carried out only after a final judgement rendered by a competent court allowing all possible safeguards to the defendant, including adequate legal assistance.

Anyone sentenced to death shall have the right of appeal to a court of higher jurisdiction.

Anyone sentenced to death shall have the right to seek pardon or commutation of sentence.

Capital punishment shall not be carried out pending any appeal, recourse procedure or proceeding relating to pardon or commutation of the sentence.

Where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering.\textsuperscript{a}

These rules have no binding force, particularly if it is accepted in the case of Somalia that the laws of occupation applied. It was nevertheless felt that their spirit should be observed as closely as possible. While there is no definition of "minimum possible suffering" accompanying the rules, Gutaale's death was instantaneous, as confirmed by medical examination, and was certainly not accompanied by any mistreatment or prolongation. Given that there was no further possibility for appeal the ECOSOC rule could not be complied with in this respect, although the President of the Court of Appeal filled the role of final reviewer and dealt with petitions for pardon and commutation. As far as the laws of occupation were concerned the Australians also felt that Articles 68, 70 & 75 of the Fourth Geneva Convention, which would have been pertinent to the matter were the trial conducted by the Contingent, had been complied with.
either in prison awaiting trial (three), had fled to Mogadishu (two), or, in Gutaale's case, dead.

2.59 The trial had been monitored closely by UNITAF and UNOSOM and the results were officially approved and received with much approbation.\(^{95}\) As a consequence requests were then received from Admiral Howe the UN Secretary General's Special Representative in Somalia, for Australian assistance in facilitating the prosecution of other notable bandits, particularly in the Kismayo area.\(^{96}\) This was not possible in view of other important force administration tasks still to be performed in the short time remaining before redeployment of the contingent back to Australia. A plan was provided by the Australians, however, for an investigation and justice reconstruction advisory team. This team could have provided a capability for intervention at key points of weakness in the reconstruction process and assisted in the resolution of significant and serious crimes, particularly those involving major international humanitarian law violators and criminals who constituted a threat to reconstruction and the security of UNOSOM.\(^{97}\)

2.60 The Australians became involved in consultations concerning a plan for the reconstruction of the justice administration within Somalia. The overall concept that was developed was to build regional arrangements based on the

\(^{95}\) "Because UN officials and the Somalis seeking peace are so eager for the system to work, the outcome of the Gutalli (sic) case was hailed as a triumph of justice", C. Wilke, "Law and Order Somali Style - Ravaged by War and Famine, Somalia Strives to turn Chaos into Civilization by Re-establishing the Rule of Law", *Boston Globe Sunday Magazine*, 27 June 1993.

\(^{96}\) Memorandum, SRSG Admiral Howe to LTG Bir UNOSOM Forces Commander, 7 May 1993.

\(^{97}\) Minute to HQ UNOSOM, from HQ AFS, 18 May 1993.
Baidoa model. The plan that was produced specified the appointment of 152 administrative personnel operating on a budget of USD$41m. At a meeting on 16 May 1993 at HQ UNOSOM Ms Wright and Admiral Howe presented the plan to Under-Secretary General for Peace Keeping Kofi Annan. The Australians were represented at the meeting to explain the Baidoa model and support the arguments for the plan. Unfortunately the later deterioration of the situation in Mogadishu and an initial lack of support at UN HQ in New York prevented the full and timely implementation of this plan.

2.61 Notwithstanding that the justice reconstruction plan was never effectively put into full operation some steps were taken to build on the Australian experience and efforts. A Police Training Academy was established in Baidoa to capitalise on the ASF and CID progress there. After the departure of UNOSOM the Baidoa and Bay region continued to progress well with outside

98 Ganzglass, Report to UNOSOM SRSG, op cit., (n. 46) pp. 18-21, 28, 31, 33, 37. Mr Ganzglass and Ms Wright travelled throughout Somalia making a full evaluation of the justice situation. Mr Ganzglass was later to sum up his impressions of Baidoa as follows:

"I visited Baidoa as a State Department consultant in UNOSOM's effort to rebuild the Somali police and judiciary and am familiar with the Australian efforts... With the consent of local leaders they rebuilt the courts and police stations, and established a rule of law. One judge I met, who remembered me as his teacher in a course on the Somali penal code, was now teaching police the rudiments of the penal code. When the Australians left in May 1993, the entire Bay Region was peaceful... In all the zones controlled by the Marines and the US army, there were no organised programs to work with local councils and rebuild courts and police stations or to train and equip the police. The US regarded such efforts as "mission creep". The Australians regarded it as essential to their mission to restore security to the area... Haiti today is a good example of what we should have done in Somalia - recruit and train a police force and restore the judicial system. The pity is that the successful Australian effort was not implemented throughout the operational area and expanded to the north and northeast". World View, Spring 1995, vol 8, no 2, p.3.


100 Meeting held at HQ UNOSOM, 16 May 1993.
help supplied by the European Community and the Life and Peace Institute among others, up to September 1995. In fact it appeared some Somalis moved to Baidoa from places such as Merca to seek a better life. The governing council of the Bay Region continued to function with key issues such as ways of funding the police and judiciary salaries being dealt with. The council was also able to resolve a dispute between the Leisan and Hareen sub-clans on 12 July 1995, preventing the situation descending into open clan warfare. The town was experiencing a degree of prosperity by mid 1995 with the harvest having been good and economic activity increasing. There was no evidence of any attempts to subvert the legal regime re-established by the contingent.

2.62 Emerging from a conference at Princeton University in April 1995 Somalis attending from Somalia were able to say that the efforts of UNITAF as a whole were not wasted in areas such as Baidoa and that wherever effort had gone into the bottom up approach of encouraging regional councils and local reconstruction these areas where progressing and resisting all efforts by the Mogadishu warlords to re-establish themselves. This came to an end in the south west on 16 September 1995 when Aideed, with 600 men and 30 'technicals', sallied out from Mogadishu and overran Baidoa and other areas in

101 Discussions between the author and immigrant and refugee Somalis in Washington D.C. in January 1995, whose family members in Somalia had advised them of their moves.
102 Telephone report received from Mr Alexandros Yannis of the European Community (Somalia Operations) Nairobi HQ, 7 September 1995.
the Bay and adjacent regions. This highlighted the key failure of the UNITAF/UNOSOM operation in not neutralising the war fighting capability of the warlords and pursuing a more vigorous reconstruction approach using clear legal frameworks according to the Bay region model. It also proved once again the futility of NGO and other agencies operating in such an environment without security support.

Conclusion

2.63 This examination of the Australian contingent's experience in Somalia has shown that the approach that this contingent took to the public security function was based on the assessment that the laws of occupation applied de jure to their circumstances. From this body of laws were drawn guidelines, standards and many answers to the difficult issues that emerge from the public security problem in an armed intervention into a collapsed state. These issues included detention action, due process as a consequence of detention, applicable criminal laws and procedures, the relationship with the civil community, the handling of major violators of international humanitarian law and criminals posing a threat to the delivery of humanitarian relief, and the reconstruction of the local justice administration. Many questions are posed by this approach including, was the assessment that the laws of occupation applied correct, if so how would they apply in the context of a coalition operation, how far do the rights of the occupying power extend, what is the

105 Reuters reports of 17 and 19 September 1995. See also ongoing and archived reports of the situation in Baidoa and Somalia in general maintained by Mr Michael Marin on the "Nomad Net" World Wide Web site.
exact nature and scope of the obligations of the occupying power, to what extent can an occupying power intervene in the measures taken by a local community in its approach to justice in the context of a collapsed state? Before turning to examine these issues it is necessary to complete the Somalia case study by dealing with the UNOSOM II period and eliciting the further issues that arose from that experience as a UN operation.
CHAPTER THREE: UNOSOM II - THE MISSION DERAILLED

Warlord Aideed and his SNA have realised that the democratic process requires political support from a broader base and that peace would eliminate their source of income and power derived from extortion, looting, and illegal rental proceeds received from occupied properties in Southern Mogadishu. As a result, the SNA has launched a campaign to drive the UN out of Somalia in the same fashion they have employed against their own people, that is through bloodshed.

Mr A. Hassan & Ms Z. Abdullahi of the Somali Support Committee

Introduction

3.1 UNOSOM operations in Somalia raise many issues which are the focus of this study. Did the laws of occupation apply to UNOSOM II? Can international humanitarian law apply at all to the UN? Would the application of the laws of occupation have served any useful purpose in Somalia? In completing this case study of the Somalia experience the issue of the legal framework for the public security issues faced by UNOSOM will be highlighted. While there were a myriad other questions raised by the UNOSOM experience, the public security issues are the sole focus of this study. The following examination will set out the factual circumstances of the presence of UNOSOM relevant to the assessment as to whether the laws of occupation applied to it.

3.2 The issues that UNOSOM faced relating to the reconstruction of a justice regime, apprehensions, detention, fair trial, due process, the use of force

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1 "UNOSOM II: Peace Making Efforts in Somalia", Somali Support Committee, 20 July 1993., p. 1. (The Somali Support Committee is a voluntary Somali lobby group supported predominantly by the Somali Development Company and is based in Alexandria Virginia, USA. It has been active on Somali issues for a number of years, in particular in attempting to end US assistance to the Barre regime prior to the civil war of 1991. This report was forwarded to HQ ADF by the Australian Mission in New York and was obtained from HQ ADF files.)
in supporting these efforts and applicable standards, will be set out so as to delineate the nature of the problem the laws of occupation would be required to address. In answering the question as to whether the laws of occupation applied to UNOSOM an analysis is required of whether the UNOSOM force was capable of asserting authority over a definable territory to the extent which would attract the application of the laws of occupation.\(^2\) If it was capable, did the subsequent confrontation with the war lord Aideed amount to a loss of control through 'wide spread disorder' or was there any other point at which the status of occupying power ended?

**The Setting**

3.3 The United Nations Operation in Somalia (UNOSOM) was established on 24 April 1992 and terminated on 5 March 1995. It began with UNSCR 751,\(^3\) which established a peacekeeping mission to monitor a ceasefire agreement among the main warring factions, including the appointment of the Algerian diplomat Mohammed Sahnoun as the first SRSG in Somalia.\(^4\) Initially 50 unarmed Pakistani military observers were deployed in July 1992, but this was supplemented following further agreement with the factions in August 1992, by a 500 man Pakistani battalion and 100 logistics personnel under UNSCR 767.\(^5\)

The mission at this stage was firmly in the Chapter VI "blue helmet" tradition.\(^6\)

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\(^2\) This forms part of the test for establishing the existence of an occupation as will be detailed in Part II, in particular Chapter 5, paras 5.2 - 5.5.

\(^3\) UN SCOR (1992).


\(^6\) That is, it was peacekeeping with no enforcement mandate and restricted to the use of force only in individual self-defence. See UNSCR 767 and Hirsch & Oakley, *op cit.*, (Chapter 1, n. 44) p. 28.
Unfortunately these troops were unable, due to the high security threat, to leave their base at Mogadishu Port as the situation in Somalia continued to deteriorate.\(^7\) Sahnoun was replaced as SRSG after he resigned following his bitter criticism of a lack of UN support and he was replaced by Iraqi (Kurdish) diplomat Ismat Kittani in October 1992.\(^8\) Following consideration by the Security Council of UN troop increases to deal with the continuing crisis it was finally determined on 3 December 1992 that the US would lead the massive military coalition intervention into Somalia to be known as UNITAF pursuant to UNSCR 794, as a Chapter VII but non-UN operation. During the UNITAF period from December 1992 to 4 May 1993 UNOSOM political and military elements remained operating in parallel with UNITAF, working towards the objective of a handback to UNOSOM at the first opportunity.\(^9\) In the meantime Kittani was replaced by retired US Admiral Jonathon Howe in March 1993 as the new SRSG. When UNOSOM II assumed responsibility for operations in Somalia from 4 May 1993 it occupied the same area of southern Somalia that had been demarcated by UNITAF.\(^10\) Initially however UNOSOM experienced a substantial troop reduction compared with the peak deployment of 38,000 under UNITAF. During the crucial handover phase UNOSOM forces slumped to 14,000, although later rising to 25,000.\(^11\)

\(^8\) Ibid., p. 68.
\(^9\) Ibid., pp. 69-76.
\(^10\) The UNOSOM II area of responsibility expanded northwards on 5 November 1993 to a line running from Obbia on the coast to the north east of Galcaio and on to the border with Ethiopia. The area contracted once again to the original UNITAF demarcation in January 1994. See Annexes C, D & E.
\(^11\) Hirsch & Oakley, op cit., (Chap 1, n. 44) p. 115.
3.4 During the handover phase, while it did not have the same capability as UNITAF, UNOSOM II was still accepted by the majority of Somalis as being the primary authority in the area it occupied. What complicated the situation was the nature of the command relationship within the forces at the disposal of UNOSOM. While US logistic troops came under UN command the crucial combat support of the Quick Reaction Force (QRF), with its tremendous firepower was, and remained at all times under US command. This also applied to the Ranger and Delta Force troops that deployed during the hunt for Aideed.

The Status of UNOSOM II

3.5 While the QRF was not under command of UNOSOM it was available to assert the authority of UNOSOM and therefore may be considered in the equation of determining whether UNOSOM II exercised the control and capability necessary to qualify as an occupying power. Even without the QRF UNOSOM was still the most significant single force in the area it occupied. Its capability must also be viewed in the context of the level of acquiescence to its authority by the majority of the population.

3.6 The actual assertion of authority was also highly significant. UNSCR 814 specified the extent of the assumption of the nation building mandate based on the presumption that there was no sovereign authority in Somalia.

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12 UNOSOM never branched out to the northern Somaliland regions and there was no clear acceptance of its authority in those areas.
Apart from the law and order mandates and continuing relief efforts, UNOSOM was tasked to:

...assist the people of Somalia to promote and advance political reconciliation, through broad participation by all sectors of Somali society, and the re-establishment of national and regional institutions and civil administration in the entire country... To create conditions under which Somali civil society may have a role, at every level, in the process of political reconciliation and in the formulation and realisation of rehabilitation and reconstruction programmes.14

This restoration of an "entire country" would include, among other things, involvement in disarmament, establishing regional councils, rebuilding the police force and judiciary, restoring to operation and equipping educational institutions, and maintaining order. The most pressing of these was restoring and maintaining order and this was to involve the force in large scale detention and enforcement activity as 1993 progressed. It is submitted that the status of UNOSOM, notwithstanding the reduced capability in comparison with UNITAF, was that of an occupying power to which at least some of the laws of occupation were applicable. In this respect the issue of effectiveness should not be confused with capability. Effectiveness, or the success of the mission, is the result of the proper use of the capability. The guidance provided by the relevant provisions of international law could have afforded some assistance in making the capability effective, despite the missed opportunities of the UNITAF phase.

14 UNSCR 814, para 4 (c) & (g).
3.7 For a period of one month following the handover UNOSOM proceeded to pursue its mandate in an atmosphere of great expectations, both within Somalia and in the international community, until 5 June 1993. On that date a Pakistani patrol was ambushed resulting in 24 dead and 57 injured Pakistanis, one Italian and three Americans injured, and six Pakistanis captured, one of whom later died.\(^{15}\) While there was no conclusive proof that Aideed had ordered this attack it was clear that his forces had carried it out and that he at least approved the action subsequently.\(^{16}\) The next day the Security Council adopted UNSCR 837\(^{17}\) which effectively set UNOSOM on a course of armed confrontation with the SNA. Later on the conflict was more specifically focused on Aideed himself with the SRSG declaring a reward of $25,000 for assistance in his capture. Four months of conflict were to follow. During this time the fighting was largely confined to southern Mogadishu and in sporadic incidents involving Aideed’s clan and faction only. At no point was the SNA capable of inflicting a military defeat on UNOSOM and its attacks were mostly in the nature of random terrorist acts such as command detonated mines, grenades thrown at passing vehicles, sniping and occasional ambushes.\(^{18}\) At no stage was there ‘widespread disorder’ or an ‘uprising’. The vast majority of Somalis continued to support the presence of UNOSOM and its mission, albeit with misgivings over

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\(^{16}\) Report by Professor T. Farer to Admiral Howe on his Investigation into the Incidents of 5 June 1993. Interview with Professor Farer, Washington D.C., 29 December 1994. Evidence showed that Aideed later congratulated the forces involved in the attack.

\(^{17}\) Adopted 6 June 1993, UN SCOR (1993)

the manner in which the confrontation with Aideed was being managed. In the end if Aideed could be described as having 'won' the confrontation it was purely as a result of a lack of political will, not military success or the physical supplanting of UNOSOM authority. The confrontation with Aideed would not therefore of itself have resulted in a loss of occupying power status, particularly in view of the amount of force that was subsequently to be exercised by the US and UNOSOM and the further assertion of authority under Resolution 837.

3.8 The nature of the UNOSOM operations was to alter dramatically after 3 October 1993 when 1 Malaysian and 18 US soldiers were killed and 78 US, 9 Malaysian and 3 Pakistani soldiers were wounded. Responding to domestic pressure and unable to articulate justifications for its approach in Somalia, the Clinton administration determined that the confrontation would be abandoned and that the US would commence a process of disengagement from the mission. During the course of 1994, until the final withdrawal on 31 March 1995, the authority of UNOSOM therefore suffered an erosion. By 31 March 1994 US forces had effectively withdrawn, except for a small protection party for remaining civilian personnel, while other contingents following this lead did not renew commitments. All US personnel were gone by September. As

20 The resolution clarified that Resolution 814 authorised UNOSOM to "take all necessary measures against those responsible for the armed attacks..., including against those responsible for publicly inciting such attacks, to establish the effective authority of UNOSOM II throughout Somalia, including to secure the investigation of their actions and their arrest and detention for prosecution, trial and punishment".
21 Hirsch & Oakley, op cit., (Chap 1, n. 44) pp. 128-129.
23 Hirsch & Oakley, op cit., (Chap 1, n. 44) p. 147.
1994 progressed UNOSOM force levels fell and the remaining troops became confined to Kismayo, Baidoa and Mogadishu, predominantly restricted to fortified compounds. The legal status of UNOSOM, therefore, after 3 October 1993 becomes difficult to categorise. The capability to exert authority remained in place for another few months and it is suggested that occupation status could be argued to have continued until March 1994. By July 1994, however, it is possible to say that the status had clearly been relinquished with UNOSOM forces controlling nothing but their own compounds and sometimes not even these.

3.9 The application of the laws of occupation was an issue of importance notwithstanding the Security Council Resolutions governing the mission. The function served by the resolutions was to provide the authorisation for the deployment and some specific objectives. The resolutions only provided a broad authority in this respect and not an adequate framework that established clear guidance for such matters as the handling of detainees, the procedure and standards applicable for dealing with Somali officials employed or approved by UNOSOM and the relationship between the force and the population. There was no formulation of principle or procedure established to carry out mandates to bring offenders to justice under UNSCR 837, for example, and no satisfactory answer was ever found to this question. The resolutions in fact posed more questions than they answered. Something more was clearly

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24 Ibid., (Chap 1, n. 44) p. 145, n. 55.
25 The 150 Zimbabweans at Belet Weyn, for example, were taken prisoner by the SNA and their arms stolen on 29 July. United Nations Secretary General's Report to the Security Council Concerning the Situation in Somalia, 17 September 1994., UN Doc S/1994/1068., para 26. See troop dispositions as at June 1994 depicted at Annex F.
needed and this is where the laws of occupation could have provided the standard against which the force measured the legitimacy of its actions and the steps that ought to have been taken. The resolutions did not indicate that applicable international law was to be disregarded and this in any event would be beyond the Security Council's authority as it would set the Council against the principles of the UN Charter, depending on whether the laws of occupation could be held applicable to UN forces. The resolutions themselves, therefore, did nothing to alter the possible-applicability of the laws of occupation. Even if they had not applied it should have been recognised that the situation so clearly involved occupation issues that the laws of occupation were the proper frame of reference for guidance.

**The Justice Reconstruction Mandate**

3.10 There was a marked reluctance by UN HQ and member states to recognise and act upon some of the key developing features of the situation. Principal among these was the justice reconstruction objective. Justice reconstruction was critical to "create the conditions", as called for by UNSCR 814, under which responsible leadership could emerge and dependence on relief could be reduced. The initial one-off injection of the $42m recommended in the SRSG's justice reconstruction plan would have been an investment that would have brought returns in actually reducing overall outlays and in shortening the period of UN involvement.26

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26 Signal from Australian UN Mission to Canberra, 22 September 1993.
3.11 The plan was not the first opportunity for decisive UN action. Attempts to activate the police force in the shape of the ASF did see UN involvement at an early date. Such efforts had been a constant thread in proposals for UN supported action from SRSGs Sahnoun and Kittani to Admiral Howe. In January 1993 a UN Police Technical Team was sent to Somalia to evaluate the possibility of creating a national police force with a brief to look at issues relating to re-establishing the judiciary and including a civilian police component in UNOSOM. Their report was supported by the SG but it was not acted on.\textsuperscript{27} All that occurred during the UNITAF phase was logistical support for the ASF coordinated by UNOSOM and a $2m contribution from the UN for food and uniforms as a one-off expenditure.\textsuperscript{28} One of the difficulties that the UN was working under in this respect was the budgetary aspect. The issue was whether this was an important and urgent enough priority to require the use of UN contingency funds or whether action would be entirely dependent on specific donor country support.\textsuperscript{29} In the end it was donor countries that were relied upon. Notwithstanding the delays involved in such an approach some equipment began to come through in the latter stages of the UNITAF operation from England, Canada, India, Italy, Germany and the US.

3.12 Despite the reluctance of UNITAF and the tardiness of the UN there was at least something to build on when the handover occurred on 4 May 1993

\textsuperscript{27} Ganzglass, "Restoration of Somali Justice System...", \textit{op cit.} (Chap 2, n. 50), pp. 7-8.

\textsuperscript{28} Letter, Ms Ann Wright to Mr Martin Ganzglass, 18 January 1995. Ms Wright was seconded from the US State Department to the staff of the SRSG and was responsible for preparing the justice reconstruction plan for UNOSOM. The letter was provided to the author by Mr Ganzglass who retains the original.

\textsuperscript{29} \textit{Ibid.}
but another factor was to create an impediment to progress. At the meeting with
Under Secretary Kofi Annan on 16 May 1993 the UNOSOM attendees\textsuperscript{30} were
led to believe that the plan for justice reconstruction was supported and would
be pursued. Without advising its UNOSOM Headquarters in Somalia the
decision was made at UN HQ that the plan would not be supported and funds
would not be sought from donors until after the establishment of regional
councils who could assume responsibility for supervising the police and
judiciary.\textsuperscript{31} There was a great fear of appearing to be neo-colonialist and there
was doubt over the basis in legal terms for the direct re-establishment of a
justice system.\textsuperscript{32} If it is accepted that the laws of occupation applied to
UNOSOM II such doubts may have been alleviated and a solid basis for action
crafted under that regime. The loss of time that occurred as a result of the
attitude that was adopted was critical, particularly in the context of the
pressures that befell the operation. It was not until after the events of 3-4
October 1993 that any urgency was applied to justice reconstruction plans.

3.13 The first sign of a change of attitude to justice reconstruction after the
16 May meeting was the announcement of a justice reconstruction plan by Kofi
Annan to a meeting of 12 member states on 3 August 1993 at UN HQ in New
York. The estimated cost had been revised upwards to USD$51.5m for the first
year, with an estimated ongoing annual cost for an unspecified period of
USD$10.3m for international staff to implement the plan. These international

\textsuperscript{30} Including Ms Ann Wright, the SRSG Admiral Howe, the Australian legal officer and Major
Mark Inch (US Army), from the UNOSOM Provost Marshall.
\textsuperscript{31} Wright Letter, op cit. (n. 28)
\textsuperscript{32} Interview by author with Ms Elizabeth Lindenmeyer, UN HQ, New York, 19 December
1994.
positions were to be funded from the peace keeping budget. The plan that was outlined was very broad but contained five main elements. The police would be re-established at local regional and national level to a strength of 10,000 by December 1994. A training academy would be established to train 3,500 new recruits by December 1994. Refresher training would be provided to 6,500 current and former police. A three tier court system would be put in place by 31 October 1993 consisting of District, Regional and Appeal courts. Prison facilities would be rehabilitated and a custodial corps reactivated. Additionally a team of international specialists would be set up to investigate human rights violations.\(^{33}\)

3.14 While it was hoped the regional and local councils could supervise the police it was projected that until the Transitional National Council was established ultimate responsibility would vest in UNOSOM II. The priority of effort would go to those areas where there was already a degree of control established. Disarmament was to remain the responsibility of UNOSOM.\(^{34}\)

3.15 The proposals were predicated on the establishment of a trust fund into which the donors would contribute while the regional and local councils were being established. The lack of urgency, paucity of detail and failure to clearly articulate the rationale behind the plan did not produce an overwhelming donor response.\(^{35}\) The most critical aspect, however, was the lack of a clear legal framework for executing the plan, such as provided by the laws of occupation. Such a framework may have attracted greater support and added greater force

\(^{33}\) Signal from Australian Mission UN New York to HQADF and the Australian Department of Defence, 4 August 1993.

\(^{34}\) Ibid.

\(^{35}\) Ibid.
to the proposal. Some delegates expressed difficulty at obtaining voluntary contributions to peacekeeping funds for this type of project. They asserted that their national legislation would only permit contributions for human rights or peace-building purposes. Mr Annan attempted to point out that the proposal was essentially a peace-building one, particularly given the institution-building involved. He pointed out that donations could be made in cash or in kind through the contribution of police trainers and personnel.36

3.16 The briefing was followed by further detail put forward in the Secretary General's Report to the Security Council of 17 August 1993.37 The Annex dealing with the justice reconstruction plan was prepared by Admiral Howe.38 The report was followed by a troop contributors meeting at UN HQ in New York on 16 September which Admiral Howe had travelled from Somalia to attend. The SRSG spent much time canvassing support for justice reconstruction stating that all contributions, regardless of scale, were desperately needed, using his metaphor that this was the ticket out for the troop contributors. At the meeting he outlined the need for uniforms, weapons, communications equipment, vehicles and police advisers. He also highlighted one of the main reasons for the increasing urgency as UNOSOM was holding over 400 detainees from the confrontation with Aideed who could not be brought to trial.39 The lack of a proper legal framework for the mission meant it was increasingly mired in uncertainty and indecision on security issues.

36 Ibid.
38 Interview with Admiral J.T. Howe, Washington DC, 10 January 1995.
39 Australian UN Mission, Signal to Department of Defence, 21 September 1993.
3.17 By this stage the US was starting to recognise the importance of the justice reconstruction issue, particularly given the negative press that was being generated by the Aideed confrontation, a confrontation the US was, in effect, bearing the responsibility for prosecuting. At the September meeting the US representative commented that not enough troop contributors were providing support to the justice reconstruction effort and, in an attempt to stimulate a better response, stated that the US would draw up a list of requirements which these countries could assist with. In fact, in two working level meetings on this issue in the week preceding the 16 September conference the US indicated that it was willing to contribute $6m to the judicial/penal side of the plan together with planning staff. The level of support indicated by the troop contributors went nowhere near making up the short fall in the needs of the plan.

3.18 The US, continuing to pursue the issue, drafted a resolution for consideration by the Security Council seeking to step up the pace and stimulate the international community at large, as clearly the troop donors would not be prepared to commit much more. The SG's report of 17 August and the draft

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41 Australian UN Mission Signal, op cit., (n. 39).

42 Ibid. Compare this to the 800 police that deployed to Haiti, the 3,600 in Cambodia with UNTAC, or the 1,721 as part of the International Police Task Force in Bosnia.
resolution were accepted by the Council and the justice reconstruction objective (not just police support) was specifically mandated and given impetus in UNSCR 865. The Resolution expressed the conviction that "the re-establishment of the Somali police, and judicial and penal systems, is critical for the restoration of security and stability in the country".

3.19 The Security Council called on the SG to implement the plan on an "urgent and accelerated basis" and as a matter of great urgency to recruit the necessary international staff with finance to come from the Trust Fund established under Resolution 794. Member states were requested, on an urgent basis, to contribute to that fund or provide practical assistance to enable the plan to proceed. The response once again was underwhelming with no lead provided by the members of the Security Council itself. This illustrated that the significance of the justice reconstruction plan had by now been realised but the continuing confrontation with Aideed, donor indifference and uncertainty over the legitimacy of such activity meant that nothing would be done about it, until 3 October 1993.

3.20 After 3 October the US commitment to justice reconstruction increased significantly as the confrontation was abandoned and non-military, indigenous security became the preferred option. The hope in US government circles seemed to be that the Somali police could assume responsibilities beyond the projected role of eliminating bandit level activity and towards assuming the

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44 Australia was also guilty of failing to properly support the plan, when specific requests from the UN for personnel who had the appropriate expertise and who were willing to return, were not acceded to.
overall security function formerly the province of UNOSOM and US forces. Pursuing this objective a working group of donor countries met on 3 November 1993 in New York. Australia’s contribution to the plan, Superintendent (SUPINT) Bill Kirk of the Australian Federal Police (AFP) was introduced to the donors as the new head of the Police Division of the justice reconstruction programme. SUPINT Kirk had previous experience on the Thai border and in Cambodia and stressed the need for courts and legal systems to be put in place in parallel with re-establishing a police force. The UK expressed concerns regarding the program at the meeting, principal among them being; where would the justice authority be derived from? There still had not been a firm legal framework supplied for the program notwithstanding the broad mandate in Resolution 865. No one at the UN was able to say what the basis for the resolution was, how further responsibility for the management and probative functioning of the system would be justified and what principles would be applied as guidance.

3.21 This meeting was only slightly more successful in garnering concrete commitments. Germany undertook to contribute DM3m in addition to its 30 police trainers, Sweden would provide USD$1.5m and possibly some police, the UK would provide expertise and some in-kind contributions in the north west, Australia provided SUPINT Kirk, the Netherlands would contribute DG1m in addition to its two policemen, while Egypt stated that it would train and equip 1500-2000 police. This was still inadequate, piece-meal, poorly coordinated

45 Australian UN Mission, Signal to Department of Defence, 3 November 1993.
46 Ibid.
and not cognitive of the cultural, professional and legal factors in Somalia. In addition there was no commitment on the judicial arm of the programme. The plan was also prejudiced by the continuing high level security threat in Somalia. SUPINT Kirk was to assume his office on around 7 November 1993 and he was to attempt to perform the police training and reconstruction mission with a staff of three.

3.22 By December 1993 the environment in which the reconstruction program would operate had changed significantly. Following Security Council Resolutions 885 and 886 the emergency relief phase of the mission was declared to be over. While still reserving the right to use force under Chapter VII to conduct disarmament of heavy weapons, disarmament would in reality be voluntary, dependent on a reconciliation of the major faction leaders. The regional approach was still to be pursued at this stage with the emphasis on shifting responsibility for security onto the Somali police and producing schemes for the demobilisation of the youth. Following Resolution 886 the policy would be to concentrate on those areas that had demonstrated stability and a readiness to cooperate. This would reward those regions and send a message to the obstructionists that there would be a price attached to their failure to cooperate.

47 Ibid.
48 Interview with Bill Kirk, Canberra, 14 August 1995.
50 UNOSOM Strategic Framework, Annotated Outline, 12 December 1993 (HQ ADF Files).
3.23 As progress was made on regional councils51 Aideed was increasingly concerned with the possibility of a broad based democratic movement that would be impossible for him to dominate. The SNA waged a campaign against the UNOSOM efforts by attempting to create shadow councils and to intimidate the UNOSOM organised councils. Equally threatening to Aideed as part of the regional initiatives was the progress being made in the organisation of the police, police stations, judicial personnel, courts, and prisons.52 UNOSOM was less able to meet Aideed's challenge as troop quality, equipment and numbers declined from December 1993 through to March 1994.53 In this environment the prospects for the justice programme were not promising as normal law enforcement could not operate without the neutralisation of the warlords.

3.24 Increasing US pressure in the lead up to its 31 March departure deadline had produced a USD$10m contribution to the justice programme from Japan at the inaugural meeting of the Somali Aid Coordination Body (SACB) on 3 February 1994. This money was for training the police and general operation of the police project but its limited impact at this time was illustrative of the failure of the spasmodic and uncertain approach to the problem that had rendered the plan ineffective. The reconstruction objective continued to be reflected in UNSCR 89754 even as the security situation was clearly becoming

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51 S. Normark, "Building Local Political Institutions - District and Regional Councils", LPI paper for the Comprehensive Seminar on Lessons Learned from UNOSOM, 13-15 September 1995 (held by author), p. 6,7. The activity of these bodies was funded by the Nordic governments. See also LPI Report on Bay Region, op cit. (Chap 2, n. 17).
53 Signal Australian UN Mission to Department Foreign Affairs and Trade, 10 January 1994.
of grave concern as the SNA kept up a terror campaign against UNOSOM, and the NGOs began scaling down and withdrawing. By May 1994 it was clear that there was a disproportionate effort going into the police as opposed to the judiciary where support was almost non-existant. The justice administration loop was not being closed and in fact a yawning gap was emerging.\(^{55}\) The police elements in Mogadishu and Kismayo were suffering from the manoeuvring's of the major factions which effectively crippled the program in these locations.\(^{56}\) Baidoa continued to progress despite isolated incidents which local figures attributed to occasional visits of outside elements attempting to destabilise the situation.\(^{57}\) In contrast to the SNA the Ali Mahdi led Group of 12 were continuing to indicate support for UNOSOM and these regional reconstruction activities in particular.

3.25 The period from July to September 1994 was to be the last phase of effort expended on the justice programme and by 17 September 1994 the US had determined that the entire operation should be abandoned.\(^{58}\) The US directed that the further issue of police equipment was to be discontinued and US equipment provided to that point was to be relocated to safer sites. Already the process was being put in train for the total abandonment of the mission and the withdrawal of equipment. All that remained of the justice reconstruction


\(^{56}\) AHC Report, \textit{op cit.} (n. 55) p. 3.

\(^{57}\) Ibid., p. 7.

program after September was the provision of some training to Somali police instructors, as most of the civilian police personnel were being withdrawn.\textsuperscript{59}

3.26 With a deteriorating security and response capability, highlighted by the humiliating capture of the Zimbabweans in Belet Weyn on 29 July 1994, the breakdown in reconstruction efforts was inevitable.\textsuperscript{60} By this stage UNOSOM carried no deterrent value whatsoever and was concerned with, and only capable of, securing the airport, port and their own well being. In UNSCR 954\textsuperscript{61} this reality was recognised and the decision was made by the Security Council to withdraw completely on 31 March 1995. By 15 February the force was down to 8,000. UNOSOM had traversed the gamut from a force capable of exercising occupation authority and with a mandate to match this position, to an enfeebled force with a restricted mandate from the Security Council, and little capability. It could therefore be argued that at this point it had no obligation under the law of occupation to restore order.

3.27 What had UNOSOM achieved with regard to the police and judiciary through this profoundly contradictory experience? Of the 10,000 strong force it was mandated to establish, 8,500 were recruited with 2,000 deployed in the north west region. This force was working out of 82 district stations that had been made operational. With the collapse of the training program at the end of 1994 only 2,179 police had received refresher training. While much equipment

\textsuperscript{61} UNSCR 954, adopted 4 November 1994, UN SCOR (1994).
had been distributed, upon the commencement of withdrawal, vehicles and military equipment in stock and from supplies provided by the donor community were shipped out of Somalia at the request of the donor Governments. With respect to the judiciary some training had been provided in judicial administration and ethics, juvenile justice, sentencing practices and attitudes, human rights and the rule of law. This training had not been in operation long enough nor was it systematically or well executed due to the crippling lack of staff and funds. By March 1995 there were 11 Appeal, 11 Regional and 46 District courts with a total staff of 374. This meant that not all the 18 Regional and 92 District councils had a judicial system in place to support the maintenance of order. The objective had not been met. The judiciary had suffered all along from a paucity of resources, even in comparison to the funds expended on the police who received the priority of effort. In the penal programme UNOSOM had supported 12 prisons with food, water and medical services while 672 prison guards had been certified and paid by UNOSOM.

3.28 Contributions received for the Somali Trust Fund had been only USD$21.6m, $21.5m of which was for the police and judiciary. Of that sum only $15.2m was actually expended on the programme. The entire experience was characterised by inordinate delay, donor apathy, haphazard implementation, fragmentation of effort, internal disunity, incompetence, lack of a carefully constructed plan of implementation, a disintegrating and transient framework.


and a precarious security umbrella. There was a lack of leadership by the
UNOSOM Justice Division and poor coordination between UNOSOM Justice,
the Police liaison function of the UNOSOM military and the International
Criminal Investigations Technical Assistance Program (ICITAP). The
introduction of the Civilian Police element (CIVPOL) officers did nothing to
improve the situation as they did not share a common tradition of policing or
language and in some cases were not as well trained as the police they were
supposed to train.65 This might not have been such a problem had the overall
administration of the operation been more effective. The Justice Division
however had no clear plan of action or command structure and no coherent
program for distributing weapons and equipment to regional police.66 Overall
the scheme has to be viewed as a failure in terms of what was hoped would be
achieved. It was, of course, never a reasonable expectation that the police
would be able to successfully confront the heavily armed factions.67 Without
disarmament of the heavy weapons and demobilisation of the militias UNITAF
and UNOSOM never laid the foundation for giving this "ticket out" a chance.68

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65 The CIVPOL contingent was made up of officers from Egypt, Ghana, Ireland, Italy,
Netherlands, Malaysia, Republic of Korea, Sweden, Zimbabwe, Australia, USA, Nigeria, Zambia.
Secretary General's Report to the Security Council on United Nations Operations in Somalia
Submitted in Pursuance of Paragraph 14 of UNSCR 897, 24 May 1994, UN Doc S/1994/614,
para 32. Interview with Bill Kirk, Canberra, 14 August 1995.
66 Signal from Australian UNOSOM Contingent to Canberra, Report of SACB meeting of 7
67 J.T. Howe, "Relations Between the United States and United Nations", in "Learning
68 T. Farer, "United States Military Participation in United Nations Operations in Somalia:
Roots of the Conflict with General Mohamed Farah Aideed and a Basis for Accommodation and
Renewed Progress", Testimony to the Committee on Armed Services of the House of
Representatives, 14 October 1993., pp. 15-17. (provided to author by Professor Farer who has
original in his possession).
Progress that had been made in the south west was negated by the conquests of Aideed in September 1995.69

The Dilemmas of Maintaining Order

3.29 During the early transition phase from UNITAF to UNOSOM II some thought had been given to the aspect of dealing with serious offences against the mission and against international humanitarian law. Some hope had been stimulated by the successful prosecution of the warlord Gutaale in Baidoa that other investigations and prosecutions could occur against problematic warlords and bandits. As was noted in Chapter 2, Australian assistance had been requested to investigate incidents involving the deaths of aid workers and the assassinations of moderate elders.70 An International Humanitarian Law expert was brought out to advise on a possible tribunal framework for dealing with those figures who were beyond the capability of the struggling Somali justice system to deal with. It was clear even in May of 1993 that the contingency of a confrontation with Aideed was being prepared for. This was prompted by his hostility, and spoiling activities, which showed no signs of abatement over the six months since the arrival of UNITAF.

3.30 The Australians had indicated to UNOSOM that the preferable approach was to use trials as a means of generating momentum in getting

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69 Information provided from various sources including Office of European Community Nairobi, ABC Journalist James Schofield, and interviews by author with a number of Somalis refugees from Baidoa, in Nairobi, Kenya on 14 August 1996.
70 A list of the crimes which UNOSOM wanted to investigate as a priority was provided to the Australians on 16 May 1993 by Ms Anne Wright of UNOSOM involving these and other incidents. Crimes Against the Somali People and Murder of International Aid Workers, REF: A/CRIMES, WRIGHT 5/15/93 (document in possession of author).
Somali courts operational, in the jurisdictions in which the crimes had been committed. This would be in accord with the laws of occupation obligation to respect local law as far as possible\(^7\) but would also have been good policy from the reconstruction viewpoint. It was conceded however that figures such as Aideed would be beyond the capacity of local authorities to handle. In this case the laws of occupation were clear. The force was permitted to establish its own tribunals to deal with matters beyond the capability of the local system or which related to the security of the force.\(^7\) In addition, any figure who had been guilty of grave breaches of international humanitarian law could be tried by an international tribunal or the courts of a volunteer country.\(^7\) The approach that could have been taken in this respect was the rapid formation of an *ad hoc* tribunal which met all the criteria concerning fundamental guarantees specified in the Fourth Convention.\(^7\) This tribunal could have been either a military court using uniformed legal personnel, from the US for example, or civilian officials recruited internationally. The military court option would have had the benefit of rapid deployment, while the civilian court would carry a greater appearance of fairness.\(^7\) Notwithstanding these discussions no plan was ever formulated for

\(^7\) A requirement of Article 43 of the Hague Convention of 1907, and Article 64 of the Fourth Geneva Convention which will be discussed in detail in Part II, Chapter 7, paras 7.3 - 7.11., *infra.*

\(^7\) Permitted under Article 66 of the Fourth Geneva Convention which will be discussed in Chapter 7, para 7.24., *infra.*

\(^7\) See *Tadic (Jurisdiction)* Case *op cit.* (Chap 2, n. 73).

\(^7\) Such a solution had been suggested by the author to Ms Anne Wright of UNOSOM in May 1993.

creating a forum for dealing with figures who could not be dealt with by the Somali courts. This failure was to result in confusion, embarrassment, loss of credibility, breaches of fundamental human rights standards and the deterioration of UNOSOM’s morale.

3.31 After the attack on the Pakistanis on 5 June 1993 issues of legal frameworks for asserting authority and dealing with detainees became more pressing. By the time the confrontation with Aideed was at an end in October 1993, UNOSOM would have 700 persons held in detention with no charges laid against them and no prospect for trial. Aideed himself became a hunted suspect with Admiral Howe fixing a USD$25,000 reward for information leading to his capture. At no stage did either the US or UN have any clear idea of how Aideed was to be dealt with if he were caught. The only suggestions that had been considered were concerning his detention, which revolved around keeping him on board ship off the coast of Somalia but still in territorial waters.76

When Professor Tom Farer, working for UNOSOM at the time, produced his investigation into the 5 June incident he was to suggest that there was "clear and convincing evidence" that Aideed authorised the attack. This was based mostly on circumstantial evidence but also testimony from a "reliable witness" that Aideed congratulated ex post facto the SNA members responsible for executing the ambush.77 In municipal criminal law terms that might not have been altogether convincing. However it could be argued the conclusion was

valid if viewed within the framework of the "Yamashita principles" of command responsibility,\textsuperscript{78} (also substantially reflected in the provisions of Article 87 of

\textsuperscript{78} General Tomoyuki Yamashita was commander of Japanese forces in the Philippines during the Allied campaigns to liberate the islands in World War II from 9 October 1944 - August 1945. During this time his troops committed horrendous atrocities on the local population, particularly in Manila. Upon his surrender he was tried for war crimes by the Allies, convicted and executed on 23 February 1946. The indictment against Yamashita was that:

"...between 9 October 1944 and 2 September 1945, at Manila and at other places in the Philippine Islands, while commander of armed forces of Japan at war with the United States of America and its allies (he)... unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies, particularly the Philippines; and he..., thereby violated the law of war". Law Reports of Trials of War Criminals, United Nations War Crimes Commission, London, 1948., pp. 3-4.

The prosecution was unable to offer conclusive proof that Yamashita had ordered the commission of the atrocities or known about them. The case was based upon the allegation that he must or should have known about them and was therefore guilty of not controlling his men. This was known as the doctrine of indirect responsibility which holds that a commander will be culpable when:

(a) he knows subordinates are going to commit war crimes and does not take reasonable steps to prevent them.

(b) he knows subordinates have committed war crimes and does not take reasonable steps to punish them.

(c) he should know subordinates are going to commit war crimes and does not take reasonable steps to prevent them.


"In some cases, military commanders may be responsible for war crimes committed by subordinate members of the armed forces, or other persons subject to their control. Thus, for instance, when troops commit massacres and atrocities against the civilian population of occupied territory or against prisoners of war, the responsibility may rest not only with the actual perpetrators but also with the commander. Such a responsibility arises directly when the acts in question have been committed in pursuance of an order of the commander concerned. The commander is also responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof."

The most recent confirmation of the principle was in the indictments by the International Criminal Tribunal for the Former Yugoslavia (ICTY) of Radovan Karadzic and Ratko Mladic (24 July 1995, issued by the Prosecutor R.J. Goldstone, available at the ICTY internet site, www.un.org/icty/25-0795A.htm). Throughout the indictment the crimes alleged are both of commission and "omission". An example is paragraph 17:

"RADOVAN KARADZIC and RATKO MLADIC, from April 1992, in the territory of the Republic of Bosnia and Herzegovina, by their acts and omissions, committed genocide."

An example of the common formulation of the principle of indirect responsibility in the indictment is paragraph 35:

"RADOVAN KARADZIC and RATKO MLADIC individually and in concert with others planned, ordered, instigated or otherwise aided and abetted in the planning and preparation or execution of the unlawful detention of civilians or knew or had reason to know that subordinates were unlawfully detaining civilians and failed to take necessary and reasonable measures to
Additional Protocol I). Under these principles Aideed would be culpable not only if he knew of the attack in advance and failed to prevent it but if he should have known about and did not prevent it, or if he subsequently failed to punish those responsible. Evidence regarding his congratulation of the perpetrators may have been sufficient to constitute a prima facie case on this basis. Professor Farer asserted that the attack was a violation of both the Somali Penal Code of 1962 and international law.

3.32 Notwithstanding Professor Farer's findings no action was taken to formulate a framework for dealing with Aideed and the detainees and perpetrators that might be taken. At UN HQ in New York there appeared to be an underlying doubt as to the legal basis upon which the UN could undertake prosecutions of this nature. This position could not be maintained in the face of increasing criticism of the detention action with the large numbers being held. Finally on 23 September 1993 the UN was forced to attempt to explain the basis of its detention of Osman Hassan Ali (Ato) a leading figure in the Habir Gedr. The explanation still did not provide a clear legal foundation for the action prevent such acts or to punish the perpetrators thereof."

If the confrontation between Aideed's forces and UNOSOM could be characterised as a Geneva Convention Common Article 3 "armed conflict" it was open to be argued that the principles of command responsibility were applicable to these circumstances.

Article 87, Duty of Commanders

3. The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.

Signal Australian UN Mission to Department of Defence, 26 August 1993. Clearly the attack was not in self defence and therefore was an illegal use of force. It is interesting to note in this respect that the ICTY indictments include UN peacekeepers in the category of protected persons and civilians with respect to the counts of hostage taking. (paras 14 & 48.)

Interview with Mr Zacklin, Director Office of Legal Counsel, UN HQ New York, 20 December 1994.
and referred to detention provisions commonly found in many countries in
states of emergency and where a prima facie case was indicated against an
individual.\(^{82}\) With this reasoning it was asserted that individuals could be
detained "when the public authorities have reasonable grounds to believe that
the detainee represents a threat to public order" which they described as
"preventive detention".\(^{83}\) At no point was there any attempt to explain how it
was that UNOSOM had come to be in the position of the "public authority".
There was no citation of the body of law that granted the authority or carried the
rights and obligations to which they referred.

3.33 The facts cited to support the logic of some of the action being taken
added weight to the application of the laws of occupation but this was still not
recognised. Specifically it was asserted that there was no central government
and that the courts and police were still in an early phase of reconstruction.
Public safety and minimum order were severely threatened and could not be
safeguarded through the normal functioning of a criminal system. The safety of
Somalis and UNOSOM had been "assaulted by a heavily armed, and centrally
directed organisation, experienced in urban warfare."\(^{84}\) Most of the detentions
that had occurred were referred to as "temporary", "for a reasonable period of
time" although there was no indication and indeed no concept within UNOSOM
or UN HQ when these detentions would end, either in release or trial. There
was also no review mechanism whatsoever to oversee the actions.


\(^{83}\) Ibid., paras 1 & 2.

\(^{84}\) Ibid., para 2.
International human rights law was referred to but it was stated that there was no prescription under this body of law as to what a reasonable period of time was. All that could be said was that the detainee ought to be released when the security situation had improved and if by that time evidence was not obtained which indicated the individual should be charged.\textsuperscript{85} There was no indication as to what the detainees could be charged with, under what law, or as to what forum would hear the charges. The detainees were to be treated humanely but:

Since persons preventively detained are not initially charged with any crime, there is no obligation for defense counsel to be present to advise the detainee. Furthermore, due to ongoing violent circumstances prevailing in Mogadishu, such a visit represents a substantial security risk.\textsuperscript{86}

3.34 These assertions were viewed with great scepticism and the whole UNOSOM detention regime was attracting heavy criticism.\textsuperscript{87} In a preface to its statement the UN fell back broadly on Resolutions 814 and 837 for authority as well as a vague reference to all the relevant provisions of international humanitarian law and the established standards of human rights protection.\textsuperscript{88}

\textsuperscript{85} Ibid., para 3.
\textsuperscript{86} Ibid., para 4.
\textsuperscript{88} Preface also attached to Australian Mission Facsimile of 24 September 1993, op cit. (n. 82).
This was still unsatisfactory as the Resolutions only made broad reference to security and law and order restoration mandates without specifying the basis upon which this would be pursued. It reflected in reality a concern within the legal department at the UN that there was in fact no legal basis for what was happening. This much was conceded when it was said in the preface to the arrest statement that Ato's detention raised "a series of legal questions, the implications of which are substantial and complex". This was as much as the UN, the organisation tasked with the promotion of human rights and the promotion of the respect for international law, could say in relation to the detention of 740 individuals and Ato in particular.

3.35 Clearly the circumstances in Mogadishu did dictate that there must be some derogation of normal standards of human rights in terms of restoring order such as set out under Article 5 of the Fourth Geneva Convention which the UN could and should have cited to support its case had the status of occupying power been asserted. Article 5 deals with those persons detained as suspected of or engaged in spying, sabotage or activities hostile to the security of the occupying power. In those cases, where absolute military security requires it, that person forfeits the rights of communication. There is also no question that the occupying power may take detention measures to ensure its

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89 Interview with Mr Zacklin, New York, 20 December 1994.
90 Preface, op cit., (n. 82)
92 Article 5, para 2 states: "Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such persons shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention."
security and public order and, it is asserted, the UN could have cited the provisions of the Hague Regulations and the Fourth Geneva Convention to be examined in Part II. The only proviso to this authority is that the detainees are still entitled to a fair and regular trial which, in accordance with Article 71 of the Fourth Geneva Convention, must take place as rapidly as possible.\(^\text{93}\) This may be derogated from under the security circumstances contemplated by Article 5 to the extent that the detainee must be granted full rights and a trial or released at the earliest date consistent with the security of the occupying power.\(^\text{94}\) The other alternative was to utilise the administrative internment provisions of the Fourth Geneva Convention.\(^\text{95}\) The great fault in the UN position in relation to those detainees who had actually committed hostile acts or were suspected of having committed such acts, was the lack of a plan for the possibility of bringing detainees to trial. If the UN had been able to say that temporary military or civilian courts it would establish would examine cases where there were definite offences alleged, or that greater effort was to be put into reconstructing the local courts with a time frame set out as to when it was projected that they may able to deal with such cases, much criticism would have been prevented or deflected.

\(^{93}\) Article 71 states \textit{inter alia} that: "No sentence shall be pronounced by the competent courts of the Occupying Power except after a regular trial. Accused persons who are prosecuted by the Occupying Power shall be promptly informed, in writing, in a language they understand, of the particulars of the charge preferred against them, and shall be brought to trial as rapidly as possible..." This provision is discussed further at Chapter 7, para 7.30, \textit{infra}.

\(^{94}\) Article 5, para 3 states: "In each case, such persons shall nevertheless be treated with humanity, and in the case of a fair trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or the Occupying Power, as the case may be."

\(^{95}\) Articles 78-135.
3.36 Efforts to rehabilitate the local courts to assume this burden were not very fruitful. By 23 July 1994 it was still not possible for regional courts to deal with serious crimes carrying a sentence greater than 10 years imprisonment. As noted in Chapter 2 it is necessary for the accused to be represented in such matters under Somali law and the difficulty was that no effort had gone into ensuring defendants had such access through recruiting and organising surviving lawyers for the task. After July the Justice Division approved the implementation of a public defender system which would have cost USD$10,000 a month. With the paucity of resources devoted to the Justice Division this plan was never fully developed.96

3.37 By July 1994 the world was holding UNOSOM accountable for the maintenance of human rights standards in the areas under its control. While no mention of the legal basis for this accountability was ever made it was very close to the laws of occupation in all but name, given the position of authority of UNOSOM, the absence of a government, and the Security Council mandates.97 The UNOSOM field operation was trying to the best of the resources available to it to begin to satisfy these demands. In the main Mogadishu prison UNOSOM had managed to reduce the overcrowded population from over 600 to 258 on 16 July by checking the details for all the prisoners, obtaining judicial review for some or, in the majority of cases, simply releasing those who had already spent time in the prison equivalent to the maximum sentence for the crime of which

97 See also n. 87, n. 102 & n. 103.
they were accused. Many were released simply because there was no evidence against them, reflecting the parlous state of investigation, evidence retention and prosecution capability. In this sense achieving a reduction in the prison population was in part an admission of defeat in relation to the objective of rehabilitating a contiguous justice system that could hold together through arrest, investigation and trial. Training programs were scheduled commencing in August 1994 for prison staff in a number of prison management areas including human rights and the application of UN standards. The Justice Division was also attempting to institutionalise UN standards for the administration of juvenile justice.

3.38 In response to international pressure and Security Council/General Assembly resolutions, a work program was established for the investigation of human rights violations. As a result of the program the Standard Operating Procedures for UNOSOM apprehensions and detentions were amended to ensure compliance with UN standards and international law. Up until that point they had clearly left much to be desired. UNOSOM human rights officers were conducting investigations and monitoring the activities of the courts, such as they were, and prisons to ensure respect for the human rights of accused

98 Briefing with Mr Adeyemi op cit., (n. 96).
99 UNOSOM II Press Release, “Courts to Reopen in Mogadishu”, 24 September 1993. In fact in many cases there was no evidence against the arrested individuals as they were innocent bystanders caught up in the trawling for Aideed and his key supporters. Former Somali police chief Brigadier Ahmed Jama was one of these, suffering terrible wounds in the process. This was ironic as Jama was the one man who could have provided invaluable assistance to UNOSOM in the police area had he been sought out. In fact SUPINT Kirk had intended to do just that but was too late as by that stage Jama was out of the country receiving medical attention and did not return to Somalia. Interviews with Ganzglass and Jama, Washington DC, 3 January 1995. Interview with SUPINT Kirk, Canberra, 15 August 1995.
100 Ibid.
persons and prisoners. While the regional Attorneys-General were responsive
to some degree, having been nominated by the regional councils UNOSOM
had created, the problem continued to be in Mogadishu where factionalism
overshadowed the whole process. The Justice Division desperately needed
and sought funds for the training of the personnel of the Somalia Human Rights
Association as well as judicial and correctional personnel, funds which were not
to be forthcoming.\textsuperscript{101}

3.39 The deficiencies of UNOSOM's ability to deal with law and order
matters were highlighted in the Report of the Commission of Inquiry into
UNOSOM when in their observations and conclusions they stated:

\begin{quote}
With the United Nations having recognised that no Somali government
existed, UNOSOM II faced a human rights dilemma when it had to
detain people in executing its mandate. In the absence of courts,
detentions came to be seen as arbitrary, exposed UNOSOM to criticism
and had to be stopped.\textsuperscript{102}
\end{quote}

They went on to add:

\begin{quote}
The finding that a country is without a government... has such far
reaching legal and political consequences that careful criteria for
invoking it seem required. If the United Nations operates in a country
\end{quote}

\textsuperscript{101} Ibid.
\textsuperscript{102} Report of Commission of Inquiry to Investigate Armed Attacks on UNOSOM II, \textit{op cit.},
(n. 18) para. 251.
that it has thus characterised, it necessarily has to bear responsibility for at least some of the basic state concerns traditionally appertaining to a government and that could invariably raise the spectre of a United Nations trusteeship or neo-colonialism.\textsuperscript{103}

What the Commission was in effect saying was that in collapsed states there will be an obligation to assume certain functions normally appertaining to the sovereign although the Commission was unable to cite a proper legal basis for this. The danger in such a situation, as they saw it, was that such circumstances could leave the mission open to the charges of neo-colonialism or that it could become a trusteeship. This sensitivity and continuing uncertainty could have been resolved by reference to the laws of occupation. If it were announced that certain action was required of the force under these provisions as a body of humanitarian law governing the exigencies of the temporary circumstances where a force finds itself the primary authority in a territory, then it could not have been characterised as neo-colonialism. The clear understanding would be that this was purely temporary, to end as soon as a local authority was capable of assuming these responsibilities, and was driven by humanitarian concerns. Certainly the vast majority of Somalis would not have had any difficulty with this as they supported the exertion of authority to bring peace to the country and were in general behind UNITAF and UNOSOM.

3.40 The end result was that all the UNOSOM detainees were released. This sent the final message of the failure of the law and order policy of UNOSOM.

\textsuperscript{103} \textit{Ibid.}, para 253.
The action led to a loss of credibility with the Somalis who could see that UNOSOM was incapable of handling security matters. It also led to a loss of morale among the members of UNOSOM and its supporting troops as all their previous efforts were shown to be in vain and the sacrifices made by the troops up to that point had served no purpose.  

3.41 One critical action that was required for the success of UNOSOM was the exercise of the authority available under the laws of occupation in shutting down the operation of all other radio broadcasting facilities. UNOSOM was forced to move against the SNA radio broadcasting facility but undermined this approach by not also closing down the operation of all other facilities, such as that operated by Ali Mahdi. The reason this was not done was because the SNA facility was a former State asset and the others were privately owned. It was asserted that this removed them from the control of UNOSOM, particularly as they were not inciting violence against UNOSOM and therefore not threatening the mission in terms of the mandate authority. Not only was this an incorrect reading of the legal authority of UNOSOM given the application of the laws of occupation in that early phase but it was politically misconceived as it sent the message to Aideed's clan that UNOSOM was taking sides.  

3.42 It became apparent that the civilian casualties and collateral damage from US and UNOSOM operations during the Aideed confrontation verged on being unjustified by the absolute necessity of military operations as stipulated in

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104 Interviews with members of UNOSOM military staff and US support troops.  
105 Hirsch & Oakley, op cit., (Chap 1, n. 44) p. 117 n 4.  
106 Ibid.
Article 53 of the Fourth Geneva Convention, or were susceptible to portrayal in this way. A more surgical approach should have been combined with a more balanced reaction to the 5 June 1993 attack on UNOSOM II forces, in asserting the rights relating to force security and the maintenance of order. Rather than react with an immediate assault upon the SNA and a limited investigation focusing on Aideed the force could have legitimately responded by declaring that all arms posed an unacceptable risk to the force and must be handed over to UNOSOM, not kept in Agreed Weapon Storage Sites (AWSS) under factional control. Aideed had already flouted this agreement by smuggling heavy weapons into Mogadishu and it was patently inadequate as a security and order measure.107

3.43 A properly staffed and credible Commission of Inquiry should have been immediately appointed to investigate the 5 June 1993 attack and all public comments of fault delayed until its findings. If those findings indicated individual fault then the matter ought to have been handled as a normal criminal operation with no public announcements of suspects until the suspect was in custody so that the element of surprise could be preserved.108 The arrest of Hassan Gutaale Abdul in Baidoa, described in Chapter 2, was carried out successfully in this manner and although the scale of the problem was different, the principle

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107 Hirsch & Oakley, op cit., (Chap 1, n. 44) pp. 116-117.
108 This is a standard civil policing procedure in many countries and in accord with the international law of human rights, where there must first be some evidence to justify the issue of an arrest warrant, unless an individual is actually in the process of committing a crime. The arrest itself may be effected without prior warning to ensure a successful apprehension. It is then the rights and process of an individual after arrest that particularly become the concern of human rights standards. See C. de Rover, "To Serve and to Protect: Human Rights and Humanitarian Law for Police and Security Forces", ICRC, Geneva, 1998., see in particular Chapter 8. See also the Rome Statute for an International Criminal Court, Article 55 (1) (d) which prohibits arbitrary arrest. (www.un.org/icc/).
remains the same. This would have accorded with the provisions concerning due process, force security and restoring and maintaining order under the laws of occupation.

Conclusion

3.44 Having described and criticised the factual circumstances of UNOSOM II's presence in Somalia, the analysis of the laws of occupation in Part II of this thesis will seek to support the assertions that this body of law did apply to the operations of UNOSOM II for a period in southern Somalia between 4 May 1993 and March 1994, and could apply to like situations in the future. This is based on the factual test upon which the laws of occupation are founded, that the intervening force was capable of and had replaced the sovereign authority in the absence of a consensual arrangement with that authority, which in fact had ceased to exist.²⁰⁹

3.45 It was shown how UNOSOM II faced enormous dilemmas as it proceeded in its haphazard way towards the justice reconstruction objective and how it faced a dramatic loss of international and local credibility in Somalia in relation to the standards or lack of them that it applied in dealing with the public security function. It is asserted that in the absence of any other framework, the laws of occupation could have provided guidance and a means of answering scrutiny on these issues. That does not mean that the law in itself would have been a panacea for all the ills of Somalia. It would still have

²⁰⁹ Set out in Part II, Chapters 5 & 6.
remained to implement the regime in a way to ensure its acceptance by the population and the actions taken to create the secure environment for this to happen would still have needed to be managed with great skill.

3.46 Using this framework may have assisted in assuaging concerns by donors as to the legal basis on which justice reconstruction was being undertaken and so assisted fund raising. This would particularly have been the case amongst the troop contributors who would, in fact, have had a degree of obligation in this respect if the laws of occupation applied.

3.47 It remains to resolve the foundation for the assertion that the laws of occupation apply to such collapsed state circumstances and, if so, whether they can apply to the UN. Before proceeding to an analysis of these issues, however, it is necessary to briefly survey the issue as to what the alternatives if any, there are to the laws of occupation in such circumstances. This will be done in the next chapter.
CHAPTER FOUR: THE PROBLEM OF FRAMEWORK
ALTERNATIVES FOR DEALING WITH COLLAPSED STATES

Failing states promise to become a familiar facet of international life. They will necessarily exact heavy tolls on their own people and on all countries. Even if the international community were to continue its current ad hoc approach, it would find itself facing mounting costs - for peacekeeping troops, humanitarian aid and coping with refugees. The real challenge to UN members is to address the problem directly, by creating a conceptual and juridical basis for dealing with failed states as a special category, and by forming institutions to succour them. The international community needs a cost-effective way to respond to growing national instability and human misery.¹

Introduction

4.1 The discussion of alternatives to the law of occupation for interventions seeking to deal with a collapsed state crisis can be placed in two main categories:

a. a regime that might be available under alternative general treaty/ customary law, or

b. a regime that is UN centred, either under the auspices of a new or existing institution or that is laid down in a more comprehensive, case specific, Security Council resolution framework.

4.2 The search for an alternative may be compelled by a number of factors, the first being the reluctance of states to be bound by the laws of occupation in

terms of the obligations imposed by the law and the political opprobrium that is perceived to attach to the label "occupying power". The second factor is that as the context is removed from interstate conflict and involves the complexities of internal conflict resolution, such situations may be viewed as requiring a "tailor made" regime.

4.3 The options that will be considered here will include;

a. the use of the laws of occupation as guidelines without recourse to a legal debate over *de jure* application;

b. the inclusion of the laws as the point of reference for specific peace operations by their adoption in the Security Council resolution creating or authorising the operation;

c. amendment of the Fourth Convention;

d. the development of an entirely new convention;

e. reliance on the evolution of custom through state practice;

f. the use of the UN Trusteeship Council to manage collapsed states having at its disposal similar rights to those available under the laws of occupation as an *ad interim* sovereign;
g. the creation of a new UN mechanism which could be designated as a "conservatorship" or "stewardship" to be raised on an *ad hoc* basis;

h. the use of a detailed Security Council resolution framework for each particular mission, either in the body of, as an annex to, or adopted by the resolution; and

i. the assumption of sovereign functions within a formal agreement framework if the possibility exists of dealing with local agents.

4.4 These options will be considered from the perspectives of practicality, appropriateness (legally and morally), political acceptability, the implications for a viable international law regime and the impact that the possible range of operational circumstances may have in practice on these alternatives. This treatment is not intended to be comprehensive, as this would be beyond the scope of the work, but to illustrate the need to rely on the current laws of occupation for the time being in the appropriate circumstances, as is the position of this thesis, and perhaps to suggest the direction that further research in this area might take.
Treaty and Custom Options

The Law as Guidelines

4.5 In the rush of international affairs it is common to react to crises that occur at a faster pace than a full and deliberate consideration of the appropriateness or otherwise of the proposed actions under international law might warrant. There is often a reluctance to make clear assertions or accept international law regimes without a full consideration of all the ramifications. There may also be a reluctance to be held strictly to account under clear, black letter international law provisions which may restrict liberty of action. In addition the label "occupying power" carries with it a sensitivity which is associated with images of the Nazi occupations of World War II and the international image problems Israel has experienced with respect to its occupied territories. One option therefore is to simply avoid the discussion of de jure application by making a statement that as a matter of public policy a force or operation will rely on the provisions of the laws of occupation as guidelines to the extent that they are relevant or appropriate.

4.6 One consequence of denying the application of the law, or of stating that it will be applied only as a matter of policy, is that it will promote arguments that it is the body of international human rights law that applies instead.\(^2\) It is not

\(^2\) E. Benvenisti, "The Applicability of Human Rights Conventions to Israel and to the Occupied Territories", Israel Law Review, (1992) vol 26, no 1, pp. 27-30. In Cyprus v Turkey International Law Reports (1978) vol 62, pp. 230-232, the European Human Rights Commission determined that the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which Turkey was a High Contracting Party, applied to the Turkish military occupation of northern Cyprus. It found that the term, "within their jurisdiction", contained in Article 1 of the Convention, referred to all persons under the High Contracting Party's, "actual
precedence. In the exigent circumstances of military operations it is suggested that it is more appropriate that a humanitarian law regime apply and therefore the imperative will exist for asserting a stronger basis for the application of this law. It should be remembered that this issue is being considered here in relation to the collapsed state scenario where the normal machinery of inter-relation between state and citizen has disintegrated or was in fact an instrument of human rights abuse in the first place. In such circumstances expectations must be modified and, as incorporating the minimum standards of civilisation, the laws of occupation are geared precisely for this. It should be stressed, however, that those who would deny the application of humanitarian law may find they are bound by an even more demanding framework.

**Treaty Amendment/Generation**

4.7 Amendments could be made to the Fourth Convention to clarify the extent of its application and affirming in clear terms that peace operations, including those that are UN commanded, are governed by it. Following on from this a new part may be introduced which could specifically address peace operation scenarios. One element of reform that would be timely given the gradual decline of the acceptance of the use of the death penalty internationally would be to open to the discretion of the occupying power the ability to ignore, override or delete such provisions from the local law for at least the duration of the occupation. As part of such an alteration the Convention could be amended to include a delineation of what if any aspects of the international human rights
regime should apply in peace operations and indeed conventional armed conflict occupations. In this respect clear statements of derogation circumstances should be set out. Following from this the Protecting Power regime could be modified to provide for a mandatory arrangement utilising a new neutral institution such as a UN Ombudsman which could perhaps share some of the protecting power responsibilities with the ICRC. An alternative to amending the Fourth Convention could be the creation of an entirely new convention designed specifically for peace operations.

4 At the UN Department of Peace-Keeping Operations sponsored "Comprehensive Seminar on Lessons-Learned From United Nations Operation in Somalia (UNOSOM)", Plainsboro, New Jersey, 13-15 September 1995, this featured in discussions in the Syndicate dealing with "Political Aspects and Institution-Building". The Syndicate recommended to the Plenary Session that some form of ombudsman mechanism be established on a mission by mission basis for peacekeeping scenarios to consider grievances by the population against the UN. The recommendation stated that, "Without such a mechanism built into the mission, the UN was perceived by many in Somalia to be 'above the law' which undercut its own efforts to promote human rights", See Comprehensive Report on Lessons-Learned From United Nations Operation in Somalia, April 1992-March 1993., Freidrich Ebert Stiftung, Germany; Life and Peace Institute, Sweden; Norwegian Institute of International Affairs; DPKO Lessons Learned Unit, December 1995., pp. 18-19. The concept of Protecting Powers has very old roots but was only introduced to the law of armed conflict by the 1929 Prisoners of War Convention. The subject is first raised in the Fourth Convention in Article 9 and there are a further 36 references to the Protecting Power. Article 9 does not define a Protecting Power or indicate how one is nominated. Pictet describes the procedure as follows:

"The belligerent Power which wishes its interests to be protected asks a neutral Power if it is willing to represent it. Should the neutral power agree, it asks the enemy Power for authorisation to carry out its duties. If the enemy Power gives its consent, the neutral Power then starts its work as a Protecting Power." J.S. Pictet, "IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War", ICRC, Geneva., 1958., p. 81.

The problem with such an arrangement is that it begs the question as to what happens when there is no Power to request a neutral state to act as Protecting Power, for example in the collapsed state scenario in Somalia. The Protecting Power system is a creature of international usage and is not modified or regulated as to form by the Fourth Convention. In international usage the establishment of a Protecting Power arrangement depends on the existence of three juridical state entities party to the contract. If the occupied territory has no such entity capable of filling this role then the Protecting Power arrangement of international usage cannot exist. The drafters of the Convention viewed the role of Protecting Powers as essential to the complete functioning of the occupation provisions and put much effort into expounding on the parameters of it. They were also aware, however, that it was distinctly possible that such a role may not be filled in practice due either to difficulties in coming to agreement over a suitable party, the incapacity or demise of the Power of Origin as an entity or because of the reluctance of a state to assume the burdens of the office. With this in mind they included Article 11 in the Convention and passed Resolution 2 at the conclusion of the Diplomatic Conference, providing and calling respectively for the establishment of an international body to fulfill the duties of a Protecting Power. This suggestion was never followed through. Final Record of the Diplomatic Conference of Geneva of 1949, vol II-B, pp. 19-20, 27, 28, 57-58, 59, 65-66, 74, 130, 351, 487.
4.8 The problem with either amendment of the Fourth Convention or the creation of a new convention is that mobilising the international community for such an effort would be extremely difficult. While the Anti-Personnel Land Mines Convention\(^5\) (APL Convention) process demonstrated that it may be possible to generate new treaties much more rapidly than previously experienced, it is unlikely that the same level of political and popular enthusiasm could be generated for a new law of occupation convention.\(^6\) Certainly clear treaty expression of such a legal regime would provide the best framework on which to rely given the binding force and certainty that could be attained.

**Custom and State Practice**

4.9 The alternative to these more pro-active solutions is to adopt the passive, evolutionary approach; that is, allow the law to evolve by observation of state practice in such situations drawing a line through common practice and issues arising from each peace operation experience. The problem with such an approach is that there are not enough peace operations from which to be able to draw firm and, at least relatively, uncontroversial legal principles. This

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\(^5\) Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Landmines and on Their Destruction, Ottawa 3 Dec 1997.

\(^6\) The International Campaign to Ban Landmines (ICBL), launched in 1991, is coordinated by a steering committee of 11 organizations. It brings together over 1,000 non-governmental organizations in over 60 countries who work locally, nationally, regionally, and internationally to ban antipersonnel (AP) landmines. It was able to generate world wide enthusiasm for a stark humanitarian problem where it was easy to draw attention to horrific injuries and idle arable land. This lead to the ICBL campaign winning a Nobel Prize on 10 October 1997. Mustering the same enthusiasm for a "dry" legal document dealing with aspects of regulation of the relationship between foreign troops and civilians would certainly not attract the same attention or be as easy to demonstrate the physical benefits of. See for example the internet sites maintained by the ICBL (www.agora.stm.it/politic/c-landmines.htm) and Vietnam Veterans of America (www.vvaf.org/lanmine.html).
approach would also leave a great deal open to opinion and uncertainty, particularly in determining clear *opinio juris*. State practice outside of treaty regimes is at best useful only in identifying the broadest principles relating to major issues such as national self-defence and the use of force. It would hardly be able to provide the proper basis for situations where a systematic and extensive framework is necessary to address the maintenance or restoration of order in a collapsed state scenario, particularly in relation to detention and due process issues.

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7 To acquire the status of customary law State practice must not only be general but accepted as law. This has been clearly set out in the *North Sea Continental Shelf* cases, ICJ Reports, 1969, p. 44, where it states, "the acts concerned...must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, ie the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation." This reasoning was confirmed in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v USA) Merits*, ICJ decision 27 June 1986, ICJ Reports1986, 14., (Nicaragua case) at pp.108-109.

8 See *Nicaragua case*, pp. 97-98, "The mere fact that States declare their recognition of certain rules is not sufficient for the Court to consider these as being part of customary international law, and as applicable as such to those States. Bound as it is by Article 38 of its Statute to apply, *inter alia*, international custom "as evidence of a general practice accepted as law", the Court may not disregard the essential role played by general practice....in the field of customary international law, the shared view of the Parties as to the content of what they regard as the rule is not enough. The Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice."

9 To support this assertion consider the sources of state practice which can include diplomatic correspondence, general declarations, opinions of national legal advisers, instructions to State representatives, positions taken before tribunals and the actual beaviour of States. Such sources are highly unlikely to produce the detail or level of consistency, uniformity and duration required to produce such a framework. See M.E. Villiger, "Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources", 2nd ed. Kluwer Law International, 1997., pp. 15-46.
UN Institutional Options

Security Council Resolutions

4.10 One prospect that has opened up since the termination of the Cold War is the greater use of the Security Council (SC) authority under Article 25 of the UN Charter. While there has been a greater recourse to SC resolutions for a broadening array of peace operations the resolutions themselves have tended to be rather limited documents setting out the broad mandate for missions but often posing more questions than they answered.10 Given the binding nature of a SC resolution as a type of lex societatis11 on members of the UN the possibility exists to extend the simple broad mandate approach to one that endorses or promulgates more prescriptive guidelines for aspects of an operation that require this. The SC resolution could be used, for example, to state that, "the Fourth Geneva Convention will be applied as a matter of policy and guidance where appropriate by all UN or UN authorised forces in their dealings with the civilian populations in their area of operations resulting from...

10 Most of the Somalia resolutions were in this category from UNSCR 794 ("use all necessary means to establish a secure environment for humanitarian relief operations"), UNSCR 814 ("to assist in the re-establishment of Somali police, as appropriate at the local, regional or national level, to assist in the restoration and maintenance of peace, stability and law and order, including the investigation and facilitating the prosecution of serious violations of international humanitarian law"), and UNSCR 837 ("to take all necessary measures against all those responsible for the armed attacks...including to secure the investigation of their actions and their arrest and detention for prosecution, trial and punishment"). In Bosnia UNSCR 824 UN SCOR (1993) (creating "safe areas" in Srebrenica, Zepa, Sarajevo, Tusla, Bihac and Gorazde), UNSCR 836 UN SCOR (1993) (authorising "all necessary measures" to secure the safe areas, by force if necessary), UNSCR 1031 UN SCOR (1995) (authorising "all necessary measures" to protect UNPROFOR and the implementation of the Dayton Agreement). In Rwanda UNSCR 929 UN SCOR (1994) (authorising "all necessary means" to meet humanitarian objectives, including the protection of displaced persons). In Haiti UNSCR 940 UN SCOR (1994) (authorising "all necessary measures" to remove the government, and "maintain a secure environment")

the absence of a recognised state authority". An alternative could be to actually lay a purpose designed set of provisions in, or annexed to the resolution. There have also been calls to create a standard UN criminal code that could be used in collapsed state scenarios.\textsuperscript{12}

4.11 Such a code could be endorsed through a SC resolution. It is quite possible this approach would be practical given the preparedness of the SC to endorse other overarching documents such as the Paris Accords for Cambodia and the Dayton Accord for Bosnia. The problems that may arise with this option, however, are the problems of the SC itself; the potential for politicisation and the whims of the Permanent Five.\textsuperscript{13}

**Administrative Functions Assumed by Agreement**

4.12 Since its inception there have been proposals for, and occasions during which UN administration of territory has occurred by agreement. In fact it seemed beyond comprehension that there would be any other situation in which a UN administration of territory might occur.\textsuperscript{14} The agreement would be either as a means of settling a dispute between conflicting states or a


post-colonial transition. It was little envisaged that agreement may have to be with internally conflicting parties. This occurred in relation to the UNTAC operations in Cambodia, relying on the Paris Accords, and the IFOR/SFOR operations in Bosnia, based on the Dayton Agreement. Another interesting example of non-Trusteeship Council UN administration occurred in West New Guinea (to become West Irian) which was not based on SC action but instead involved the General Assembly (GA), from 1962-1963. While the Paris Accord set out wide-ranging powers for a UN administration to run Cambodia on behalf of the Supreme National Council (SNC) the Dayton Accords provided for significant intrusions on aspects of sovereignty without assuming a comprehensive administrative role for Bosnia. As the West Irian experience was the first instance of the UN assuming the administration of territory not under the auspices of the Trusteeship Council it is instructive to look at the framework in that case.

4.13 After a lengthy dispute between the Netherlands and Indonesia over the territory of West New Guinea an agreement was concluded on 15 August 1962. The Agreement provided for the temporary transfer of administration of the territory to a United Nations Temporary Executive Authority (UNTEA), established by and under the authority of the UN Secretary-General, to be

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15 Details of the Accord are set out at Chapter 6, para. 6.27., infra.
16 Details of the Agreement are set out at Chapter 6, para. 6.29., infra.
assisted by a security force (UNSF). Sovereignty of the territory was to pass to Indonesia subject, by implication, to a plebiscite that was to be held by 1969.\footnote{Articles XVIII, XIX and XX.} In the interim the UN was to assume extensive sovereign functions over the territory and tasked in particular with the maintenance of law and order. A UN Administrator acceptable to the parties was to be appointed with full authority under the direction of the UN Secretary General with the UN flag to be flown during the period of administration.\footnote{Articles IV-VI.} The UNSF was to supplement the Papuan police in maintaining law and order. Interestingly even Indonesian forces present in the territory were to come under the authority of the Administrator.\footnote{Article VII.} In fact the UNSF was intended to be exclusively an internal security force. The distinction to be made here is that this was not a force assisting a state apparatus to maintain internal order but a security force supporting a subsidiary organ of the UN which was the status of UNTEA.\footnote{D.W. Bowett, "United Nations Forces: A Legal Study of United Nations Practice", Stevens & Sons, London, 1964., p. 258.} To conduct the administration UNTEA was authorised to employ as part of its apparatus, former Dutch, Papuan and Indonesian personnel with the requirement that as many Papuans as possible be brought into administrative and technical positions.\footnote{Article IX.} UNTEA had the power to amend existing and promulgate new laws within the spirit and framework of the agreement. Existing laws that were consistent with the agreement were otherwise to remain in effect.\footnote{Article XI.} The rights of the inhabitants were set out in terms of basic human rights guarantees as were arrangements to ensure that the transfer to

\begin{footnotes}
\item[19] Articles XVIII, XIX and XX.
\item[20] Articles IV-VI.
\item[21] Article VII.
\item[23] Article IX.
\item[24] Article XI.
\end{footnotes}
Indonesia was in accord with the self-determination and will of the Papuans.\textsuperscript{25} The provisions of the Convention on the Privileges and Immunities of the United Nations were recognised as applying to all UN personnel and property.\textsuperscript{26} The agreement was to enter into force with its adoption by resolution of the General Assembly.\textsuperscript{27}

4.14 Here was an example of a non-Trustee Council administration of territory. The essential ingredient here however was that the administration was handed over to the UN by agreement of two powers where the actual sovereignty of the territory was still in dispute. What was the basis on which this approach was used? There were two aspects to this issue. What was the authority of the General Assembly to establish the operation and what was the authority of the Secretary General to accept and carry out the task? There was no real challenge or debate about these issues at the time, nor was the constitutional basis set out in the General Assembly resolution or the Agreement between the parties, so the search for an answer lies in an examination of the UN Charter. It appears the best view is that the authority was based in some respects on Article 98.\textsuperscript{28} This Article allows for functions to be entrusted to the SG by the organs of the UN. These functions would also be exercised in accordance with the SGs powers, provided for in Article 97, as the Chief Administrator of the Organisation which has as its primary function the

\textsuperscript{25} Articles XVII-XXIII.
\textsuperscript{26} Article XXVI.
\textsuperscript{27} Article XXVIII.
\textsuperscript{28} "The Secretary General shall act in that capacity in all meetings of the General Assembly, of the Security Council, of the Economic and Social Council, and of the Trusteeship Council, and shall perform such other functions as are entrusted to him by these organs ...."
maintenance of international peace. Another basis for the action would be Article 14 which allows the General Assembly to "recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations", this being subject to the prohibition on the General Assembly dealing with any matter which is being dealt with by the Security Council, contained in Article 12. It has been clearly established by the ICJ that the General Assembly does have the authority to initiate peace operations with the consent of the government on whose territory it is to be stationed. The substantial limitation on the General Assembly is that it cannot authorise enforcement, or Chapter VII, type operations which are exclusively the preserve of the SC. As the collapsed state scenario is often one where there is either no state authority with which the General Assembly or SG can come to an agreement and/or the deployment is a Chapter VII action, the use of an UNTEA type mechanism would have to be effected through the SC. The SC would do this as a measure taken to ensure international peace and security, in terms of the expanded concept of that power in recent years to include internal conflicts. Laying out the authority of a UN transitional administration in a document similar to that employed for UNTEA would be the best approach to take, perhaps supplemented with an interim criminal code if necessary. Particular problems likely to be encountered would relate mainly to achieving a framework and employing an interim code...

31 See SC Resolutions governing Northern/Southern Iraq, (for example UNSCR 688, UN SCOR (1991)), Somalia and Bosnia (see n. 10).
that was suitable for the municipal legal tradition and culture. Other issues could be the transition to domestic control and how actions taken under the interim framework would carry over.

The Trusteeship Council

4.15 What about utilisation of the Trusteeship Council itself given its good record of successfully bringing administered territories to independence? This has been suggested as a means of resolving self-determination disputes where it has been said that:

For central governments under political siege or embroiled in bloody civil wars, the Trusteeship Council would be a way out of a seemingly unsolvable dilemma. There would be a procedure and a means by which to address a self-determination claim. The trusteeship system could save untold numbers of lives from humanitarian crises and avoid the devastation of civil war - tragedies that ultimately can imperil the very existence of a ruling government.32

4.16 There have also been calls for use of trusteeship mechanisms for collapsed state scenarios, including Somalia.33 One such proposal by Yehezkel Dror states:

Where societies are disintegrating or evil rulers engage in crimes against humanity, more drastic measures are required. In such circumstances, the United Nations should impose a trusteeship regime, approved by a special majority vote of the Security Council or the General Assembly, without veto rights. Trusteeship regimes should last for a maximum of two years, unless renewed by special majority vote of both the Security Council and the General Assembly. Such radical steps, subject to other safeguards including judicial review by a global court, are necessary to protect individuals and humanity against the aberrant behaviour endemic during a period of global transformation.34

The problems with such an approach are numerous. As far as resolving self-determination disputes is concerned most incumbent centralised governments in conflict with insurgents are unlikely to accept such a concept as they will be trying to prevent the independence of the contested territory in the first place and historically have been prepared to accept the level of devastation referred to. Once the civil war does degenerate to the point where the central government has ceased to exist, which has often been the case, then there is a difficulty in identifying who would have the authority to make such an arrangement. Warring factions are usually reluctant to relinquish any hard fought advantage over rivals as was demonstrated by the violence with which Aideed opposed UN initiatives in Somalia. Once a state has reached the point

of collapse then there is no means by which the Trusteeship system under the UN Charter can be used as Article 75 and particularly Article 77 of the Charter make it clear that territories can only be administered under this system when they have been placed there by means of individual agreements with the UN, that is, by a sovereign authority. The Charter was clearly at pains to emphasise the basis of this regime in agreements:

...the Charter places greater emphasis (than the League of Nations Covenant on mandates) on the agreement stage and makes the conclusion of these agreements appear to be a voluntary matter subject to moral compulsion than was implied in the Covenant.

4.17 There was therefore no contemplation or provision that the trusteeship system would be part of a regime of compulsion under Chapter VII. The agreements by which territories would be placed under trusteeship would be part of the international treaty regime, something only a state was capable of being party to, thereby excluding any arrangement with local factions which did not carry the recognised authority of a state. Complicating matters further is

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35 Article 77
1. The trusteeship system shall apply to such territories in the following categories as may be placed thereunder by means of trusteeship arrangements:
   a. territories now held under mandate;
   b. territories which may be detached from enemy states as a result of the Second World War; and
   c. territories voluntarily placed under the system by states responsible for their administration.
2. It will be a matter for subsequent agreement as to which territories in the foregoing categories will be brought under the trusteeship system and on what terms.
the positive prohibition in Article 78 that the system will not apply to territories which have become UN members.\textsuperscript{38} The other aspect of the trusteeship regime that is problematic is that it is inextricably linked to the political and historical context of the de-colonisation process.\textsuperscript{39} It is probable that there would be significant political difficulties with attempting to amend the Charter to permit the use of the Trusteeship Council for this purpose as it would be seen as a mechanism of "neo-colonialism". This was in fact the concern voiced by Mr Kofi Annan, the Under-Secretary General for Peacekeeping Operations, when considering a trusteeship for Somalia in 1993.\textsuperscript{40} The proposal was raised more recently in relation to Rwanda and Burundi along with other possibilities all of which were subjected to a similar objection of "benevolent colonialism".\textsuperscript{41} Without doubt, however, from a purely practical point of view, it would be far more sensible to make the necessary reforms to enable the idle framework of the Trusteeship Council to be put to use.

A New UN Mechanism

4.18 If there are legal and political impediments to the Trusteeship Council what about the creation of an entirely new mechanism specifically designed to deal with collapsed states. One such option has been described by Jarat

\textsuperscript{38} Article 78
The Trusteeship system shall not apply to territories which have become Members of the United Nations, relationship among which shall be based on respect for the principle of sovereign equality.

\textsuperscript{39} Goodrich & Hambro, \textit{op cit.}, (n. 35) pp. 419-459., Simma, \textit{op cit.}, (n.36) pp. 933-948.

\textsuperscript{40} Meeting at UNOSOM Headquarters 16 May 1993 which also included the SRSG Admiral Jonathon Howe, Ms Elizabeth Lindenmeyer of the UN Department of Peacekeeping Operations, Ms Anne Wright seconded from the US State Department to UNOSOM, MAJ Mark Inch the UNOSOM Provost Martial and the author.

\textsuperscript{41} R.A. Griggs, "Geostategies in the Great Lakes Conflict and Spatial Designs for Peace", Centre for World Indigenous Studies, 1997., p. 10, para. 5.5.
Chopra arising from the *de facto* circumstances in which the UN and operations authorised by it may often find themselves, in contemporary peace operations. He states:

The UN cannot remain aloof from its relationship to territory and local population, over which it may have claimed jurisdiction, and therefore must recognise its role in the exercise of executive political authority. It may have to fulfil this role independently in anarchical conditions, or jointly with an existing regime. Even in the latter case, if the UN is to ensure accountability effectively, it needs an independent political decision-making capability, as well as law and order institutions at its disposal. In both cases reliance on local authority structures, either coherent and oppressive or fragmented and probably non-existent, and at the same time attempting to reconstitute a new authority, prevents the achievement of this objective.\(^{42}\)

Chopra claims the UN must establish a centre of gravity in such situations claiming jurisdiction over an entire territory of such peace operations, deploying throughout if possible. A direct relationship with the population should be established to build leaderships that will eventually assume responsibility for reconstituting authority and institutions.\(^{43}\) This is an argument for a move away from a concept of UN intervention as diplomacy based in the collapsed state.

\(^{43}\) Ibid.
context, to an all-pervasive political framework, using an international mandate to give effect to local self-determination and break the nexus of oppressive "malevolent institutions". Chopra points to failed administrative efforts by the UN in Cambodia and Somalia to illustrate how without this conceptual approach a peace operation becomes dysfunctional. He talks of the error of relying on rather than challenging prejudicial local structures. Being also sceptical of the current UN organisational frameworks to come to grips with such tasks he argues for the establishment of a new UN "interim executive body" to operate as a joint authority which would combine legitimacy with effectiveness.

4.19 When dealing with the neo-colonialism allegation Chopra states:

Peace-maintenance is not some colonial enterprise. While there are generic principles that can be learnt regarding the administration of territory and population from any model of governance, the purpose and behaviour of peace-maintenance is the opposite of colonialism. Colonial domination is a unilateral enterprise; a joint authority is a collectively accountable body. While a colonial power draws resources from a colony, an international authority directs resources into a nation. A colonial power plays the role of master and the colonised that of servant. But in peace-maintenance, the international authority is the servant of both an international and locally supported rule of law and order. The goal of peace-maintenance is not imposition of an alien system, or a preconceived style of operation functioning in a social

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44 Ibid.
vacuum. The intention of a local international authority is precisely to create a flexible decision-making capability that can respond to local needs with political, anthropological and sociological sensitivity.46

Regardless of the merits of the logic of this argument there will still be a political and perception battle to be fought with such a concept.47 Given the regular occurrence of the circumstances that lead to such suggestions it may be a fight worth making. The legal basis would have to rest on the expanded concepts of humanitarian intervention and what constitutes a breach of international peace and security that have arisen in the course of recent UN or UN authorised activities. It is also doubtful in the worst case scenarios of collapsed states that there exists any legal entity that could be called a "state" carrying with it the inviolability of sovereignty.48

4.20 Chopra envisages the UN political directorate he advocates as being utilised in four roles; governorship - where the UN assumes full responsibility for government, obviously in the worst case scenarios of total breakdown, either on its own or appointing a single power or group of powers to do so still being answerable to some UN mechanism to assure accountability; control - where there was a mandate to exercise direct control the UN would deploy through

46 Ibid., pp. 340-341.
48 Article 1 of the Montevideo Convention on the Rights and Duties of States sets out the criteria for statehood as being that a state should possess:

(a) a permanent population; (b) a defined territory; (c) government, and a capacity to enter into relations with other states. Brownlie defines "government" to mean a stable political community, supporting a legal order, in a certain area. I. Brownlie, "The Principles of Public International Law", 4th ed. Oxford University Press, 1990., pp. 72-73.
existing instruments of the state, observing the conduct of administration and having the power to take corrective action where necessary; partnership - where resources and structures may be reasonably adequate but there is a transition process required, from a totalitarian regime to democracy for example, so that there would be a "UN authority-in-trust" that would act as a partner of local authority but be "first among equals" having "the final say" in the transition period; and finally assistance - where there is disarray in administrative functions and the "trust authority" provides "an overall coherence and international standard for the development of government structures", the idea being that flaws in the system would be corrected through this authority.49

4.21 This leads him to the logical conclusion that these activities would require effective means of government to be at UN disposal and in particular in relation to the central problem of restoring and maintaining order, including "UN civilian police forces, an independent means of criminal prosecution and a criminal law developed for UN operations generally that takes account of human rights issues. These activities may only be possible in the context of a secure environment provided by UN military forces."50 This would require a more robust civilian policing approach than has previously been undertaken where real powers of arrest and investigation were assigned. It would require the possibility both legally and administratively of establishing an independent means of administering justice including an interim criminal law code for UN use which he says would be "a simplified document which takes account of

50 Ibid., p. 354.
various legal systems and is likely to be limited in the first instance to blatant violations. Practice and application will create the larger body of law for this activity.

4.22 Similar views are expressed by Gerald Helmen and Steven Ratner who talk of the need for a UN "conservatorship" mechanism. They argue that such a concept is compatible with the principle of sovereignty enshrined in the UN Charter because, "the purpose of conservatorship is to enable the state to resume responsibility for itself". These authors still felt that consent would be required from a "host state" but went on to add:

Whether that consent must be a formal invitation or simply the absence of opposition (emphasis added) would seem to depend upon the circumstances. The only exception to the principle ought to be rare situations involving major violations of human rights or the prospect of regional conflict where warring factions oppose international presence.

They seem not to have considered the situation where there is no state authority to deal with at all. To implement this conservatorship mechanism they say the UN would have to introduce a set of criteria for determining whether a state qualified for such support based on the concept that a state would ask for such conservatorship knowing itself that dysfunctionality was at hand and being
prepared voluntarily to surrender authority to the UN.\textsuperscript{55} This would seem highly implausible. They advocate the use of the Security Council, perhaps establishing a subgroup "not all of whose members need be on the council\textsuperscript{56}, as the appropriate UN organ to manage conservatorships under its own mandate with a budget approved by the General Assembly.

Thus the Security Council might set up a board of trustees for Somalia by resolution, specifying the terms of the plan, and appoint five countries (perhaps three from Africa on the recommendation of the Africa Group) as members.\textsuperscript{57}

4.23 To supplement such arrangements they suggest the UN Secretariat develop a "management facility" to administer and coordinate the conservatorship and provide relief.\textsuperscript{58} This would involve centralising various activities undertaken by separate UN organs and obtaining political acceptance of an institution that would be designed potentially to exercise government of all or part of the territory of member states, in certain cases without the consent of a state apparatus. Clearly this would take a major effort of international political will. Even if the will could be mustered problems of using countries from the region could arise in relation to self-interest or antagonism. There have also been tremendous difficulties with internal UN management arising from having to pay due deference to the political aspects of appointments rather than for

\textsuperscript{55} Ibid., p. 18.
\textsuperscript{56} Ibid., p. 19.
\textsuperscript{57} Ibid.
\textsuperscript{58} Ibid.
reasons of competence and efficiency that do not augur well for a "management facility".\textsuperscript{59}

\section*{Conclusion}

4.24 Despite some of the practical obstacles to these proposals the logic of Helman and Ratner's comments that head this chapter still rings true. There is a need to come up with a better institutional approach to collapsed states and this would be best achieved, from a juridical viewpoint, under UN auspices. Certainly there will be significant impediments to achieving this, including political sensitivities and the difficulty in mobilising the will of member states. It is also not a subject upon which it would be easy to marshall international public opinion to apply pressure to states to put the issue on the agenda. Similar difficulties would confront an attempt to construct a purpose designed convention. Significant jurisprudential issues of international law would also require resolution in reconciling such action with the UN Charter and the principles of sovereignty; although it is submitted that a supportive legal basis can be found in the expanded conception of the maintenance of international peace and security for authorising humanitarian interventions during the course of the 1990s.

4.25 The fundamental fact that confronts the international community however is; what happens if we have to do this tomorrow? At the moment no such institutional framework exists and is not likely to for some time, if ever. An

\textsuperscript{59} Righter, \textit{op cit.}, (n. 12) pp. 93-202.
intervention into a collapsed state can take place in circumstances of extreme urgency and could occur at any time. This can happen, for example, where there is a genocide under way or otherwise massive loss of life. In such cases, whatever position the international community adopts to the revival of the collapsed state, there is likely to be an interim period when the intervention forces are alone in a position on the ground to exercise control and to influence events.

4.26 The complexities of restoring and maintaining order in collapsed state interventions demand that something more than a broad and vaguely worded mandate is essential. One aspect of this issue that is certain is that the promotion of international law and the rule of law within states will not be served by the total absence of any standard or means of accountability for intervening forces. Setting unrealistic standards on the other hand could discourage the participation of states in such vital rescue operations and undermine the willingness to apply legal regimes.

4.27 In the absence of any alternative, it is submitted that the law of occupation will be the only framework available, unless the issue is more adequately addressed in the mandate. The mandate ought to express exactly what the nature of the relationship with the population is from the point of view of the restoration and maintenance of order and then provide for either the application of the Fourth Geneva Convention and ancillary provisions as guidelines or a reasonably detailed, prepared model. If this approach is
deemed the best then work on preparing the model should begin as soon as possible. In the meantime the only framework upon which we can draw is that which currently exists in the form of the law of occupation. In the absence of any superseding framework there may be circumstances where this law will in fact apply *de jure*. The demonstration of how this can be so will be the subject of the following chapters.
Part II
A Solution
CHAPTER FIVE: THE HISTORICAL DEVELOPMENT OF THE LAWS OF OCCUPATION

Initially, occupation was viewed as a possible by-product of military actions during war, and therefore it was referred to in legal literature as "belligerent occupation"... Today the more inclusive term, "occupations", is generally used. The emphasis is thus put not on the course through which the territory came under the foreign state's control, whether through actual fighting or otherwise, but rather on the phenomenon of occupation. This phenomenon can be defined as the effective control of power (be it one or more states or an international organisation, such as the United Nations) over a territory to which that power has no sovereign title, without the volition of the sovereign of that territory.

Dr Eyal Benvenisiti

Introduction

5.1 To determine whether the law of occupation can apply to a situation such as the Somalia operations of UNITAF and UNOSOM under the law as it exists today it is necessary to trace the historical development of the law of occupation. This is important because it demonstrates what concepts were encompassed in the law as it developed. It is also necessary in order to define the key terms found in the law such as the term "occupation" itself. Seeing how the law developed will, in addition, illustrate how it has come to grips with the issue of the public security function which, in turn, will facilitate consideration of the utility of the law in this respect and how it is to be applied in the light of state practice. What will emerge is the identification of the law of 'belligerent occupation' with the concept and state of war itself. In addition, the evolution of

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a parallel stream of law disassociated from the legal state of war will be identified and investigated. A sub-set of this law of 'non-belligerent occupation' that will also be considered is 'pacific occupation'. This was an occupation that occurred specifically in the context of an agreement with the sovereign of the occupied territory. After having determined what principles are inherent in these two traditions of belligerent and non-belligerent occupation, Chapter 6 will attempt to determine if and/or how these principles are reflected in the current state of the law. It is contended that the law of non-belligerent occupation would have applied to a Somalia style scenario, which demonstrates the importance of determining whether it continues to exist in any form.

What Constitutes "Occupation"?

5.2 The first attempt to address this question is to be found in the 1866 edition of Wheaton's international law text where it stated that 'occupation' implied a firm possession where the occupying power is able to assert its will over the people.² The authority of the occupant extended no further than the authority it could physically exert or obtain acquiescence to, its title resting on and measured by the force it had at its disposal. Other authorities of the period stated that the occupant's power extended over the territory it actually controlled and forcible possession reached only so far as there was an absence of resistance in the context of an ongoing contest against a belligerent.³ In such a case if any part of the territory held out then only what was possessed was

occupied and possession had to be maintained. This line of reasoning was reflected in the Brussels Code of 1874 which stated in Article 1 that a territory was considered occupied when it was actually placed under the authority of the occupant and it extended only to those territories where that authority was established and could be exercised. This 1874 definition was to be adopted for both the 1899 and 1907 Hague Codes.

5.3 Analysis of the formula that was adopted in the Hague Regulations of 1907, begins with the term "placed under the authority". This has been expressed as meaning "effective control". Effective control could involve, for example, the ability to repress an uprising of the population. There does not seem to have been a clear understanding of what constitutes effective control and it would appear that it could simply be stated as the presence of a sufficiently strong military force to give effect to the intentions of the occupant.

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5 Article 1 states, "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised."
6 The Brussels 'Code' (Project of an International Declaration Concerning the Laws and Customs of War, Brussels, 27 August 1874) was in the form of a Declaration and was not in fact adopted as a treaty. Source of Brussels and Hague Codes used in this work is D. Schindler & J. Toman, "The Laws of Armed Conflict", Martinus Nihjoff, 1988., pp. 22-34 (Brussels Code), & pp. 69-93 (Hague Codes).
7 The 1899 Hague Code (Convention with Respect to the Laws and Customs of War on Land and its annex: Regulation Concerning the Laws and Customs of War on Land, The Hague, 29 July 1899) also was not taken up as an international instrument but it formed the basis of 1907 Hague Code (Convention Respecting the Laws and Customs of War on Land, The Hague, 18 October 1907) which was adopted as a treaty.
10 Ibid., pp. 37-42.
Von Glahn highlights the distinction here between mere invasion or penetration of territory and occupation which denotes the actual control of territory. In other words occupation is not established when forces are merely passing through territory. An occupation that does not physically cover all the territory in which control is sought to be exercised can still be operable if the populations of these areas acquiesce in the control and authority of the occupant. Von Glahn summarises the control test as follows, "as long as the territory as a whole is in the power and under the control of the occupant and as long as the latter has the ability to make his will felt everywhere in the territory within a reasonable time, military occupation exists from a legal point of view".

5.4 There is no requirement in the Hague Regulations for a formal proclamation declaring an occupation and it is not established as a requirement of customary law, although considered good practice by many. It also appears that an occupation will exist regardless of the establishment of a special military administration. All that is required is that the deployed forces are capable of exercising authority over a certain foreign area where there is no form of indigenous government or, if there is, the authority of the government is inferior or subordinated to that of the deployed force. The Israeli Supreme Court in the Ansar Prison case dealt with this issue and the meaning of Article 42 of the

12 Ibid., p. 29.
Hague Regulations. The Court was deliberating on the status of the presence of the Israeli Army in Lebanon in 1982, in circumstances where no military administration was put in place or proclamation made that the area was under Israeli authority. An administration was not established as it was intended that the area in question would only come under temporary military control. The Court nevertheless held that there was an occupation stating:

A military force may invade or enter an area in order to pass through it to its intended goal and it may leave that area without establishing any effective control. But if the military force has taken control of the area in an effective and workable manner, then even though its presence in such an area is limited in time or its intention is to set up no more than a temporary military control, the situation thereby created is one to which the rules of warfare dealing with belligerent occupation apply. Furthermore, the application of the third chapter of the Hague Rules of the parallel instructions in the Fourth Geneva Convention are not conditioned upon the establishment of a special organisational framework in the form of a Military Government... Allowing the former government to act does not alter the fact that the military force is maintaining an effective military control in the area...17

16 See n. 8.
Belligerent Occupation

The Roots of Belligerent Occupation

5.5 In the legal concept of the law of belligerent occupation (Occupatio Bellica) the term 'belligerent', historically, denoted an occupation that had arisen in the context of a formal state of war or bellum. Although aggressive war was outlawed by the UN Charter, a formal state of war was still legally possible after the Charter in the case of a state acting in self defence. The situation of military occupation in the context of war is as ancient as war itself. Apart from

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18 Reference to a "state of war" in this work refers to the technical, legal status. The definition of a state of war in these terms is as follows: "...a state of war will arise either upon a formal declaration of war, whether unilateral or bilateral; or by some act of force done by one party against the other with the intent of war; or by some act of force done by one party, even without such intent, if the other elects to treat it as a cause of war." P. Corbett & W.L. Walker, "Cases on International Law: Volume II War and Neutrality", 5th ed. Sweet & Maxwell, 1937., p. 24. In this technical sense a "party" can only be a State. Dinstein, op cit., pp. 4-16. A legal state of war can only therefore exist where one or more States involved in a confrontation involving force elect to characterise that confrontation as war. Other manifestations of conflict attract different legal consequences. For example any type of international armed conflict attracts the operation of the Geneva Conventions of 1949, while any type of armed conflict is covered by common Article 3 of those conventions. Internal wars are addressed more specifically in Additional Protocol II to the Geneva Conventions. Any presence of the military forces of one State on foreign territory where this is by consent, such as pursuant to a status of forces agreement or treaty, or that is not characterised by either of the States involved as being in the context of a state of war, or where there is in fact no State structure in place in the territory in which the foreign forces are present capable of satisfying the definition of a State in international law, then that military presence is not in the context of a state of war. All that matters now from the perspective of international humanitarian law is that an armed conflict exists.

19 Article 2(4) of the Charter states: "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations."

20 Article 51 of the Charter states: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security." G. Schwarzenberger, "International Law as Applied by International Courts and Tribunals", Stevens & Sons, 1968, Vol II, pp. 45-52. Y. Dinstein, "War, Aggression and Self-Defence", Cambridge University Press, 1994., pp. 175-187. See also the comments of the Court in the Nicaragua case, ICJ 1986 14 at p. 94, where it was said that the Charter provision on self-defence exists alongside the customary law of self-defence which continues to be relevant in determining self-defence concepts and practice.
the practices of the Romans there was little formality about how occupied territory was to be managed. The thread that ran through the early historical experience was that upon conquest or occupation, the land and populace were completely at the mercy of the occupying troops and had no rights the occupying troops were obliged to observe. During the seventeenth century this began to change as the principle of the absolute right of monarchs was tempered by theories of natural law and this influence flowed through into the law of war. Grotius' treatise on, "The Rights of War and Peace", was an attempt to distil and reconcile these elements. With regard to the law regulating military presence his work did not take matters very much further. He described the state of the law as being that there was no legal constraint on the occupying forces but suggested the development of a regime based at least on moral principles. Grotius set out, however, one significant practice that modified the status of the occupied territory:

Lands are not understood to become a lawful possession and absolute conquest from the moment they are invaded. For although it is true, that an army takes immediate and violent possession of the country which it has invaded, yet that can only be considered as a temporary possession, unaccompanied with any of the rights and consequences alluded to in this work, till it has been ratified and secured by some durable means, by cession, or treaty.

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23 Ibid., p. 336.
5.6 This was a key development for it suggested a number of regulatory requirements. Firstly there would have to be a basis for regulating the relationship between the military forces and the civilian community in the absence of the right of sovereignty. Secondly this temporary condition would require prescription as to the continuing standing of the sovereign in relation to the territory, the force of the laws in place in the territory during the occupation and the status of any changes made to the laws by an occupying force. This theory also enshrined the principle that the situation was a temporary one, a theme that continues to the present day. All subsequent analysis of the law governing these circumstances must be based on an understanding of this temporary status, bearing no relationship or compromise in legal terms to the principle of sovereignty.24

The Lieber "Code" - 1863

5.7 The development of detailed principles governing military occupation, formally began with the production of the manual "Instructions for the Government of the Armies of the United States in the Field", drafted by Dr Francis Lieber, which became known as the Lieber Code of 1863.25 The context

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24 This position had to some extent been anticipated in comments on the issue of postliminium (the resumption of dispossessed rights after captivity) from Roman law by late sixteenth, early seventeenth century jurists, such as Ayala, "De Jure et Officiis Bellicus" (1582) Book I, Chapter 5, para. 33, and Gentili, "De Jure Belli Libri Tres" (1612), Book III, Chapter 17. Vattell echoed Grotius in discussion of the disposition of title to territory of a sovereign occupied by an enemy, "Le Droit des Gens" (1758), Book III, Chapter 13, para. 198. No other significant deliberations by jurists touching on military occupations were to be produced until after the introduction of the Lieber Code of 1863.

25 G. von Glahn, "The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation", University of Minnesota Press, Minneapolis, 1957., p. 8. The Code was promulgated as General Order no. 100 by President Lincoln on 24 April 1863 and the Union armies directed to apply it to the conflict then in progress. The version here referred to is the 1898 edition from the United States Government Printing Office and reprinted in D. Schindler
in which the code was introduced and applied is itself of great interest. It has been universally accepted and treated as a code which regulated the conduct of classic, formal interstate warfare. Although it was certainly intended to deal with such conflicts it was also intended for the guidance of Union troops in the American Civil War. As such it was the first codification of standards applicable to such conflicts, a subject that was not to be addressed again in such detail until Additional Protocol II to the Geneva Conventions in 1977. This makes the work particularly significant for this analysis. The Lieber Code was primarily concerned with the regulation of relations between the military forces and civilian populations. It was designed to address the growing circumstances of the control of the rebellious southern areas of the United States by Union troops as they advanced. The expansive nature of the code beyond conflicts between nations was indicated in Section X in particular, which deals specifically with Insurrection, Civil War and Rebellion.

5.8 Clarification of the application of the laws of war to civil war or insurgency situations in Section X highlights that this does not signify a recognition of the insurgent forces as a legitimate government or entity and does not afford neutral or third parties legal evidence upon which they can rely in recognising the insurgency as an international entity. Lieber indicated in Article 152 that "humanity induces the adoption of the rules of regular war

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26 Some publicists in fact viewed the Code as only applicable to civil war and that it could not be considered as the first codification of the laws of interstate war. This is however clearly not the case as the specific references to Civil War in the Code indicate Lieber was drafting for all conflict circumstances. D.A. Graber, "The Development of the Law of Belligerent Occupation, 1863-1914: A Historical Survey", AMS Press, New York, 1968., pp. 18-19. G.B. Davis, "Dr Francis Lieber's Instructions for the Government of Armies in the Field", American Journal of International Law, (1907) vol. 1, pp. 22-24.
toward rebels". The Code seemed, therefore, to assert that principles of humanity had emerged at that time to the level where the provisions of the Code were a minimum standard in civil wars, although this was confined to the conduct of the conflict and did not signify the extension of any other regime of international law to the rebellious individuals involved.

5.9 Article 1 of the Code stated the fundamental ground rule of occupation:

A place, district or country occupied by an enemy stands, in consequence of the occupation, under the Martial Law of the invading or occupying army, whether any proclamation declaring Martial Law, or any public warning to the inhabitants, has been issued or not. Martial Law is the immediate and direct effect and consequence of occupation or conquest. The presence of a hostile army proclaims its Martial Law.

5.10 Under the authority of martial law the local civil and criminal laws as well as the domestic administration and government continued in operation at the total discretion of the military commander, but the exercise of this authority was only to the extent that it was required by military necessity. In other words the civil and criminal laws were to remain in effect unless interrupted or stopped by order of the military commander.\(^27\) The reasons for interfering were related to matters such as the support and efficiency of the occupying force, its safety and the safety of its operations.\(^28\) Martial Law was to affect chiefly the police and collection of revenues, whether imposed by the sovereign power or the military

\(^27\) Lieber Code, Article 6.
\(^28\) Ibid., Article 10.
commander. However all the functions of the hostile government, legislative, executive or administrative at all levels, ceased under martial law or continued only with the sanction of the military commander who might chose to participate in these functions. The commander was to be strictly guided by the principles of justice, honour, and humanity in administering Martial Law, which would be justified in the degree of its stringency in accordance with the remoteness of the territory from the scene of actual or threatened hostilities.

5.11 Local magistrates, civil officials and citizens could be required to take oaths of temporary allegiance or any pledges considered necessary for the safety or security of the occupying army, and they could be expelled or arrested if they refused. Whether they did so or not it was asserted that the people and civil officers owed strict obedience to the military authority for as long as they were in control. The salaries of those who continued in service were to be paid from public revenue. They could not be compelled to the service of the victorious government this authority being subject to the settlement of the ultimate status of the territory. The occupying army could appropriate all public money and movable property and all the revenues of real property belonging to the hostile government or nation. Private property could only be seized due to military necessity for the support and benefit of the army. In the case of civil

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29 Ibid.
30 Ibid., Article 3.
31 Ibid., Articles 4 & 5.
32 Ibid., Article 26.
33 Ibid.
34 Ibid., Article 39.
35 Ibid., Article 33.
36 Ibid., Article 31.
37 Ibid., Article 38.
wars or insurrections the commander was to throw the burden of the war on the disloyal citizens, subjecting them to stricter regulation than non-combatant civilians in inter-state war.\textsuperscript{38}

5.12 It was notable that the code continued to recognise that, in the context of interstate war, an occupation did not affect the issue of sovereignty. Other notable features were: the indication of the general requirement to leave local laws intact unless otherwise required the military necessity of supporting and securing the troops, the provision for the continuation of administration, the relationship of that administration to the occupying power and finally the extension of these rules to include a civil war situation.

\textbf{Brussels - 1874}

5.13 A conference was held in Brussels in 1874 at which the first international attempt was made to codify the laws of war including occupation issues. The conference took its lead from the Lieber Code, which by now had been adopted by the defence forces of a number of states.\textsuperscript{39} The Brussels code contained fifty-six articles of which seventeen dealt with belligerent occupation.\textsuperscript{40} While the Brussels code was not subsequently ratified it did become the basis for the provisions drafted at the Hague conferences of 1899 and 1907 and it was regarded by many, including the Institute of International

\textsuperscript{38} \textit{Ibid.}, Article 156.
\textsuperscript{39} These included Italy, Russia, France and Germany. Von Glahn, \textit{op cit.}, p. 8.
\textsuperscript{40} These were Articles 1-10 and 36-42. Schindler & Toman, \textit{op cit.}, pp 22-34. Graber, \textit{op cit.}, (n. 4) pp. 23-24.
Law, as a statement of the laws of war at that time. It was also incorporated into the military manuals of many nations.

5.14 The Brussels code distinguished the circumstances in which the laws of occupation would apply and confirmed that an occupation was a temporary condition that did not affect the issue of sovereignty. In Article 2 the code introduced the admonition to the commander of occupation forces to re-establish and assure, as far as possible, "l'ordre et la vie publique", (public order and civil life). The code also provided that local officials who remained in their posts and were not replaced by the occupying power ought to be protected as long as they discharged their duties in good faith. The occupant was permitted to collect taxes if the previously existing system had broken down as long as this was in accordance with existing forms and practices, for defraying the expenses of the administration of the territory to the same extent as the sovereign government was obligated. The broad authority of the

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41 The Institute of International Law was founded in 1873 as an association of fixed membership and associates of different nations. Its object was to aid the growth of international law by stating discernible general principles and assisting with the codification of the law. It was very influential in achieving these objectives during this period. Schindler & Toman, op cit., p. 36


43 These included once again Italy, Russia, France, Germany but also England. Graber, op cit., (n. 4) pp. 20-26.

44 The version referred to here is reproduced in Schindler & Toman, op cit., pp. 22-34. The authentic French text was obtained from the ICRC CD-ROM, "International Humanitarian Law", ICRC Publications, Version 2, 31 December 1993.

45 Brussels code, Articles 1 & 7.

46 The authentic text of the code being in French the translation of this phrase into English has become a point of contention. It is an important point because the Hague Regulations of 1907, which remain in effect in this respect, use the same phrase, while the authentic text is also in French. This debate will be dealt with in Chapter 7. For the purposes of this work the English translation cited here will be used. E. Benvenisti, "The International Law of Occupation", Princeton University Press, 1993., p. 7, n.1.


48 Ibid., Article 5.
occupying power was preserved with no further modification on the Lieber code.\textsuperscript{49}

**The Hague - 1899-1907**

5.15 After the failure of the Brussels conference another attempt to obtain international ratification of a code of war was made in 1899 at the instigation of Tsar Nicholas II of Russia. The results of the conference, convened in The Hague, were to follow much the same lines as the Brussels attempt with the same points of contention. All the provisions regarding belligerent occupation remained the same. The difference on this occasion was that all the powers who attended the conference ratified the Code. Another conference was convened in the Hague in 1907 to review the 1899 Code but there were very few amendments to the law of belligerent occupation. The Hague Code of 1907 was widely adopted and has been the subject of extensive interpretation by tribunals, authorities and governments.\textsuperscript{50} More importantly with regard to the law of occupation, certain provisions of the Regulations annexed to the 1907 Code have been preserved by virtue of Article 154 of the Fourth Geneva Convention of 1949.\textsuperscript{51} These provisions will be considered in detail in Chapter 7.

\textsuperscript{49} Graber, *op cit.*, (n. 4) pp. 37-217.
\textsuperscript{50} Graber, *op cit.*, (n. 4) pp. 59-256.
\textsuperscript{51} The Article states, "In the relations between the Powers who are bound by the Hague Conventions respecting the Laws and Customs of War on Land, whether that of July 29, 1899, or that of October 18, 1907, and who are parties to the present Convention, this last Convention shall be supplementary to Sections II and III of the Regulations annexed to the above-mentioned Conventions of The Hague".
5.16 A point of significant interest in the development of these codes was the lack of treatment of the issue of judicial administration. This was in marked contrast, as we shall see, to the attention the matter was receiving in non-belligerent/pacific occupations. This was probably due to the fact that the exigencies of war placed a far higher emphasis on the Martial Law of the occupier than in non-belligerent occupations. There would therefore have been a reluctance to proscribe the discretion of a belligerent occupant in this regard.

The Experience of Belligerent Occupation Under the Hague Code - 1914-1949

5.17 During the World War I German occupation of Belgium from 1914-18, a number of issues arose that posed questions of the Hague Regulations, particularly with regard to Article 43 which states:

a. "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all measures in his power to restore, and ensure, as far as possible, public order and civil life, while respecting, unless absolutely prevented, the laws in force in the country."

The Germans instituted many measures in Belgium which facilitated their administration and which were also highly intrusive in some respects. Division by the Germans of Belgian territory into three zones was based on operationally related distinctions. There was a zone a few miles wide near the fighting called "the zone of operations" in which strict martial law applied. Then
there was a "zone of rear areas", containing crucial rear echelon and supply resources, which was under military administration and in which the civilian inhabitants were left largely to fend for themselves. The third zone was called "the zone of occupation" and under nominal civilian control with a German governor general administering in Brussels. In March 1917 however the Germans passed a decree dividing the country up into two administrative districts which coincided with the division between the Flemish and Walloon populations. It could be argued that this measure was designed to foment division and went beyond the provisions of Article 43 as it could not be justified as a measure to ensure public order or the maintenance of the security of the occupying forces.

5.18 During the Armistice period following the defeat of Germany in November 1918 to June 1919 when the Peace Treaty and the Rhineland Agreement were signed (which will be discussed below as a non-belligerent occupation) the Allies stated that the Hague provisions would be applied to occupied German territory. Despite some failings this was largely the case. In particular, the German administration was left completely intact.

5.19 There were particular difficulties arising in this period as a result of the scale of World War I that had not been encountered in previous occupations. The Rhineland was prostrate with severe dislocation, both economically and

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53 Benvenisti, op cit., (n. 1) p. 43.
54 Ibid., pp. 42-46.
55 See paras 5.44-5.52 infra.
socially. The area was in the grip of widespread food shortages and the population bordering on starvation. This economic ruin and starvation could not be dealt with through any supervisory methods of occupation administration that had yet been employed. This forced the Allies to create the Inter-Allied Rhineland Commission which had the primary responsibility of addressing the economic problems and food relief but also assumed many administrative functions. In order to restore and ensure public order the allies found it necessary to make extensive interventions in the economic and relief affairs of the territory. This was not a legal obligation previously apparent under the Hague Regulations but it was clearly a humanitarian one and a key factor in maintaining control over the territory. These considerations added to the experiences of World War II, would lead to a reappraisal of the obligations of the occupant in the Fourth Geneva Convention.\footnote{Ibid. pp. 12-14.}

5.20 The situation that confronted Allied forces in World War II as they liberated territories throughout Asia, Africa and Europe was infinitely worse than post World War I Germany, amounting in many cases to the total absence of any form of administrative capacity. In Africa the British armies faced something of an administrative, logistic and cultural nightmare as they came into custody of territories as diverse as Ethiopia, Eritrea, Somalia, Madagascar, Cyrenaica and Tripolitania.\footnote{Lord Rennell of Rodd, "British Military Administration of Occupied Territories in Africa: During the Years 1941-1947", His Majesty's Stationary Office, London, 1948., pp. 113-121.} The problem of the administrative division of occupied territory became an issue in a similar manner as the German occupation of
Belgium. During their occupation of Cyrenaica in North Africa, the territory was divided into two administrative areas for what they declared to be benign, practical reasons, although there arose as a consequence some tension between the Arabs of the two areas. From the two experiences the rule would appear to be that the division of territory would be permissible for such benign purposes, provided there had not been previously existing divisions or subdivisions, in which case the occupation ought to give due effect and recognition to these divisions.

5.21 The overlay of an absent and dispossessed Italian sovereign, combined with colonial circumstances, provided the demanding context for the British occupations in Africa. A set of instructions was issued for the administration of Eritrea and Somalia which were to be a model for the other African territories. These referred to the Hague Regulations and specified that the laws and courts were to remain in operation as far as possible but should the judiciary be unable or unwilling to carry out its duties then the authorities were authorised to appoint their own. Religious observance was guaranteed with the proviso that clerics not engage in any political propagandising inciting resistance or revolt against the occupying force. The same was true with education, teachers being obliged to refrain from reference to politics and required to submit to inspection of the schools. Detailed guidelines were provided for the issuing of regulatory

59 Part of modern Libya.
61 Von Glahn, op cit., (n. 25) p. 266.
62 Ibid., p. 116-121.
63 Ibid., p. 117.
proclamations and the approval of legislation enacted by the remaining Italian Governors.\textsuperscript{64}

5.22 In Somalia the British were confronted with a situation which was to prove similar to that faced by UNITAF and UNOSOM forces 51 years later, centred on the widespread availability of arms and the serious threat of bandit gangs.\textsuperscript{65} The priority for the British therefore became the creation of a police force to maintain order and disarm these elements, as there were no regular troops available for this task.\textsuperscript{66} The additional problem the British faced in this respect was that the Italian police force had to be completely disbanded as unreliable and were made prisoners of war. This was a dilemma never experienced in any previous occupation. A training depot was established in Mogadishu and an outside contingent of police was brought in.\textsuperscript{67}

5.23 The prisons were also in a "deplorable" condition.\textsuperscript{68} These were reformed and reorganised.\textsuperscript{69} Action was also taken in relation to education. With the existing conditions of economic ruin, drought, locusts and famine, improvements in farming and food production were undertaken. This proved extremely successful, making Somalia self-sufficient in essential food stuffs.\textsuperscript{70} This signals an important point about the requirements of effective occupation administration in territories where administration, law and order, economic life,
and food production and distribution have extensively or totally broken down. These cases pointed to the need for a far more extensive framework to address occupation than suggested by the simple formula of respecting local law and administration and the right to restore order, provided for in the Hague Regulations. Where there is no justice administration but there is a requirement to respect local laws the occupation administration is obliged to take action to acquire familiarity with, and make arrangements to give effect to, those laws. In this respect there arose a need to acquire English versions of the Italian Penal Code. Texts and knowledge of applicable international law were in short or non-existent supply. With armed bands roaming the countryside there was the potential danger of turmoil and feudal warfare. Establishing a police force as a first priority, combined with the good fortune of improved food production due to adequate rains, helped to avoid this total disintegration.

5.24 It was quickly realised by the British that the establishment of courts would inevitably have to follow and with not too much delay. The Legal Department was called on to set up courts for the first time in Cyrenaica in 1941. It was a complete system of criminal courts termed 'British Courts' to avoid the term 'Military Courts'. These courts were staffed with officers and applied Italian criminal law, having jurisdiction over offences against the ordinary criminal law as well as war crimes and offences created by proclamation. The court of highest jurisdiction was composed of three officers sitting together, mirroring the British military court structure and empowered to

71 Rennell, op cit., (n. 58) p. 333.
72 Ibid.
impose the death sentence subject to confirmation by the Commander-in-Chief. This power was later delegated to the Chief Political Officer. There was no appeal structure but convicted persons were able to petition the Commander-in-Chief. This was the system that came to be applied throughout the territories until Italian courts were able to resume functioning where this was possible. In Somalia this resumption was not possible outside Mogadishu. Where Italian courts were able to resume and were accepted by the population they were not permitted to hear war crimes trials and were placed under the supervision of the Legal Officers of the territories in which they functioned. These officers could intervene to transfer cases to British courts where necessary. Some aspects of the Italian Penal Code were modified in their application in the British courts to accord with standards of British justice considered more appropriate. The Italian Code prescription of minimum sentences and the provisions relating to criminal lunatics are two examples of aspects that were so modified.

5.25 In Somalia ad hoc military courts operated for a time assisted by Judicial Instructions issued by the Legal Adviser covering all aspects of the law to be applied. In Cyrenaica the British military courts were the only criminal courts in operation. By proclamation these dealt with war and civil crimes while the Sharia and Rabbinical courts were permitted to continue functioning, dealing with religious matters, family law and succession. With the absence of indigenous courts able to administer the Italian Penal Code the first military

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73 Ibid., pp. 336-337.
74 Ibid., p. 338.
75 Ibid., p. 339.
tribunals administered a Civil Offences Proclamation utilising English criminal procedure.\textsuperscript{76} In Tripolitania the Italian courts were able to function and did so satisfactorily so that the military courts left most matters to these.\textsuperscript{77}

5.26 When the Legal Advisers finally acquired the texts in international law that they had been seeking, they found they were of no assistance. Lord Rennell explained that:

The observations in these learned works dealt with a state of affairs which might have arisen in the territory of a sovereign state in Europe a quarter of a century ago, where homogeneous nations were concerned and where existing law and judicial and executive arrangements were adequate... Such was not the picture in the Italian African Empire in 1940 and the ensuing years.\textsuperscript{78}

In other words the Hague Regulations and the writings of publicists up to that time were woefully inadequate to address these type of scenarios and further experience in Europe and Asia was to show that this was not confined to occupations in Africa.

5.27 When Allied forces progressed through Europe in the final campaigns of World War II they had already acquired significant experience of occupation and had begun planning for the eventuality of overrunning German territory. In

\textsuperscript{76} Tracey Watts, \textit{op cit.}, (n. 60) p. 76.
\textsuperscript{77} Lord Rennell, \textit{op cit.}, (n. 58) pp. 334-344.
\textsuperscript{78} \textit{Ibid.}, p. 345.
the lead up to the German occupation the assessments made by Ernst Fraenkel, to be considered below,\textsuperscript{79} concerning the shortcomings of the Rhineland pacific occupation, were given due regard as were the lessons gleaned from the general mistakes made in dealing with Germany following World War I.

5.28 There were two significant difficulties not within the contemplation of the Hague Regulations that faced the Allies. First was the utter devastation of Germany far beyond that experienced in the Rhineland and certainly well beyond anything contemplated in 19th Century European warfare. Secondly, the Hague Regulations required the occupying force to respect, unless absolutely prevented, the laws in force in the territory. The laws in force in Germany included the race and anti-democratic laws that the war was now largely all about. The Allies had agreed that something had to be done about German society in general, not just defeat of its armies. This meant that these laws would not be allowed to remain. In fact it would now come to be articulated as a result of the war that many of these laws were contrary to general principles and standards of international law, even though no conventions dealt with the subject, and as such were a legitimate international concern and target for action. Schwarzenberger asserts that, even before the Fourth Geneva Convention, there was an exception to the stipulation to respect local laws:

\begin{quote}
It is concerned with the position of a civilised Occupying Power in the territory of an enemy who has relapsed into a state of barbarism. In so
\end{quote}

\textsuperscript{79} See para. 5.44-5.52 \textit{infra}. 

\textsuperscript{79}
exceptional a situation, compliance with the standard of civilisation may demand action, rather than the exercise of restraint. It may, for instance, make unavoidable the exercise of the occupant's legislative powers for the double purpose of destroying the legal foundations of such a barbarous system and restoring a minimum of civilised life in the occupied territory.80

5.29 In September 1944 there was an awareness that the Allied military commanders would need guidance and a framework for administering conquered territories before the eventuality. As a result a number of ordinances were produced on 18 September 1944. These provided for: (a) a detailed list of crimes and offences to substitute for German law; (b) the abrogation of Nazi law; (c) dispensation of compliance with German law; (d) regulation of German courts; (d) military government courts; and (e) communications in Germany.81

When the occupation of all German territory was complete the country was divided into zones, as had previously been agreed at Yalta, assigned respectively to the forces of the US, UK, USSR and France. The military commander of each zone was designated the supreme authority in the zone with the central authority for the whole country vested in the Allied Control Council in Berlin.82 Full German sovereignty was not to be restored to West Germany till 1955. This opened up a complicated debate about the status of the occupation in international law.

80 Schwarzenberger, op cit., (n. 20) p. 195.
The issue was: when did belligerent occupation end, and what was the status of any other periods of control over German territory? It is clear that a belligerent occupation would not normally end until the end of the formal state of war, which could occur for example on the signing of a peace treaty. The belligerent occupation in Germany would not therefore have ended until, in the case of the US, 1951, when at President Truman's request Congress declared the state of war with Germany to be terminated. Notwithstanding this the occupation and the exercise of the rights of the occupant were to continue until 1955 and President Truman clearly indicated to Congress that this was to be the case. We would normally then identify the period from 1951-1955 as a pacific occupation. But the situation and the assertions of the Allies were more complicated than this. For example a Statute of Occupation was promulgated in 1949 in which a West German government and basically a new state was created, with the conditions laid out under which the continuing occupation would be governed. This Statute was ratified by the newly convened Parliamentary Council in Bonn. This meant that the occupation was no longer carried on through the dictates of the Military Government but in agreement with the duly elected representatives of the territory, in effect the sovereign. From that moment on the occupation therefore acquired the clear

83 "The rights of the occupying power do not rest upon the existence of a state of war, as such, and will not be affected by its legal termination. The rights of the Occupying Powers result from the conquest of Germany, accompanied by the disintegration and disappearance of its former government, and the Allied assumption of supreme authority." Truman letter to Congress, July 1951, Information Bulletin (Office of the US High Commissioner for Germany), August 1951., p. 66.
84 Pinson., op cit., (n. 82) p. 569. See discussion of what constitutes a pacific occupation, para 5.35 infra.
85 Ibid., p. 557.
characteristics of a pacific occupation, particularly with there being no suggestion that hostilities would resume.

5.31 Further complicating the issue however are assertions by some commentators that the state of belligerent occupation ended following the arrest of the German government, such as it was, on 23 May 1945 and the Declaration on 5 June 1945\(^\text{86}\) that active hostilities had ceased.\(^\text{87}\) It was asserted by the Allies themselves that with this unconditional surrender and the total dissolution of German sovereignty the occupation was no longer a belligerent occupation but an occupation of conquest.\(^\text{88}\) This meant that the Allies would no longer be restricted by the provisions of the Hague Regulations but would be able to exercise the rights of a sovereign over conquered territory. They would therefore be free to dispose of, and deal with the territory as they saw fit. Such an argument would involve determining whether the rights that may be exercised under conquest are only available if the conqueror intends to incorporate the territory into his own state which is beyond the scope of this work. Nevertheless, it would appear that there is merit in the argument given that the whole of the territory of the sovereign was under Allied control, the previously existing sovereignty was totally extinguished, the Allies had assumed supreme authority, and the territory was to be substantially altered by detachment of significant areas to other sovereign nations.

\(^{86}\) Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority with Respect to Germany and Supplementary Statements, 5 June 1945, reproduced in *American Journal of International Law*, July 1945, Supplement, p. 171.


5.32 What the allies found by way of administration when they did overrun Germany was a total vacuum:

The complete governmental structure of the country, not only at the top but even on the smallest municipal and village levels, collapsed in its entirety. The elite leadership which had held the country in its grip for the preceding decade disappeared abruptly from the scene. Nor was there a new leadership elite to take its place.\(^{89}\)

To this fact was added the experience of liberating the concentration camps which revealed the full horror which German politics and society had unleashed. The opportunity was therefore presented for a drastic remoulding of the German polity and the allies declared a policy summarised as the "four D's". These were de-nazification, demilitarisation, decartelisation and democratisation.\(^{90}\) One of the key characteristics of this reform drive was that the occupation policy in West Germany was given a high degree of cohesion by the dominance of the American involvement even though there were initially separate British and French zones.\(^{91}\) This addressed one of the major dilemmas of the Rhineland occupation after World War I.\(^{92}\) While many of the occupation policies of the US may not have been successful or were too

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\(^{89}\) Pinson, *op cit.*, (n. 82) p. 534.


\(^{91}\) Of course the Soviet Union pursued far different objectives in the East German area. See paras 5.44 - 5.52, *infra.*
ambitious, there is no doubt that they achieved their overall aim of producing a pacified, democratic, responsible West German polity.\textsuperscript{93}

5.33 Many of the same considerations also applied to the occupation of Japan. The intrusion into Japanese society was just as extensive, if not more so, in that the whole concept of the Japanese relationship to government, being based on a religious adherence to the person of the emperor, meant addressing basic tenets of religious faith as well as institutions. This highlights the main feature of the occupation in that while Germany was occupied by Europeans of predominantly the same Christian background, Japan would require far greater cultural sensitivity and awareness if any of the reforms were to be durable.\textsuperscript{94} The positive results of the occupation of a country which no longer threatened international peace and which was left in a position of anti-militarist self-determination, were significant achievements.

5.34 There is much to be learned from a careful study of the Allied occupations arising from World War II. This is particularly so in the context of any future humanitarian interventions conducted by the international community in the circumstances of collapsed states or states which have descended into barbarism.


\textsuperscript{94} Manchester, \textit{op cit.}, pp. 459-538.
Non-Belligerent Occupation

What Constitutes Non-Belligerent Occupation?

5.35 The principles of non-belligerent occupation grew from the more complex and diverse types of military presence that began to occur in the 19th Century. The key criterion with respect to this stream of the law is that the occupation took place in a context which was not associated with a formal state of war. Determining what the legal requirements were in relation to establishing the existence of a non-belligerent occupation is difficult but it would appear that the criteria were similar, in the case of non-treaty occupations, to those that applied to belligerent occupation. The legal opinion dealing with the US non-belligerent occupation of Cuba in 1899 produced by the US government appeared to look at the matter in terms of the effective authority of the previous sovereign having disappeared, there being no other effective authority in the territory and the military force being able to assert authority. This was sufficient to activate the rights and obligations that flow under non-belligerent

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95 See R. Robin, "Des Occupations Militaires En Dehors Des Occupations De Guerre", extracts translated, Carnegie Endowment for International Peace, Washington, 1942. F. Llewellyn Jones, "Military Occupation of Alien Territory in Time of Peace", Transactions of the Grotius Society, vol 9, London, 1924., pp. 149-162. These military occupations other than in states of war included occupatio pacifica or occupations by consent. The term 'pacific' did not denote that the occupation was 'peaceful' in the ordinary sense of the word, or that no force was used, but that it was in legal terms an occupation outside the context of a formal state of war, by treaty, invitation or acquiescence of the state to be occupied, humanitarian interventions, occupations of a collapsed state, or simply de facto military occupation of territory whose status was uncertain. This will be illustrated in the following examination. 'Belligerent' occupation was a legal regime that applied to formal states of war only, including occupations pursuant to an armistice as a state of war is not terminated thereby. As we shall see below, this distinction became irrelevant after the introduction of the Fourth Geneva Convention of 1949. Schwarzenberger, op cit., (n. 20) pp. 84-85. G. Schwarzenberger, "International Law as Applied by International Courts and Tribunals", Stevens & Sons, 1957, Vol I, pp. 84-85.

occupation. There would seem to be no reason why the criteria would differ from what is required under the law relating to belligerent occupation with the essential elements being the effective control of territory in which the writ of the sovereign no longer runs. In this respect the analysis of the criteria for belligerent occupation by the authorities is equally applicable to non-belligerent occupation, with the Von Glahn formula\textsuperscript{98} in particular providing a logical reference point. The existence of a pacific occupation depended on the terms of the relevant agreement governing the presence of the forces in the foreign territory.

**The Roots of Non-Belligerent Occupation - 1800-1873**

5.36 As we have seen there was already in the Lieber Code a blurring of the application of 'belligerent' occupation principles by their extension to civil wars and internal conflicts as a standard of civilisation. Further complicating matters was the fact that during the nineteenth century there was a discernible trend towards the development of a state practice of occupation by military forces not in the context of states of war between sovereign states. Something which had not been evident up to that time. This trend coincided with and was in fact driven by the age of European expansion through nationalism and imperialism, but also occurred in the context of the attempt by conservative forces in Europe to retard the democracy revolutions. The circumstances in which occupations of this kind occurred could be in pursuance of a treaty, for re-establishing

\textsuperscript{97} Ibid., pp. 11-15.

\textsuperscript{98} See para 5.3 supra.
domestic order in a country, or a deterrent move to defend a friendly
government from internal or external enemies.\textsuperscript{99} Quite often it was to ensure
compliance with international duties owed to the occupying state or to extract
reparations and guarantees for the future, the territory being held as security, or
to supervise the reparative arrangements.\textsuperscript{100} While not necessarily 'peaceful'
they were nevertheless, in the strict sense, not belligerent occupations and in
some cases fell within the category of \textit{occupatio pacifica} (pacific occupation)
that is occupation by agreement. Raymond Robin summed up the discernible
principles of these occupations as follows:

\textit{...in cases of occupation by way of intervention, the powers of the
occupant are, in general, more extensive than they are in cases of
occupation by way of guarantee. Often, to be specific, occupations for
the purpose of intervention admit of a certain interference in the
administration of the occupied country; a fact which may be explained
by the very purpose of these occupations (ie to restore order). But they
have no fixed rule: their extent varies with the circumstances attending
the occupation. Sometimes the result is tantamount to placing the
government of the occupied state in a position of tutelage and giving to
the occupant what is apparently supreme authority; and sometimes, on
the other hand, the occupying state confines itself to taking care of
police matters and the re-establishing of order.}\textsuperscript{101}

\textsuperscript{99} D. Thompson, "Europe Since Napoleon", Penguin, 1966., pp. 21-76. The Convention of
La Soledad. Robin, \textit{op cit.}, (n. 95) pp. 27-40, 228-238.
\textsuperscript{100} Robin, \textit{op cit.}, (n. 95) pp. 9-10.
\textsuperscript{101} \textit{Ibid.}, pp. 237-238.
A different style of occupation, but one also involving law and order issues, was the continuing occupation of parts of France by German forces, provided for in the peace settlement following the conclusion of the Franco-Prussian war of 1871, and therefore a clearly pacific occupation. The continuing occupation was by way of guarantee with respect to the reparation obligations agreed to by France. The treaty regulating the occupation was distinguished by the manner in which it sought to define the jurisdiction of the occupying force in terms of the maintenance of order and the security of the force. By that time the German forces had in effect adopted the Lieber Code which had gained significant influence. The Germans had extensive rights to search residences, confiscate arms, prohibit inflammatory publications or meetings, withdraw all crimes against public order from the local courts and employ courts martial to deal with them. A point not addressed by the treaty however was the issue of crimes committed against the German forces by the inhabitants. This is important for where the formal treaty was silent, general principles of international law had to be applied. In this respect the state of the law at that time appeared to be that, even in cases of pacific occupation, the occupant had the right of jurisdiction over the inhabitants of the occupied territory who were guilty of offences against the force and they could be tried by military court martial. The difficulty that arose here was that, under the treaty, the policing responsibilities had been returned to France so the Germans would be dependent upon French investigations and arrests to bring any such offending parties to trial. This issue was successfully resolved through

102 Ibid., p. 61.
cooperative efforts as the Germans realised that any attempt at policing on their part was likely to be ineffectual as they would be unable to "penetrate into the recesses of the country in order to find and seize the guilty persons." In practice a cooperative approach was adopted so that the majority of these type of matters were dealt with by French courts.

The Principles of Non-Belligerent Occupation Take Shape - 1882-1898

The next significant example in the practice of states was the British non-belligerent occupation of Egypt in 1882. The stated purpose of this occupation was the re-establishment of internal order and in this sense was in the tradition of the Austrian occupation of Piedmont and Sicily in 1821, and the French occupation of Rome from 1849-1870. The difference being that the occupation was not at the request of the local authority and it was not regulated by treaty. The intervention had arisen from the threat to British and French interests and nationals in Egypt which was at that time under Turkish suzerainty. Turkey was clearly unable and unwilling to do anything about the situation. There was no action or desire to enter into a state of war by Turkey or any other power to prevent the British intervention, as long as the stated sole purpose of re-establishing order was adhered to. Turkey sought instead to ensure firm plans for a British withdrawal but was unable to do so. The British were to remain in Egypt until 1922 with a brief return visit in 1956. The reasons given for this perpetuation were the unfinished pacification, the need for reorganising the country, and finally the trouble in Sudan. During the period of

Ibid., p. 62.
occupation the British exercised extensive rights to restore order and totally reconstruct the civil administration.\textsuperscript{104} This occupation appeared to violate the most fundamental principle of non-belligerent occupation, that the entire operation must be geared to the resumption of the authority of the sovereign as soon as possible. That this was required was indicated by the continual international pressure on Britain to indicate a departure date.\textsuperscript{105}

5.39 More interesting from the point of view of non-belligerent occupations in administrative or legal vacuums in terms of state entities were the issues that arose from the conclusion of the Spanish-American War in 1898. US defeat of Spain left US forces in possession of Puerto Rico, Cuba, and the Philippine Archipelago within which they had established temporary military administrations. These administrations continued following the conclusion of a treaty of peace with Spain and could no longer be classified as belligerent occupations. Conditions in the three territories differed. In Puerto Rico the US sought to annex the territory and therefore replace Spanish sovereignty with its own. In the Philippine Islands the US became engaged in suppressing an insurrection while asserting its own sovereignty over the islands, at least for the near future. In Cuba the declared aim was the island's independence and therefore sovereignty was to vest in the Cuban people. As a result of the perplexing issues arising from the occupations the US Secretary of War initiated a legal report which was subsequently approved, adopted and

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\textsuperscript{104} Pakenham, \textit{op cit.}, (Chapter 1, n. 6) pp. 131-140, 189, 211, 339-341., Robin, \textit{op cit.}, (n. 95) pp. 87-93. \\
\textsuperscript{105} \textit{Ibid.}
\end{flushright}
published by the Administration. The report had reference to the Lieber code, to a number of US Supreme Court decisions arising from the Mexican War, the American Civil War and the subsequent military occupations of various states, to the unratified Brussels Code and to the works of eminent publicists.

5.40 The report clearly drew a distinction between the conditions of occupation that apply during a state of belligerency and a state of peace. Whatever legal rights accrued to a military force in both circumstances sprang from the same source according to international law and usage. That is to say, the fact of military occupancy, all authority in the territory being in the hands of the occupier and the sovereign being unable to exercise any power. There were clear principles that had come to be accepted internationally as governing the belligerent occupation:

   Military Governments, resulting from military occupation, are intended to perform two services: (1) Promote the military operations of the occupying army; (2) preserve the safety of society.107

The US specifically adopted the obligation expressed in Article 2 of the Brussels Code, that the occupier should do everything in its power to re-establish and secure, as far as possible, public safety and social order. This obligation also applied to non-belligerent occupations but the actions justified in a state of belligerency would be dramatically altered in non-belligerency:

106 Magoon, op cit. (n. 96).  
107 Ibid., p. 11.
But when the war is ended and the military government ceases to be an instrument to promote actual warfare and devotes itself simply to civil affairs instead of military affairs, limitations at once attach. The reason for this rule is derived from the established doctrine that military government or martial rule is the creature of necessity, and its acts must be justified by necessity - real or apparent.108

5.41 The overriding principle, which had been reiterated by the US Supreme Court, was that "necessity" gave rise to the authority of the military force in the sense that, there being a displaced or non-existent civil authority, the substitution of a fresh authority was "necessary" to preserve the safety of the army and society.109 Without the exigencies of war less stringent security measures should be necessary, unless there was wide spread lawlessness or insurgency to deal with. As there was no other power but the military it was allowed to govern until the laws could have their free course. This was applicable to civil wars as well as occupation of foreign territory. The continuance of military government in southern states after the US Civil War was sanctioned in the Reconstruction Acts110 and upheld by the US Supreme Court.111 This was precisely because there was no adequate protection for life or property existing in the subject states and military government was

108 Ibid., p. 15.
110 Legislation (14 Stat. L., 428; & 15 Stat. L., 14) passed by the US Government to eliminate slavery, ensure democratic government and provide for the temporary administration of the southern states. Some of these provisions were relied upon as late as the 1960s in civil rights campaigns. Magoon, op cit., (n. 96) p. 17.
necessary for enforcing good order and peace until a state government and apparatus could be created. Instead of administering the laws of war, the state of war having ended, the military government was obliged to administer the laws of peace. The maximum rights, privileges and immunities available under the civil codes formerly applying in the occupied territory should be given effect. Similarly it was clearly permissible for a military force to administer a system of criminal justice where none existed, but this must cease as soon as the courts were reinstated.\textsuperscript{112} These principles were asserted by the report to be equally applicable in non-belligerent occupations under international law.\textsuperscript{113}

5.42 The mandate of the occupying forces in non-belligerent occupation was to create the conditions which would enable the civil branch to assume ascendancy in the affairs of civil government and to preserve peace and order in the meantime. In attaining this end the force was to utilise the laws in force in the territory at the time of the arrival of the occupying force, supplemented by the military orders that were necessary to secure order. These military orders do not have the status of legislation in the sense that they are only in effect until civil administration is resumed. Upon this event the civil administration would be required to specifically incorporate the military orders into law if it desired them to remain in force.\textsuperscript{114} In addressing the novel situation in Cuba where there was no longer Spanish sovereignty or any state apparatus, the US

\textsuperscript{112} This drew upon the American experience of having established military courts in both the Mexican and Civil Wars and terminating them when the local systems were sustainable. Magoon, \textit{op cit.}, (n. 96) pp. 18-22.
\textsuperscript{113} \textit{Ibid.}, p. 19.
\textsuperscript{114} \textit{Ibid.}, p. 29.
did not assert *enduring* sovereignty but put in place a military government. It was determined that:

...under this condition the military government of Cuba may exercise *such powers of sovereignty* (emphasis added) as are necessary for the successful conduct of the internal affairs of government, subject to the restraints imposed by the ideas and theories of government prevailing under the sovereignty by which it was created and the orders of the superior officials and authorities of the sovereignty by which said military government is sustained.\(^{115}\)

**5.43** The report expressed this to be sustainable due to the ideas and theories of government of the US being in accord with democratic principles and the rule of law. US war aims in Cuba were geared to this outcome. After compelling the Spanish to relinquish sovereignty the force that deployed was to restore order to the island to enable the inhabitants to establish a stable independent government. This task was not a minor one and would take some time. In this respect the scenario was a precursor to many facing the international community today:

> The prejudices, animosities, hatreds, strifes, resulting from many years of internal warfare, were to be allayed and the inhabitants moulded into a homogeneous whole on which the foundations of a nation might rest, and thereafter a government constructed which would give to the island

and its inhabitants peace, prosperity, and the largest degree of liberty consistent with the maintenance of individual rights and collective tranquillity.\textsuperscript{116}

In this context the military government was entitled to exercise the rights closely approximating those of a belligerent occupation, notwithstanding that the war had ended. The military government was to be an \textit{ad interim} sovereign. The limitation on this form of government would always be the principle of necessity. Only those acts necessary to enable functioning administration and justice, the security of the force and public order would be justified. The non-belligerent occupation must continually strive for and move towards the assumption of authority by a duly elected, indigenous civil government. These principles would have equal relevance in modern peace enforcement operations.

\textbf{Between Treaty and Principle - The Rhineland - 1919}

5.44 While development in the codification of the law of belligerent occupation was to remain virtually static from 1874 until 1949, the illumination of the rules of law relating to non-belligerent occupation continued to depend exclusively on the experience of state practice, \textit{opinio juris} and the "teachings of the most highly qualified publicists".\textsuperscript{117} Of particular interest in state practice were the occupations of the Rhineland and the Ruhr in Germany following

\footnotesize{\textsuperscript{116} Ibid., p. 33.  
\textsuperscript{117} The writings of eminent publicists have always been a legitimate source of evidence of the law. This was recognised by the formal incorporation of this source as a subsidiary means for determining the rules of law, in the Statute of the International Court of Justice, Article 38 (1) (d). I. Brownlie, \textit{"Principles of Public International Law"}, 4th ed. Oxford University Press, Oxford, 1990., pp. 24-25.}
World War I. There were two distinct periods of occupation in the Rhineland, the Armistice period from November 1918 to June 1919, during which the allies determined to specifically apply the provisions of the Hague Convention of 1907 as this was a belligerent occupation, and the Treaty or pacific occupation period from 1919 to 1930.\footnote{Pinson, \textit{op cit.}, (n. 82) p. 427.} The further distinguishing feature of the Treaty period was the supplementary Rhineland Agreement of 28 June 1919 which regulated the conditions of the occupation to its conclusion.\footnote{Full text of the Rhineland Agreement is reproduced in full in, Fraenkel, \textit{op cit.}, (n. 56) Appendix I, pp. 233-236.} The separate occupation of the Ruhr by French and Belgian forces in 1923 was not regulated by treaty and was in fact opposed by the German government through an officially orchestrated campaign of passive resistance.\footnote{Pinson, \textit{op cit.}, (n. 82) pp. 430-432.} This occupation was therefore a non-belligerent rather than pacific occupation as, while no state of war existed, there was nevertheless a lack of consent. The Rhineland Agreement contained only thirteen Articles and was therefore ambiguous or silent on numerous issues. This necessitated reliance on the general principles of pacific occupation from time to time.

5.45 An area which was particularly obscure was the administration of justice, there being only four paragraphs in Articles 3(c), (d) (e) and 4 covering the issue. The details were filled in by the Inter-Allied Rhineland High Commission\footnote{The Inter-Allied Rhineland High Commission was the Treaty successor to the Inter-Allied Rhineland Commission. It was constituted pursuant to Article 2 of the Rhineland Agreement and consisted of four members representing Belgium, France, Great Britain and the United States. The Commission, under Article 3 of the Agreement, had the power to issue ordinances, “so far as may be necessary for securing the maintenance, safety and requirements of the Allied and Associated forces”. Fraenkel, \textit{op cit.}, (n. 56) p. 233.} which promulgated detailed regulations in its Ordinance 2
governing the judiciary and police. These provisions became controversial and were contested by the German government in numerous diplomatic notes and pronouncements in the Reichstag. In practice the military tribunals that had been established during the Armistice period continued to function as the judicial instruments of the occupation government. The status of the indigenous courts was covered in Article 3 of the Agreement which permitted them to continue to exercise civil and criminal jurisdiction, except that offences committed against members of the occupying force could be dealt with by the occupation military courts. There was no jurisdiction in the German courts to deal with members of the force for offences committed by them. This was expanded upon by the High Commission in Ordinance 2, which subjected the civilian population to the jurisdiction of the military courts for breaches of any High Commission Ordinance. Offences involving damaging public installations with a view to compromising the security of the force were also brought within their purview. The German government protested that these provisions went beyond the Agreement but the protests were dismissed on the basis that the High Commission had an inherent right to provide for the security of the troops which implied the authority to transfer jurisdiction from the German to the military courts.

5.46 Through the period of occupation about one third of cases relating to violations of High Commission Ordinances were heard by the military tribunals.

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122 These Regulations were promulgated on 10 January 1920. The full text of the Ordinance is reproduced in Fraenkel, op cit., (n. 56) Appendix II., pp. 238-245.
123 Ibid., pp. 149-162.
124 Ibid., pp. 149-151.
The military tribunals functioned according to a mixture of procedure developed for the purpose of the occupation and common law traditions but, in the matter of sentencing, the tribunals were obliged under Ordinance 2 to adhere to the laws and regulations of Germany. While the tribunals were originally conducted with juries, this practice ceased by 1924. Although the High Commission had rights that permitted a high degree of intrusion into the operation of the judiciary it applied what was an emerging principle of the law of occupation, requiring the preservation of judicial independence as far as possible.\(^{125}\) Difficulties also developed in the areas of civil and public or administrative law with regard to aspects of jurisdictional disputes between the High Commission and the German government over contractual matters and concerning decisions passed by German courts which were not to the liking of the occupying force. The interesting aspect of these issues was that the resolution to the problem that was suggested but not in fact implemented was the creation of a Council of Justice of the High Commission, which would have included German representation, to deal with all such contentious matters. The establishment of such a body would, it was asserted, have been authorised by general principles of international law relating to pacific occupation.\(^{126}\) If the effect of such an institution was to increase the role of local authorities in the administration of justice and facilitate the transition to the authority of the sovereign then this assertion would have been correct. If, however, it usurped the administration of justice beyond the necessities of restoring order, securing the force and

\(^{125}\) Ibid., p. 153, 162-167.  
\(^{126}\) Ibid., p. 172.
eliminating barbarous aspects against the standard of civilisation then it would be illegal.

5.47 While the personnel of the occupying force were not subject to the criminal jurisdiction of the German courts, it was determined that the German police would have powers of arrest over them in certain instances. These included murder, rape, arson, armed or violent assault, robbery with violence and breaking and entering, with the offender to be handed over immediately to the nearest military authority. It was determined that the commanders could require the obedience of their subordinates to German police regulations as lawful and enforceable military orders. The provision that dealt with policing within the Agreement specified that reliance would be placed upon the German police to bring offenders before the military tribunals. This proved unworkable and placed the occupying force in the position of having to produce Ordinances that gave military police authority that was in fact contrary to the Agreement. The authority relied upon to promulgate these Ordinances was the right of the occupant to provide for the security of the force and public order under the principles of pacific occupation. This would have been the case had the Agreement not addressed policing. As it did, however, most legal opinion, including that of the allied jurists, was that the force was bound by treaty law to operate in accordance with the provisions in the Agreement. This highlighted a serious mistake in the drafting of the Agreement. The importance of this error was that when the occupying force was compelled to provide for military police

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127 Ibid., p. 175. Conversely there was no specific provision for the authority of the military police of the occupying force over the civilian population in the territory for breaches of German law.
authority in contravention of the Agreement it lost support internationally and further alienated the Germans, helping to build the environment of resentment that facilitated the coming to power of the Nazis.\textsuperscript{128}

5.48 The key issue that underlay problems with the Rhineland Agreement was the relationship between it and these general principles of non-belligerent occupation. From the beginning the drafters of the Agreement indicated the adoption of the principles in Article 3 which stated that, "The High Commission shall have the power to issue ordinances so far as may be necessary for securing the maintenance, safety and requirements of the Allied and Associated forces". The responsibility imposed on the occupant in both non-belligerent and belligerent occupations to maintain public order was acknowledged in the preambles of the Ordinances of the High Commission.\textsuperscript{129} The very first proclamation of the Commission reiterated the other fundamental principles of non-belligerent occupation:

\begin{quote}
The Inter-Allied High Commission desires to rely on the collaboration of the German officials and magistrates to ensure, in full harmony with it, the institution of a state of order, work and peace for the population of the Occupied Territories. Responsible for public order, of which the burden lies finally on the troops of Occupation, it means to guarantee to the people of the Rhineland justice, the enjoyment of their public and
\end{quote}

\textsuperscript{128} \textit{Ibid.}, pp. 177-181.
\textsuperscript{129} Fraenkel, \textit{op cit.}, (n. 56) p. 191.
private liberties, and the development of their legitimate aspirations and of their prosperity.\textsuperscript{130}

5.49 Notwithstanding that practice often fell short of this statement it is important as an acknowledgment of the key elements of non-belligerent occupation that were enumerated by the US in relation to the former Spanish possessions, as considered above. The power of the military authority being governed by the principle of 'necessity' the role of the occupying force was to establish order and facilitate the earliest possible transfer of power to duly reconstituted civil authority. Local institutions must be respected, full efficacy given to existing local laws and the justice administration unless it was 'necessary' to interfere in order to deal with a threat to the maintenance of the security of the force and public order, or the equitable return to civil authority would otherwise be frustrated. The Rhineland occupation was not governed solely by the Agreement in this respect which was in effect only the committal to writing of some aspects of the customary law principles of non-belligerent occupation. The applicable law stemmed in part from this document as a valid treaty but where it was silent or required interpretation the customary principles deriving from the fact of the occupation also applied.\textsuperscript{131} The law of non-belligerent occupation was founded in established facts and not the legality of the occupation in the same way as the Laws of Armed Conflict are not founded in the legality of a conflict but only by its existence. The only other legal issue of relevance was whether or not a state of war existed, which would

\textsuperscript{130} Ibid.
\textsuperscript{131} Ibid., pp. 199-200.
determine whether the occupation was belligerent or non-belligerent. The requisite facts in non-belligerent occupation are: the presence of a force on foreign territory; its ability to exercise control; the inability of the sovereign to do so; the assignment by the sovereign of authority; or the absence of a sovereign authority altogether.

5.50 Any ambiguities or silences in a treaty regulating an occupation generally accrued to the authority of the sovereign. The occupying force would still, however, have the right to take measures not delineated by the treaty to secure its forces, governed by the principle of necessity.\(^{132}\) In the case of the Rhineland occupation this was given expression by the French Army command when dealing with the issue of customs regulation which was not covered by the Agreement:

This ordinance, like all other customs ordinances, was enacted by the High Commission not by virtue of a convention concluded between Allied powers and Germany, but in execution of a unilateral decision of the said powers, and thus, as far as customs and export and import questions are concerned, it substituted an occupation regime of power for the regime by agreement which continues to control relations between occupied Germany and the occupying powers in all other fields. It is therefore out of the question to base the jurisdiction of

\(^{132}\) Ibid., p. 199.
military tribunals in customs matters on the Rhineland Agreement attached to the treaty.\textsuperscript{133}

5.51 Clearly the implied powers of the pacific occupant were not restricted in any way by the lack of specification in the Agreement which only described the jurisdiction of the occupying forces in a very broad way. It did not contain anything to suggest that all powers not expressly granted by the Agreement were therefore beyond the occupant's authority. While this appears to offer wide-ranging possibilities for the occupying power, this must be read in conjunction with the limitations imposed by the doctrine of 'necessity' and the strict objectives to which an occupying force must adhere in non-belligerent occupation.\textsuperscript{134}

5.52 There were many deficiencies in the Rhineland occupation. There was far too much dissension and disunity of approach within the coalition forces stemming from widely different political agendas. As Ernst Fraenkel stated, "a lawful regime can be built up only by the consistent application of legal methods".\textsuperscript{135} Fraenkel called for the use of a more detailed statute of occupation following the experience in the Rhineland, anticipating another occupation to be likely as he observed the progress of World War II. His call was to be heeded and the Allies were to implement in Germany the Occupation Statute of 1949.\textsuperscript{136}

\textsuperscript{133} Ibid., pp. 200-201.
\textsuperscript{134} See paras 5.38 - 5.43, supra.
\textsuperscript{135} Ibid., p. 230.
\textsuperscript{136} Occupation Statute Defining the Powers to be Retained by the Occupation Authorities, Signed by the Three Western Foreign Ministers, 8 April 1949, reprinted in Documents on Germany, 1944-1971, Committee on Foreign Relations, United States Senate, 92nd Congress., 1st Sess. 8 (1971) at p. 148. Pinson, \textit{op cit.} (n. 82) pp. 557-558, 561, 566, 567, 569.
Occupation of Allied Territory in World War Two

5.53 Other examples of non-belligerent occupation occurred in the course of World War II when Allied forces came into control of the territories of non-belligerents or allies, establishing temporary military administrations. These were sometimes regulated by prior agreement in which case they constituted pacific occupations such as in the cases of Belgium, Luxembourg, the Netherlands, Norway, and the Netherlands East Indies. In the cases of France, Indo-China and Denmark, however, there was no prior agreement, this only being addressed after the occupations were established. In all cases the Allies applied the same principles of belligerent occupation as a minimum standard with the exception that the earliest possible handover to a sovereign authority was the prime objective of the occupation.\(^{137}\)

Non-Belligerent Occupation at the Inception of the Fourth Geneva Convention of 1949

5.54 Non-belligerent occupations not regulated by treaty shared much in common with belligerent occupation. It was clearly provisional in nature, although often of lengthy duration, an *ad interim* sovereignty not affecting the true sovereignty of the territory. It was in the strictest sense a *de facto* condition founded on the actual presence of a force exercising authority over foreign territory and ceased immediately when possession ceased. The maximum deference had to be given to local institutions which could only be interfered

with on grounds of necessity related to the need to maintain order and the security of the force. The difference in non-belligerent occupations was that the inhabitants of the territory were not an 'enemy' population and the relationship between the force and the inhabitants was to be governed as far as the security situation permitted by peacetime legal regimes. The required object of the non-belligerent occupation was the restoration of the sovereign authority at the earliest opportunity with all activities geared to this whereas the condition of belligerent occupation was governed by the duration of the state of war and the needs of the belligerent in sustaining its war effort. In treaty regulated occupations the extent of the authority of the occupant was regulated by the terms of any applicable treaty governing the occupation and general principles where a treaty was silent. Treaties could cover any matter desired by the parties and cede any or all aspects of sovereignty if so desired, being governed by the law of treaties only.

5.55 Where there was no sovereign and hence no treaty and the purpose of the occupation was to re-establish order then it was for the occupant to judge whether order was sufficiently established.\(^{138}\) In such occupations where there was a significant security problem the authority of the occupant expanded by virtue of the doctrine of necessity to the extent that it acquired many of the characteristics of a belligerent occupation. The occupant was nevertheless always operating under the imperative of facilitating the restoration of civil authority and lawful sovereignty. The occupant did not have the power to legislate. It could however issue and enforce temporary regulations in the

\(^{138}\) Robin, *op cit.*, (n. 95) p. 130.
interests of public order and the safety and maintenance of the force, which
ceased to have effect immediately upon the departure of the force. It did not
have the right to assume the administration of justice unless there was no other
such regime functioning, in which case it had the right to take whatever
expedient action necessary to ensure order, provided general principles of
justice were adhered to and the local laws given the maximum effect possible.
This would include establishing tribunals and a judiciary which would be
obliged to apply the local penal laws. The occupant could only institute revenue
collection measures or requisition if the local system had ceased to function
and it was necessary to do so to enable the civil administration to function. It
did have the right however of garrison and could take measures for the secure
garrisoning of the force, probably confined to the use of public property given
the prohibition against interference with private property, unless such use was
equitably negotiated. At the same time the local legislatures had to be permitted
to function and produce legislation as long as it was not inimical to the force.

5.56 The disciplinary codes of the occupying force or forces had full
application and could not be infringed upon by the local legislature nor were the
occupation forces subject to the criminal code or courts of the territory. The
occupant would necessarily have jurisdiction in these circumstances to deal
with its personnel for breaches of the local municipal law if it were desirable and
possible to do so. The question would not arise where there were no local
courts functioning and/or no sovereign authority, in which case any interim
tribunals that were established by the occupant would have jurisdiction. In fact
the authority of the occupant was often in proportion to the extent of the vacuum of authority which it was entitled to fill, including police functions. The occupying force would also have jurisdiction to deal with offences committed against the force by the inhabitants. The military police of the occupying force would have the authority to arrest such offenders and the personnel of the force. Foreign persons, except diplomatic personnel, within the territory were in the same position as inhabitants. Diplomatic agents threatening the security of the force could be arrested and expelled but not tried by the occupant.\footnote{139}

Conclusion

5.57 The parallel development of the two strands of the law regulating military presence in foreign territory, belligerent and non-belligerent occupation, illustrates problems and approaches which have great relevance to the circumstances of modern peace enforcement. The case of a collapsed state, in particular, will present many of the law and order issues that occurred in the above situations. We have seen how the restoration of law and order was achieved in occupations such as that of the British in Egypt and Somalia, although these occupations achieved little in terms of establishing a firm basis for self-government. The experience in the Rhineland following World War I showed the folly of a lack of unity of policy in directing an occupation and the questions left open by the state of the law at the time. The need in particular for a legal framework such as an "occupation statute", as Fraenkel termed it\footnote{140}, led

\footnotesize\textsuperscript{139} Ibid., pp. 10-19. 122-322.  \textsuperscript{140} Fraenkel, \textit{op cit.}, p. 230.
to the creation of such a framework for the occupation of Germany after World War II and to the more detailed provisions governing occupations in the Fourth Geneva Convention of 1949, which will be discussed in Chapters 6 and 7. The Rhineland occupation also demonstrated the need to eliminate the sources of major grievances in the occupied community, including those against the occupant, when seeking to promote the development of peaceful, democratic states. The Allied experience in Germany and Japan illustrates the successful combination of order restoration and maintenance, and the reconstruction of polities capable of maintaining this order in accord with international human rights standards.

5.58 The fact that there has always been a body of principles regulating non-belligerent occupation is of particular note. The question remains as to whether this element of the law was taken into consideration in the subsequent drafting of conventions dealing with occupation. If it was not taken into account was it extinguished by the conventions or left to continue operation unaffected by the codified provisions? If it was not extinguished, arguing that the codes apply only to international armed conflicts may carry the implication that the historical law of non-belligerent occupation continues to exist and apply in such circumstances.
CHAPTER SIX: THE CURRENT STATE OF THE LAWS OF OCCUPATION AND THEIR APPLICATION TO PEACE OPERATIONS

If the term 'occupation' has come to refer to far more types of situation than the classic belligerent occupation indicated in the Hague Regulations of 1899 and 1907, this is not because of any intellectual fashion or progressive legal development, but rather because of the inescapably complex and varied character of military and political events. Indeed one can say of military occupation, as Clausewitz said of war, that it is not a totally independent phenomenon, but 'a continuation of political intercourse, with the addition of other means'.

Adam Roberts1

Introduction

6.1 Having seen how the law of occupation and its components evolved up to and including World War II it next falls to determine what impact the Fourth Geneva Convention and subsequent developments had on the law. The questions that arise in relation to the Convention are; (a) has it altered the criteria for determining the legal state of occupation?, (b) in what circumstances will the Convention apply and in particular does it apply to peace enforcement under Chapter VII of the UN charter?, (c) has the body of law relating to non-belligerent occupation survived the Convention and if so has it been altered by it?, (d) does the Convention apply to UN forces?, (e) when does the Convention cease to apply? Related to this analysis is the necessary assessment of what the status of the Fourth Convention is in terms of customary law. Finally the question of the political acceptability of the binding

Roberts, op cit., (Chap 5, n. 13) p. 299.
operation of the law will be considered. It is submitted that the application of the law was greatly widened by the Fourth Convention and that it in fact sought to encompass non-belligerent occupations. The analysis will attempt to show how the law could be said to have had *de jure* application to the UNITAF deployment to Somalia, how it binds forces acting under the UN Charter whether UN commanded or operating under the authorisation of a Security Council mandate, and that to an extensive degree it has indeed attained customary international law status.

The Advent of the Fourth Geneva Convention

6.2 Following World War II a broad review of the laws of armed conflict occurred through a series of conferences initiated largely through the efforts of the ICRC, culminating in the Diplomatic Conference of Geneva from 21 April -12 August 1949. Given the experiences and the behaviour of the Axis forces in territories they occupied during World War II, and issues arising from the occupations of World War I, a central element of this review was the law regulating the rights and obligations of an occupant. The result was a

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2 The ICRC had in fact been attempting to advance codification of civilian protection prior to World War II in conferences it convened in 1921, 1923 and 1925. This resulted in the Diplomatic Conference of 1929 the Final Act of which recorded the unanimous wish, "that an extensive examination be made with a view to concluding an international convention on the condition and protection of enemy civilians on the territory of a belligerent or on territory occupied by him". The ICRC then established a Commission of Experts to draw up a draft convention aimed at completing and specifying the Hague Regulations. The draft prepared by the Commission was adopted at the 15th International Conference of the ICRC in Tokyo in 1934. It was to be considered at a Diplomatic Conference convened by the Swiss Government for the beginning of 1940 but World War II intervened. The draft nevertheless was an important basis for the discussions which led to the adoption of the Fourth Geneva Convention of 1949. Of note is the fact that the 1934 draft still referred to "belligerent" occupation and "enemy" civilians (Articles 1 and 18) which were to be eliminated in the Fourth Convention. This indicates that the non-belligerent occupations of World War II (ie Czechoslovakia and Denmark) had had a significant influence on the drafters of the 1949 code. ICRC IHL CD-ROM, *op cit.*

3 *The Geneva Conventions of 12 August 1949: Commentary*, J.S. Pictet ed., volume IV,
significant expansion and codification of the law of occupation, hitherto found in customary law and the 1907 Hague Regulations, in the provisions of the Fourth Geneva Convention of 1949. This was part of the first attempt to provide for the systematic protection of civilians in light of their greater exposure to danger and abuse with the advent of total war. There are 188 States party to all four Geneva Conventions of 1949 making them the most universally adopted international humanitarian law codes. The Fourth Geneva Convention is broken up into four parts dealing with: I General Provisions; II General Protection of Populations Against Certain Consequences of War; III Provisions Common to the Territories of the Parties to the Conflict and to Occupied Territories; and IV Execution of the Convention. Of most concern in this work are Part I, which contains the important application and derogation provisions, Part III, which contains the substantive provisions dealing with occupation, and Article 154 of Part IV which preserves the relevant provisions of the Hague Regulations of 1907.

The Relation of the Fourth Convention to the Hague Regulations

6.3 Article 154 of the Convention stated that it would be supplementary to Sections II and III of the Hague Regulations which deal respectively with the

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6 See Chapter 5, para. 5.14 and n. 46, *supra*. 
conduct of Hostilities and Military Authority over the Territory of the Hostile State. Supplementary with respect to those states who are bound by the Hague Regulations and also party to the Convention. However this does not, apparently, mean that only those states party to the Hague Regulations are subject to the residual operation specified in Article 154. The International Military Tribunal at Nuremberg after World War II declared that in 1939 the Regulations were accepted by all civilised states and regarded as the codified expression of the laws and customs of war. It is uncontentious that the Regulations have acquired the status of customary law and will bind all states whether they are party to them or not. The conclusion that follows from this is that:

There is no need... in particular cases, to wonder whether the Hague Regulations and the Fourth Geneva Convention are both applicable. If the Geneva Convention is applicable, the Hague Regulations are also applicable a fortiori in respect of all matters concerning civilian persons in time of war not contained in the 1949 Convention.

6.4 The Hague Regulations survive to the extent that a particular provision has not been superseded by the Fourth Convention. In this respect it appears that, as far as the provisions regulating occupation are concerned (Articles 42-56), only Articles 44 and 50 of the Hague Regulations are completely redundant. Some of the surviving Hague provisions relate to the assumption by

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8 Pictet, op cit., p. 614.
9 Ibid., pp. 614-621. Art. 44 - "A belligerent is forbidden to force the inhabitants of territory
the occupant of certain facets of sovereignty whereas the Convention details specific protections of civilians and the circumstances in which these civilians will qualify for protection. The Pictet commentary on the Fourth Convention asserts in this respect that the definition of an occupation in Article 42 of the Hague Regulations is not applicable to the issue of the protection of civilians as the Convention creates a simple test of its own. This test is set out in Article 4 of the Convention which states that protected persons "are those who, at a given moment and in any manner whatsoever, find themselves, in the case of... (an) occupation, in the hands of... (an) Occupying Power of which they are not nationals". The commentary states that Article 42 will therefore remain relevant only to the functions detailed in Hague Articles 53-56 relating to the control and management of State assets. This cannot be the case, however, as Article 4 of the Convention still uses the term "occupation" which is not redefined in the Convention and therefore Article 42 remains the only code occupied by it to furnish information about the army of the other belligerent, or about its means of defense." Art. 50 - "No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible." These provisions were superseded by Articles 31 and 33 of the Fourth Convention, Art. 31 - "No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties." Art. 33 - "No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited. Pillage is prohibited Reprisals against protected persons and their property are prohibited." "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised". The full text of paragraphs one and two of the Article states, "Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals. Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral state who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are." Paragraph three excludes from the operation of the Convention those protected by the other Conventions.
definition of what constitutes an occupation.\textsuperscript{12} The discussion in Chapter 5 dealing with the definition of "occupation" would appear, therefore, to remain pertinent to the Convention. Article 42 is modified by the Fourth Convention, however, in that the term "hostile army" is no longer relevant given the extension of the occupation provisions by Article 2 of the Convention to non-conflict situations. In other words Sections II and III of the Hague Regulations which were formerly confined to states of war are now applicable to all international armed conflicts and, with respect to the occupation provisions, to those circumstances defined in the second paragraph of Article 2 of the Convention which will be discussed below.

The Application of the Convention

6.5 The introduction of the Fourth Convention was to radically alter the application and shape of the legal regime regulating military presence in foreign territory. It would no longer be accurate to refer to the law of belligerent, or non-belligerent occupation. This did not result from the outlawing of aggressive war by the Kellogg-Briand treaty\textsuperscript{13} or the UN Charter because defensive and internationally authorised armed force was still legal under both the treaty and the UN Charter.\textsuperscript{14} It resulted from the expansion of the convention coverage to all forms of non-treaty occupation, whether in the context of an armed conflict with the sovereign authority of the occupied territory or not. As we shall see the

\textsuperscript{12} Pictet, \textit{op cit.}, pp. 617, 621. The surviving provisions of the Hague Regulations will be discussed in greater detail in Chapter 7.


\textsuperscript{14} Dinstein, \textit{op cit.}, (Chapter 5, n. 20) pp. 81-116.
framers of the Convention clearly had in mind the type of non-belligerent occupations considered in Chapter 3. The new Convention was designed to regulate the relationship between foreign military forces and a civilian population where the force exercises the sole authority or is the only agency with the capacity to exercise authority in a distinct territory. As Roberts puts it:

One might hazard as a fair rule of thumb that every time the forces of a country are in control of foreign territory, and find themselves face to face with the inhabitants, some or all of the provisions of the law on occupations are applicable.  

6.6 How does the Convention produce this result and what did the framers have in mind when they so expanded this area of law? The answer to the first question lies in an analysis of Article 2 of the Convention where the application of the laws set out in the Convention is defined. To appreciate the Convention fully it must be understood that it has different levels of application. All four 1949 Conventions were drafted with the object in mind of addressing all forms of armed conflict in some way, as by that time the experience of undeclared and civil wars had already been evident. For example common Article 3 to all the conventions addresses all forms of armed conflict not of an international character while paragraph one of common Article 2 applies the remaining provisions in the Conventions to all international armed conflicts, whether a state of war exists or not. This is notwithstanding the use of the phrase "in Time

of War" in the headings. We also can see that certain non-conflict situations were to be addressed in the Fourth Convention in particular dealing as it does with the protection of civilian populations and their relationship with foreign armed forces. The Conventions also create certain peacetime obligations. It is important at this point to set out the key paragraphs of common Article 2:

In addition to the provisions which shall be implemented in peacetime\(^{17}\), 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.\(^{18}\)

6.7 Paragraph two of the Article contains the key formula, for the purposes of this work, providing the expanded coverage of the provisions regulating occupations. The wording to note here is the expression, "The Convention shall also apply", meaning that it also applies to the following outlined circumstances other than a state of war or armed conflict between or among High Contracting Parties as mentioned in paragraph one. The additional application is to, "all cases of partial or total occupation of the territory of a High Contracting Party, 

\(^{17}\) ie. Articles 144-146 which deal respectively with dissemination, communication of official translations of the Convention and municipal legislative implementation requirements.

even if the said occupation meets with no armed resistance".\textsuperscript{19} The form of words adopted in the Report on the Work of the Conference of Government Experts, convened by the ICRC in Geneva in 1947,\textsuperscript{20} would have made this clearer as it stated that the Convention should apply "also in the event of territorial occupation in the absence of any state of war".\textsuperscript{21} The commentary on this draft provision stated that, "This Article was adopted in order to make the Convention applicable to... every occupation of territories, even should this occupation not be forcible".\textsuperscript{22} Nevertheless, as Pictet states:

The sense in which the paragraph (Article 2 paragraph 2) under consideration should be understood is quite clear. It does not refer to cases in which territory is occupied during hostilities; in such cases the Convention will have been in force since the outbreak of hostilities or since the time war was declared. The paragraph only refers to cases where the occupation has taken place without a declaration of war and

\textsuperscript{19} This was not intended to discourage armed resistance to an invader or reflect a belief that it was improper to expect civilian populations to resist, as such action was given legitimate belligerent status, provided certain qualifications were met, in Articles 13 (2) of Geneva Convention I and 4A (2) of Geneva Convention III. The absence of the requirement for resistance reflected only the desire to simplify the \textit{de facto} qualifications for the application of the Convention to ensure the protection of civilian populations in the widest range of relationships with foreign armed forces in positions of authority. Schwarzenberger, \textit{op cit.}, (Chapter 5, n. 20) pp. 325-327.

\textsuperscript{20} This conference was convened to review draft reworkings developed by the ICRC in 1937 of the earlier Geneva Conventions and was an important preliminary step towards the final drafting of the Geneva Conventions of 1949 at the Diplomatic Conference of that year. \textit{"Report of the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims (Geneva, April 14-26, 1947)", ICRC, Geneva, 1947.}


without hostilities, and makes provision for the entry into force of the Convention in those circumstances.\textsuperscript{23}

This interpretation coincides with the method of treaty interpretation set out in Article 31 of the Vienna Convention on the Law of Treaties\textsuperscript{24}, that is, in accordance with the ordinary meaning of its terms in their context and in the light of the object and purpose of the treaty. Taking Articles 2 and 4 together, the object and purpose of the treaty in this case is the protection of those who find themselves at a given moment and in any manner whatsoever in the hands of an Occupying Power, regardless of whether there is an armed conflict.

6.8 This general category of occupation is distinct from occupations occurring as a result of armistice or capitulation which is covered by Article 2 paragraph one. The Pictet commentary explains the distinction as follows:

(A) simultaneous examination of paragraphs 1 and 2 leaves no doubt as to the latter's sense: it was intended to fill the gap left by paragraph 1. The application of the Convention to territories which are occupied at a later date, in virtue of an armistice or a capitulation, does not follow from this paragraph, but from paragraph 1. An armistice suspends hostilities and a capitulation ends them, but neither ends the state of

\textsuperscript{23} Pictet, \textit{op cit.}, (n. 21) pp. 21-22.

\textsuperscript{24} Signed at Vienna 23 May 1969, entered into force 27 January 1980. The Convention only deals with treaties concluded after entry into force of the Convention (Article 4) but Articles 31 and 32 on interpretation are considered to be statements of the customary law general principles of treaty interpretation. (See Brownlie, \textit{op cit.}, pp. 626-632.) See the Fletcher School of Law and Diplomacy Tufts University, Multilateral Treaties internet site.
war, and any occupation carried out in war time is covered by paragraph 1.25

6.9 The historical references the framers had in mind was the non-belligerent occupation phenomenon including the recent experience of the German occupation of countries in relation to which there had been no state of war, and the Allied occupations of the territory of States with which they were not at war during the liberation operations. The first of these was Czechoslovakia whose occupation by Germany occurred even before the outbreak of general hostilities in 1939.26 It was clear therefore that the Convention was not concerned with the circumstances of the coming together of military forces and civilian populations foreign to each other in a relationship of authority and submission, but with the fact of its occurrence. As Roberts states, "The broad terms of common Article 2 establish that the 1949 Geneva Conventions apply to a wide range of international armed conflicts and occupations - including occupations in time of so-called peace".27 This is further reflected by the terms expressed in Article 4 referring to protected persons where it talks of "a conflict or occupation" and "a Party to the conflict or Occupying Power". In addition Article 6, which defines the beginning and end of the application of the Convention, states that the Convention will apply, "from the outset of any conflict or occupation mentioned in Article 2".28

26 Ibid., p. 21.
6.10 The trend towards a broader application of the legal regime regulating military presence did not commence with the Fourth Convention as it was also evident in relation to the Hague Regulations of 1907. As we have seen, the Hague Regulations were considered and widely accepted as stating the general principles of laws and customs of the laws of land warfare at the time. While these general principles clearly were intended in their codified form to apply to cases of formal states of war they were also applied to a wider context. As customary international humanitarian law, they represented the minimum standards of civilisation and therefore could be applied to the relationship between foreign military forces and a civilian population where there were clear security imperatives for the occupying force. As a consequence, in the Chevreau case of 1931 the laws of belligerent occupation were held to apply to British forces stationed in Persia during World War I. This was despite the fact that Persia was a neutral state, the British troops were not present through invasion, and they had not proclaimed martial law. In particular the Arbitrator took into account the needs of the occupant in ensuring the security of the force against the "hostile activities of the bands of brigand armies". The effect of the Fourth Geneva Convention was to take this expansive trend, the experiences of the broad range of occupation and to meld them into a coherent regime so that

29 See infra para. 6.3.
30 Affaire Chevreau (France/Royaume-Uni) (1931) 2 Reports of International Arbitral Awards, pp. 1118.
31 "Dans ces circonstances, l'Arbitre estime ne pas pouvoir nier aux forces britanniques operant en Perse le droit d'y prendre les mesures necessaires pour se proteger contre des actes de la population civile qui seraient de nature a nuire aux operations ou a favoriser l'ennemi, droit qui, en general, d'apres le droit international, appartient aux forces belligerentes occupant un territoire ennemi". Ibid. p. 1123. The British forces under General Dunsterville moved into the area near the Caspian Sea at the beginning of 1918 to establish order after the withdrawal of Russian troops following the Russian Revolution in late 1917.
there was no longer any real legal distinction between belligerent occupation and non-belligerent occupation without the consent of an existing sovereign.\textsuperscript{32} The key determinative feature for the purposes of the operation of the law is where the armed forces of a State exercise "some kind of domination or authority over inhabited territory outside the accepted international frontiers of their State and its dependencies".\textsuperscript{33}

6.11 The practical effect is that, for the parties to it, the Convention will apply to a wide range of situations that were hitherto not within the contemplation of the formal codes or would have been covered by the less prescriptive law of non-belligerent occupation. For example Eyal Benvenisti asserts that the Convention applied to the US actions in Grenada and Panama.\textsuperscript{34}

6.12 US analysis of the action in Panama reflected the difficulty being experienced in coming to grips with post cold war operations of this type. On the one hand there was a desire to fall back on the provisions under the Hague Regulations and the Convention concerning such matters as the arrest and handling of detainees, interrogation, and legitimate action in the maintenance of the security of the force. On the other hand there was trepidation concerning the formal responsibilities towards the civilian population contained in the Convention. One uncertain attempt to distinguish the case from \textit{de jure}
application of the Convention was based on the level of control necessary to support an occupation. It was said that because US forces did not establish an "administration" or "military government" the necessary level of control was not in existence tending to indicate no occupation had occurred. As we have seen, however, this is clearly not what is envisaged by the Convention and the test of occupation from Article 42 of the Hague Regulations.

6.13 The test is whether the force present is not just passing through, is not engaged in actual combat and is in effect the sole authority capable of exercising control over the civilian population, or any remaining authority requires the approval or sanction of the force to operate. Basing the test on whether the force had established a formal administrative framework of military government would enable the abrogation of any responsibility by the expedient of not establishing such a government. This would also be contrary to the intention of Article 4 of the Convention which defines protected persons, in relation to whom the rights and obligations of the Convention relate, as those simply "in the hands" of the occupying power. The only lawful way of avoiding this responsibility under the Convention is by simply leaving the occupied territory as there is no requirement of any kind for the force to remain. Indeed the whole thrust of this law is that the situation is temporary, seeking only the regulation of the relationship between the force and the population while the force is present.

36 See paras. 5.2-5.4 of Chapter 5.
37 Pictet, op cit., (n. 21) pp. 47, 617.
6.14 Given the transformation that has been wrought by the Fourth Convention it now seems possible to identify the circumstances which will attract the application of this body of law. Adam Roberts has set out four basic elements in this respect:

(i) 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 range of contacts with the host society not adequately covered by the original agreement under which it intervened;

(ii) the military force has either displaced the territory's ordinary system of public order and government, replacing it with its own command structure, or else has shown the clear physical ability to displace it;

(iii) there is a difference of nationality and interest between the inhabitants on the one hand and the forces intervening and exercising power over them on the other, with the former not owing allegiance to the latter;

(iv) within an overall framework of a breach of important parts of the national or international legal order, administration and the life of society have to continue on some legal basis, and there is a practical need for an emergency set of rules to reduce the dangers which can
result from clashes between the military force and the inhabitants. (emphasis added).\textsuperscript{38}

6.15 These elements were to be found in reference to the UNTAC operation in Cambodia and, in particular, in the Allied and UN operations in Somalia considered in Part I. Other recent situations that have often contained these elements are the so-called 'safe haven' operations.\textsuperscript{39} Establishment and maintenance of safe havens has usually involved a force being deployed into a clearly demarcated area. Often entry into this area by forces not part of the UN authorised operation is not permitted, even if these excluded forces belong to the state in which the haven is located. Within the safe haven the deployed force may be required to undertake such activities as arranging for demilitarisation, cantonment of weapons, humanitarian relief of the population, restoration and/or maintenance of basic infrastructures such as sanitation, facilitation of NGO activity, and perhaps the restoration and maintenance of public order. The force may find itself the predominant authority with the varying degrees of break down in civil authority, including the total lack thereof, that may occur in these areas.

6.16 From the above analysis and using Roberts' basic elements there can be no doubt that the Fourth Convention will apply to most of these operations where there is no consent or formal agreement with the State in which the action is taken. It is submitted, for example, that the Convention applied to the

\textsuperscript{38} Roberts op cit., pp. 300-301.
\textsuperscript{39} See Chapter 8 paras 8.1 - 8.5, infra.
safe haven in Northern Iraq during Operation Provide Comfort. It also applied to South-West Rwanda in Operation Turquoise where the French had no permission from any Rwandan entity in the confused aftermath of the civil war. Had this state of affairs been accepted and acknowledged, solutions would have been available to perplexed commanders and the international community regarding the regimes and relationships that should have applied within these areas.

**Does the Fourth Convention have the Status of Customary Law?**

6.17 The question of whether the Geneva Conventions of 1949 have attained the status of customary international law has been the subject of much discussion but little tribunal deliberation or clear *opinio juris*. This issue is unlikely to arise in relation to States as practically every State is a party to the Conventions. It is an issue however that has a bearing on whether the rules in the Conventions apply to UN commanded military operations. The Fourth Convention itself provides no delineation as to whether its provisions are declaratory of customary law or constitutive of new principles. The ICRC and Pictet would appear to assert that almost the whole convention was declaratory.\(^{40}\) It is clear that many of the humanitarian provisions particularly in Section I of Part III were attempts to clarify existing customary law but the enlarged aspects including those which created detailed administrative requirements and matters involving dealings between states, have been claimed by authorities such as Schwarzenberger and Dinstein to be constitutive

\(^{40}\) Pictet, *op cit.*, (n. 21) p. 9.
and thus only binding between parties to the Convention. The ICJ in the Nicaragua case debated the issue in a limited way with respect to certain provisions of the Conventions. It specifically determined that the Conventions were "in some respects a development, and in other respects no more than the expression" of fundamental principles of international humanitarian law. Articles the Court determined to be declaratory of customary law were the common articles on denunciation, common Article 1 setting out the responsibility to respect and ensure respect for the Conventions, and common Article 3 setting out minimum standards for any armed conflict, including civil war. No further indications were given by the court as to which other provisions, if any, were declaratory of customary law.

6.18 Examples of provisions of the Fourth Convention relating to occupation, which it could be said with a degree of certainty are declaratory of customary law as setting out basic humanitarian standards would include the requirement to respect the honour, family rights, religious and other customs of protected persons and to treat them without adverse distinction relating to race religion or political opinion (Article 27); the prohibition of physical and moral coercion to obtain information from protected persons (Article 31); the prohibition of murder, torture and other inhumane treatment (Article 32); the prohibition on collective


42 Nicaragua v United States of America (Merits) ICJ Reports, 1986, p. 113.

43 Ibid., pp. 114. The position of the court in relation to the customary international law status of common Article 3 was relied on and endorsed by ICTY in The Prosecutor v. Dusko Tadic A/K/A "Dule" (Decision on the Defence Motion on Jurisdiction) 10 August 1995, para 67.
penalties, pillage and reprisals (Article 33); the prohibition on taking hostages (Article 34); the prohibition on deportations (Article 49); the prohibition on compelling protected persons to serve in the occupant's armed forces (Article 51); the prohibition against the destruction of property unless required by military necessity (Article 53).\textsuperscript{44} Also remaining in place would be the provisions of the Convention that are only a restatement of the provisions of the Hague Regulations, which are noted above to have been customary law by 1939.\textsuperscript{45}

6.19 If many provisions of the Fourth Convention were not declaratory of customary law the question then becomes have these non-declaratory provisions subsequently achieved the status of customary law? This debate is complicated by the fact that there are so few States who have not become party to the 1949 Geneva Conventions and therefore it is difficult to trace non-Convention state practice or \textit{opinio juris}. One argument put in the light of this difficulty is that the Conventions have achieved customary law status by virtue of their widespread acceptance as indicated by the number of states adopting them.\textsuperscript{46} The argument is supported by comments of the ICJ in the North Sea Continental Shelf case where it was stated that:

With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the

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\item\textsuperscript{45} Pictet, \textit{op cit.}, (n. 21) pp. 614-621.
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passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected.\textsuperscript{47}

This view was echoed to some extent in the 1985 \textit{Continental Shelf} case dealing with the 1982 UN Convention of the Law of the Sea, where the Court, although emphasising the pre-eminence of state practice and \textit{opinio juris}, asserted that:

...\textit{(l)}t cannot be denied that the 1982 Convention is of major importance, having been adopted by an overwhelming majority of States; hence it is clearly the duty of the Court, even independently of the references made to the Convention by the Parties, to consider to what degree any of its relevant provisions are binding upon the Parties as a rule of customary international law.\textsuperscript{48}

\textsuperscript{47} 1969 ICJ Reports p. 42. Denmark and the Netherlands had argued that Article 6 of the 1958 Geneva Convention on the Continental Shelf had attained the status of customary law through the impact of the Convention and subsequent state practice. The Court defined the process involved in producing this result as being that the specific provision was norm-creating, generating a rule which while only conventional or contractual in origin had passed into the "general corpus of international law" and was so accepted by \textit{opinio juris} as to have become binding even on countries not party to the Convention. The Court stated that, "There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognised methods by which new rules of customary international law may be formed. At the same time this result is not lightly to be regarded as having been attained." p. 41. The applicable rules for evaluating the customary crystallisation of a convention were laid down in this case so that the provision in question must first of all be, or have the potential to be, of a "fundamentally norm-creating character". The possibility of making reservations to the provision is relevant as detracting from the norm-creating aspect. There must be a very significant number of ratifications and accessions. In the case of the 1958 Continental Shelf Convention the Court determined these to be insufficient. pp 42-43.

\textsuperscript{48} 1985 ICJ Reports p. 30.
This argument is an attractive one, particularly in relation to such fundamental humanitarian laws. In this case it would be relevant to consider *opinio juris*, even that emanating from States party to the Conventions, indicating acknowledgment of the provisions as having become customary law.\(^{49}\) Israel is the only State however to make official comment in this respect.

Having had due regard to the debate on the status of the Fourth Convention in relation to the territories occupied by it since 1967, Israel stated that although none of this territory belonged to a High Contracting Party within the terms of Article 2, it was bound by the "humanitarian" provisions of the Fourth Convention. No Israeli court or State official, however, has ever delineated specifically which provisions they do or do not regard as humanitarian.\(^{50}\) With this lack of *opinio juris* the only evidence to support the argument for the customary status of the entire Convention is its widespread adoption which still leaves the issue open to debate.\(^{51}\) It would therefore seem that only the Hague Regulations and the humanitarian provisions of the Convention, such as those outlined above, can be said with certainty to have obtained that status. This

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\(^{49}\) Meron, *op cit.*, (n. 44) p. 367.


\(^{51}\) In relation to state practice the Court in the *North Sea Continental Shelf* case stated that, "Although the passage of only a short time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it may be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; - and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved". pp. 42-43. Meron, *op cit.*, pp. 366-368.
debate remains significant in evaluating the effect of these provisions on the UN as an organisation.


6.21 Protocol I\(^{52}\) represents the last addition to this body of law. Protocol I has not extended the field of application of the law of occupation except with regard to the aspect of the termination of the legal state of occupation which will be considered below. The provisions of Protocol I regulating occupations will therefore apply in the same circumstances as delineated in the Fourth Geneva Convention to which it is supplementary.\(^{53}\) Protocol II\(^{54}\) has no bearing on the law of occupation dealing as it does only with the regulation of the conduct of internal conflicts between the forces of a High Contracting Party and indigenous dissident forces.\(^{55}\) An occupation under the Fourth Convention can only occur where troops control foreign territory, and only applies in relation to non-nationals of the occupying force.

\(^{52}\) Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I). Reference relied upon here is contained in "Protocols Additional to the Geneva Conventions of 12 August 1949", ICRC Publishing, Geneva 1977. In relation to the issue of Protocol I as customary law, it would appear there is strong support for the proposition that most of its provisions have attained this status. See in particular International Review of the Red Cross, No. 320 September-October 1997, ICRC Geneva.

\(^{53}\) Protocol I, Article 1(3). "This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions."


\(^{55}\) Protocol II, Article 1(1). "This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of... (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."
Termination of an Occupation

6.22 The time at which the law of occupation ceases to apply is also an important issue. As stated above the law is intended to cover what is an essentially temporary state of affairs. The underlying assumption is that the temporary measures provided for should end, and the status of the territory be resolved, as soon as possible. There is, however, no defined limit to an occupation notwithstanding the fact that it is 'temporary', as illustrated in the prolonged circumstances of the Israeli control of the West Bank, Gaza and Golan Heights or the Allied occupations of Germany and Japan. In this sense the law of occupation in its current state should be read in the context of the UN Charter, as the Charter governs issues of dispute resolution, contains prohibitions against territorial aggrandisement and regulates the transition of territories and colonies under trusteeship including assistance to statehood or peaceful incorporation into new state entities. There is nothing specified or implied in either the Fourth Geneva Convention, or the customary law of occupation that requires the force to remain. It is not, for example, a requirement that the force must remain until normal civil life or order is restored. The force is only required to work towards this end as far as it is within its capacity for the period during which it is in the territory. The force is free to depart at any time of its own pleasing and all its legal obligations with respect to that territory end with this departure.56 The only circumstance where the force

56 "Belligerent occupation is, after all, a question of fact. It seems to the writer that an occupation would be terminated at the actual dispossession of the occupant, regardless of the source or cause of such dispossession", Von Glahn, op cit., (Chap 5, n. 11) p. 29. See also Graber, op cit., (Chap 5, n. 4) pp. 58-59, 64 for historical roots of this reasoning.
may be obliged to remain is where a genocide is occurring, in which case there
may be an obligation on the force, and indeed the international community at
large, under the Genocide Convention to take preventative action.57

6.23 The Fourth Geneva Convention will cease to apply when the military
force departs or when it is forcibly evicted. If during the occupation a legitimate
sovereign government is constituted to which the force by agreement hands
over all authority, then this will terminate the relationship which the Convention
regulates. It will also cease to apply when the force has effectively lost control
of the territory or part of it due to widespread and effective armed resistance by
the local population. In this situation the Convention ceases to apply because
the force "is presumed to have lost capacity to exercise authority".58 Clearly the
resistance referred to would have to be dramatic and not just a random
campaign of terror or widespread lawlessness. A fair determinative test in this
respect is provided by the prescription set out in Article 1(2) of Protocol II,
specifying the circumstances in which it will not apply. These circumstances
are, "situations of internal disturbances and tensions, such as riots, isolated and
sporadic acts of violence and other acts of a similar nature, as not being armed
conflicts". The circumstances in which Protocol II does apply are those where

57 Convention on the Prevention and Punishment of the Crime of Genocide, United
Contracting Parties confirm that genocide, whether committed in time of peace or in time of war,
is a crime under international law which they undertake to prevent and to punish". The
prohibition of genocide will be binding on all states regardless of whether they are signatories to
the Convention as this prohibition has attained the status of jus cogens. There are 118 states
"Multilateral Treaties Deposited with the Secretary General", United Nations New York, 31
December 1994, updated by the Australian Department of Foreign Affairs and Trade
(ST/LEG/SER.E/13).
58 Graber, op cit., p. 259.
the dissident forces are under a responsible command, exercise control over a part of the territory so as to be able to carry out sustained and concerted military operations and to implement the Protocol.\(^{59}\) What we see here, in effect, is the legal demarcation between a situation covered by the Fourth Convention and a common Article 3 type armed conflict, to which Protocol II is supplementary.\(^{60}\)

6.24 The termination of the application of the law is clear in the case of the departure, eviction or loss of control by the occupying force. There is, however, a complicating gradation of application provided for in the Fourth Geneva Convention based on the changing nature of the military presence. In Article 6\(^{61}\) it specifies that in the case of occupied territory occurring in a conflict situation the general application of the Convention ceases one year after the close of military operations. While the occupation continues, however, and to the extent that the occupying power exercises the functions of government, a number of articles remain applicable. This was a provision apparently drafted with the Allied post World War II experience in mind, but went against the initial impulse in the drafting process to end application when the occupation ended.\(^{62}\) This then poses the question as to what provisions apply to a non-belligerent

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\(^{59}\) Article 1(1).

\(^{60}\) Ibid.

\(^{61}\) Article 6. "The present Convention shall apply from the outset of any conflict or occupation mentioned in Article 2... In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143.

Protected persons whose release, repatriation or re-establishment may take place after such dates shall meanwhile continue to benefit by the present Convention."

\(^{62}\) Pictet, op cit., (n. 21) p. 62.
occupation, whether the application of the provisions change at any point and when they cease altogether. Pictet comments on this issue as follows:

Article 6 does not say when the Convention will cease to apply in the case of occupation where there has been no military resistance, no state of war and no armed conflict. This omission appears to be deliberate and must be taken to mean that the Convention will be fully applicable in such cases, so long as the occupation lasts. 63

6.25 This produces the result that more provisions continue to apply to an occupation which begins as non-belligerent, while fewer provisions would apply in relation to an occupation begun in a conflict situation, even though it may have acquired the same character as a non-belligerent occupation one year after the cessation of military operations. This anomaly was addressed by Protocol I. For those states party to it, the Protocol altered the termination provisions of Article 6 of the Convention by clearly stating in Article 3 (b) that the relevant provisions of the Protocol and Convention will cease to apply "on the termination of the occupation". 64 For those few remaining nations who have not yet adopted Protocol I, such as the US, the Article 6 anomaly in the Convention will remain an issue and poses an interoperability question.

63 Ibid., p. 63.
64 Article 3 (b), "the application of the Conventions and of this Protocol shall cease,... in the case of occupied territories, on the termination of the occupation, except... for those persons whose final release, repatriation or re-establishment takes place thereafter. These persons shall continue to benefit from the relevant provisions of the Conventions and of this Protocol until their final release, repatriation or re-establishment".
The Current Status of the Customary Law of Non-Belligerent Occupation

6.26 The final issue to be determined relating to current applicable law is to what extent, if at all, the customary international law of non-belligerent occupation has survived the introduction of the Fourth Convention. Clearly from the above analysis the Convention has sought to regulate the majority of occupations that the customary law of non-belligerent occupation previously covered. Circumstances where customary law may have residual application may nonetheless be extremely important. These would include the cases where it may supplement what is declaratory of customary law in the Fourth Convention for those states that have not acceded to the Convention and in the case of pacific occupations pursuant to an agreement. As there are now so few countries that have not acceded to the 1949 Conventions the former situation will be extremely rare. There is still, however, the issue of operations by the UN which, as an international organisation, is not signatory to any of the conventions referred to here. This will be discussed below.65 In the case of occupations by agreement, these may occur with increasing frequency in the years ahead as collapsing or debilitated states seek foreign assistance to deal with internal security and reconstruction problems.

6.27 A recent example of a pacific occupation by agreement was the UNTAC experience in Cambodia. The Paris Agreement under which the UN forces deployed constituted the temporary transfer of key areas of sovereignty

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65 See paras 6.31-6.48.
to the UN. There were many areas which remained the source of much contention and uncertainty under the necessarily broad terms of the Agreement. It was argued above that the customary law of pacific occupation

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"The SNC hereby delegates to the United Nations all powers necessary to ensure the implementation of this Agreement, as described in annex 1.

In order to ensure a neutral political environment conducive to free and fair general elections, administrative agencies, bodies and offices which could directly influence the outcome of elections will be placed under direct United Nations supervision or control. In that context, special attention will be given to foreign affairs, national defence, finance, public security and information. To reflect the importance of these subjects, UNTAC needs to exercise such control as is necessary to ensure the strict neutrality of the bodies responsible for them. The United Nations, in consultation with the SNC, will identify which agencies, bodies and offices could continue to operate in order to ensure normal day-to-day life in the country".

Under Article 16 UNTAC was given responsibility for fostering an environment of respect for human rights, also governed by the provisions of annex 1.

Annex 1, Section A, paragraph 1 assigned to UNTAC the powers necessary to ensure the implementation of the Agreement. Paragraph 2 put in place a mechanism for resolving issues by requiring UNTAC to comply with the advice of the SNC, provided there was a consensus in the SNC and the advice was consistent with the objectives of the Agreement. If there was no consensus then SNC President Norodom Sihanouk was empowered to make the decision on what advice should be offered UNTAC which it was bound to follow, once again, only if it was consistent with the objectives of the Agreement. If the President was not in a position to make such a decision then the power transferred to the Special Representative of the Secretary-General (SRS). The determination of whether the advice of the SNC or President was consistent with the Agreement was a matter for the SRS to determine.

Section B of annex 1 dealt with civil administration and through paragraph 1 placed under the direct control of UNTAC "all administrative agencies, bodies and offices acting in the field of foreign affairs, national defence, finance, public security and information". More specifically, paragraph 4 gave the SRS the power to:

"(a) Install in administrative agencies, bodies and offices of all the Cambodian Parties, United Nations personnel who will have unrestricted access to all administrative operations and information;

(b) Require the reassignment or removal of any personnel of such administrative agencies, bodies and offices."

Paragraph 5 went on to grant the SRS the authority to determine, in consultation with the Cambodian Parties, the civil police necessary to perform law enforcement. In this respect it was provided that:

"All civil police will operate under UNTAC supervision or control, in order to ensure that law and order are maintained effectively and impartially, and that human rights and fundamental freedoms are fully protected. In consultation with the SNC, UNTAC will supervise other law enforcement and judicial processes throughout Cambodia to the extent necessary to ensure the attainment of these objectives". (paragraph 5 (b)).

Under Section D, UNTAC was empowered to organise and conduct the election and to establish a system of laws, procedures and administrative measures for this purpose. (Paragraphs 1, 3(a)). UNTAC was also tasked to make provisions for the investigation of human rights complaints, and, where appropriate, corrective action. (Section E).

will fill any such voids left by an Agreement of this sort and certain fundamental
principles can be applied to help clarify uncertainties.68 One example of an area
that customary law can illuminate is the right of the force to take measures for
its own security.69 Another of the principles discussed above that would also be
applicable in the case of occupation by agreement relates to the aspect of
control. For example in the case of UNTAC the UN force was never able to
exert its authority in the areas controlled by the Khmer Rouge. The Khmer
Rouge were clearly a force exercising sole control over a part of Cambodia
such as to enable them to carry out sustained and concerted military
operations.70 The customary laws of pacific occupation therefore did not apply
to that particular area of Cambodia as the occupying force had no control there.

6.28 The transformation of the situation in the Israeli occupied West Bank
and Gaza Strip beginning in 1993 also has the characteristics of a pacific
occupation if not the de jure status of one. Following the principle that
sovereignty inheres in the people, particularly given the confused historical
status of those territories, the Israeli Government concluded agreements with
the interim representatives of the Palestinian people until a representative entity
was confirmed by elections on 20 January 1996. Also, a state of belligerency
clearly ceased to exist between Egypt and Israel and Jordan and Israel through
the respective peace treaties of 26 March 1979 and 26 October 1994

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68 See Chapter 5, paras 5.35 - 5.53, supra.
69 See Chapter 5, paras 5.37, 5.41, 5.43, 5.45, 5.54., supra.
70 Cambodia acceded to Protocols I and II on 14 January 1998, see ICRC International
Humanitarian Law web site, Table of States Party to the Geneva Conventions and Their
Additional Protocols, www.icrc.org. The test is used here as an indicative guide for determining
when effective control by the occupant ceases as explained in para 6.22, supra.
converting the Gaza and West Bank situations into non-belligerent occupations. The progressive agreements executed with the Palestinian Authority from 13 September 1993 to 28 September 1995 did not alter the status of the territories as 'occupied' or the ultimate authority of the Israeli Military Government, despite the military re-deployments. The status of the territory was not to change until a full transfer of sovereignty to a Palestinian Government was effected. The Palestinian Authority has not as yet attained "statehood" and does not have the technical capacity to conclude treaties cognisable in international law. The agreements did however transform the nature of the occupation, endorsed in the Palestinian elections.

6.29 Another recent experience of pacific occupation was that established by the Dayton Agreement involving the warring parties in the Former Republic of Yugoslavia, NATO, the Organisation for Security and Cooperation in Europe (OSCE) and the UN. This Agreement provided for the deployment of a large NATO Implementation Force (IFOR) for a period of one year pursuant to UN Security Council authorisation and Chapter VII of the UN Charter. IFOR was

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71 Details and full texts of all peace treaties and agreements provided courtesy of the Information Division of the Israeli Department of Foreign Affairs.
74 Annex 1-A, Articles I (1) and VI (1). UN Security Council Resolution 1031 of 15 December 1995 subsequently provided full authorisation for the Agreement under Chapter VII including UN responsibilities arising from the International Police Task Force and the High Representative for relief matters. The IPTF were to have significant monitoring and training but no law enforcement responsibilities. To fulfill these tasks they were to have complete freedom of movement and be allowed access to any site, person, activity, proceeding, record or other item or event in Bosnia and Herzegovina. This was to include the right to monitor, observe and inspect any site or facility at which it believed police, law enforcement, detention, or judicial activities were taking place.(Annex 11, Article II, 2, 5., Article III., Article IV, 3).
empowered to "take such actions as required, including the use of necessary force, to ensure compliance with the... (agreement) and to ensure its own protection", a point to be emphasised throughout the document. There were a number of other provisions assigning authority to the IFOR commander and various agencies, approximating an occupation condition. This condition was by no means confined to the Cease-Fire Zone of Separation (two kilometres either side of the Agreed Cease-Fire Line) into which the bulk of the forces were to deploy. A significant role was assigned to the OSCE in fostering ongoing

75 Annex 1-A, Article I (2).
76 In Annex 1-A, Article II (4) the Parties were required to, "cooperate fully with any international personnel including investigators, advisors, monitors, observers, or other personnel in Bosnia and Herzegovina", including free and unimpeded access and movement and by, "providing such status as is necessary for the effective conduct of their tasks". Under the provisions governing access to Gorazde in Annex 1-A, Article IV, 2, control over the transit routes was vested in IFOR. The IFOR Commander was given the authority to direct the Parties in relation to the removal, dismantling and destruction of all mines, unexploded ordnance and other explosives. IFOR was given the right to provide the military security for the areas transferred to it from UNPROFOR (Article IV, 3). Particularly robust was the provision in Phase III of the process giving IFOR the right to, "compel the removal, withdrawal, or relocation of specific Forces and weapons from, and to order the cessation of any activities in, any location in Bosnia and Herzegovina whenever the IFOR determines such Forces, weapons or activities to constitute a threat or potential threat to either the IFOR or its mission, or to another Party". (Article IV, 5).

Bringing together the threads of many recent peace operations IFOR was tasked; to help create secure conditions for the conduct of tasks associated with the settlement, including free and fair elections; to assist the movement of organisations in the accomplishment of humanitarian missions; to assist UNHCR and other agencies and NGOs in their humanitarian missions, and "to observe and prevent interference with the movement of civilian populations, refugees, and displaced persons, and to respond appropriately to deliberate violence to life and person". (Article VI, 2). To meet these responsibilities and protect the IFOR, the Commander was given the authority to do all that he judged necessary and proper, including the use of military force. (Article VI, 5).

IFOR was also given the right to observe, monitor, and inspect any Forces, facility or activity in Bosnia and Herzegovina that it believed may have military capability. It was to have complete and unimpeded freedom of movement by ground, air and water throughout Bosnia and Herzegovina and the right to bivouac, manoeuvre, billet, and utilise any areas or facilities to carry out its responsibilities as required for its support, training, and operations. (Article VI, 6 & 9 (a)). In a direct assignment of sovereign authority and reflective of the power exercised by the UNITAF Commander in Somalia, the IFOR Commander was given, "sole authority to establish rules and procedures governing command and control of airspace over Bosnia and Herzegovina to enable civilian air traffic and non-combat air activities by the military or civilian authorities in Bosnia and Herzegovina, or if necessary to terminate civilian air traffic and non-combat air activities". (Article VI, 9 (b)). The IFOR Commander was to transfer this authority to civilian control in a gradual fashion consistent with IFOR objectives to ensure the smooth and safe operation of an air traffic system when IFOR departed. He was also authorised to promulgate rules for the control and regulation of all surface military traffic throughout Bosnia and
negotiations but also in the election process. In this respect the OSCE was responsible for certifying whether conditions existed for effective elections and if this were the case then it was responsible for adopting and putting in place an elections program. This was to include the establishment of a Provisional Election Commission to supervise, "all aspects of the electoral process to ensure that the structures and institutional framework for free and fair elections" were in place. A reconstruction programme reminiscent of the post World War II efforts was to support the Agreement with the marshalling of the resources of the international community, the IMF and the World Bank taking place at the subsequent Peace Implementation Conference of 8-9 December 1995.

6.30 Clearly pacific occupation is being put to renewed employment by the international community to meet the challenges of the diverse security crises that threaten international peace and stability. This is clearly being driven by the need to address the source of this threat which is not primarily cross border invasions but internal disintegration and violence. Having failed to prevent the

Herzegovina. (Article VI, 9 (b) (3) & (c)). The IFOR Commander was given the final authority in theatre regarding the interpretation of the agreement on the military aspects of the settlement of which the appendices were an integral part. (Article XII).

Under the respective Status of Forces Agreements concluded between NATO and the Federal Republic of Yugoslavia, the Republic of Bosnia and Herzegovina and the Republic of Croatia, NATO personnel were to be covered by the provisions governing experts on mission under the Convention on the Privileges and Immunities of the UN 1946. These personnel were to respect the laws of Bosnia and Herzegovina as far as they were compatible with their legitimate tasks and mandate and were subject to the exclusive jurisdiction of their national elements in relation to criminal and disciplinary offences. NATO was also authorised to make improvements or modifications to the infrastructure of Bosnia and Herzegovina, "including roads, utility systems, bridges, tunnels, buildings, etc." (para 17 of Agreement with the Republic of Bosnia and Herzegovina).

crises in the first place, it is only through action that equates to occupation that such internal strife can be effectively addressed, if addressed at all.

**Operations Under The UN Charter**

6.31 In the context of the expanded application of the law of occupation and the type of operations analysed in Chapter 2, it is necessary to consider the application of the Fourth Convention and Hague Regulations to operations that are carried out under the auspices of the UN Charter. In this respect there are two distinct classes of operation that must be considered: UN authorised missions and UN commanded missions. The former case is where the forces of a member state or states conduct an operation under a Security Council mandate but remain under national and not UN command, such as in Operation Desert Storm in the Second Gulf War and Operation Restore Hope in Somalia. The latter is where the forces are assigned to the command of the UN pursuant to an agreement between the UN and a member state, the force commander being under the direct authority of the UN Secretary General or his Special Representative, such as with UNTAC in Cambodia and UNOSOM in Somalia. These two forms of operation are often distinguished by the shorthand reference of 'contracted out' as opposed to 'blue helmet'.

**'Contracted Out' Operations**

6.32 It is clear that there are no grounds upon which an exception could be made for the application of the law of occupation in contracted out enforcement
operations. There is nothing in the UN Charter that would indicate that actions of member states authorised by the Security Council would absolve them from the obligations of conventions to which they are party or customary law. On the contrary, the Charter specifically iterates as its fundamental purposes the promotion of human rights, international law and treaty obligations.\footnote{See the Preamble to the UN Charter, "We the Peoples of the United Nations, Determined... to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained."} Forces deployed under UN authority originally in a peacekeeping role could also find themselves in circumstances attracting the application of the laws of occupation if the government or transitional authority which had agreed to the presence of the troops collapsed, such that these forces were the sole remaining cohesive authority.\footnote{Roberts, "What is a Military Occupation", \textit{op cit.}, p. 289.} In the case of multilateral forces in general, whether acting under UN authorisation or independently, the application criteria outlined above is the same and the law will equally apply to these forces. The issues that arise in this circumstance include the delineation of jurisdiction amongst the contingents, and who is to bear overall responsibility for adherence to the law and the coordination of policy. This will be easier to resolve in some ways where each contingent is assigned a specific area, particularly if that territory coincides with a pre-existing administrative regional entity. This for example was the situation in which many of the contingents of the UNITAF coalition force found themselves in Somalia. The conventions do not specifically address these issues of authority and coordination in coalition occupations. The experiences of World Wars I and II however serve as good examples of both the problems
and solutions to such situations. It is possible, therefore, to draw a tentative outline of developing customary law from state practice in this regard although the evidence of *opinio juris* is weak.

6.33 The first issue to be addressed is that the respective contingents in a coalition force may be bound by differing laws. We have seen that the Hague Regulations have been determined to represent customary international law and it is highly unlikely that there would be any forces involved who have not acceded to the 1949 Geneva Conventions. There are, however, some States, such as the US which have not acceded to the Additional Protocols. These forces would thus be bound by the limitation restrictions of Article 6 of the Fourth Convention discussed above. The second fundamental point is that the law will apply to each State individually, each State therefore bearing individual responsibility for adherence to the law. Another important factor is that the Hague Regulations require that the local laws be respected and retained as far as possible. Within this overall proviso each occupying power is given great discretion to take wide-ranging action to secure its forces and restore public order, including the introduction of its own regulations and administrative arrangements. There is obviously a great deal of potential for a disjointed and contradictory approach within a coalition force.

6.34 What then has been the experience of state practice in coalition operations? In the Rhineland following World War I there were four Allied zones

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81 See para 6.24, *supra*.
82 Article 43. This provision will be considered in more detail in Chapter 5.
occupation. French, Belgian, British and American. There was a Supreme Command which regulated the military campaign of the coalition forces but this was not specifically geared to assume responsibility for coordinating the occupation as well. Nevertheless, Marshal Foch, the supreme commander, made the assertion on behalf of all the forces that the Hague Regulations would be the basis of supervision of the Rhineland. It was also the Supreme Command that issued the model ordinance for basic police regulations. The commanding generals of the respective zones were free however to issue their own decrees on the basis of the model ordinance, making changes that they asserted were necessary due to local conditions. In the beginning the commanding generals met once a month in an attempt to coordinate measures in the various zones, while the controleur-general appointed by Foch attempted to coordinate civil affairs with the responsible officers appointed by the commanding generals. Coordination was hampered by tensions between the Supreme Command and the zone commanders. This marked the only centrality to this occupation experience as each of the zones operated with a high degree of autonomy and developed administrative arrangements that largely bore no relation to each other. Eventually the difficulties of coordination led to the establishment of the Inter-Allied Rhineland Commission in April 1919, which also marked the transition from military to civilian predominance in occupation authority.

Fraenkel, op cit.,(Chap 5, n. 56) pp. 9-10
Ibid., p. 10.
Ibid., p. 11.
Ibid., pp. 11-14.
6.35 In World War II joint occupations occurred in Italy, Germany and Japan, involving American, British, French, Soviet and, in the case of Japan, Commonwealth forces. The approach of the Allies in the final days of World War II was far more systematic than it had been in World War I, being informed by that experience, their recent experience during World War II and having had time to contemplate the likelihood of the needs of such an occupation. Prior to the invasion of Sicily the Allies established a body designated the Allied Military Government of Occupied Territories (AMGOT). Initially it was declared that this body would operate in accordance with the Hague Regulations but, as we have seen, the occupations of Germany and Japan were regarded as total conquests, drawing on the notion of debellatio,87 so that the Allies would not be strictly bound by the provisions of the Hague Regulations. In Sicily there was joint Anglo-American command which suffered from disagreement of approach. The British preferred to develop an administration based on the indigenous officials while the Americans wanted to have army officers administering directly. This was eventually resolved by leaving the decision to the commander on the ground.88

6.36 In Germany, once again, the territory was divided up into zones administered by the French, British, and Americans with the addition of the Soviets. The difference this time was that the whole state was subject to this

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87 Debellatio is the circumstance where, as a result of legal war (ie in self-defence and/or since 1945 war fought under UN auspices) the international personality of a belligerent is totally destroyed. Schwarzenberger, op cit., Vol I, p. 297. "In this case, the enemy state has ceased to exist as a subject of international law. Therefore, in relation to this defunct entity, neither the rules of land warfare nor any other rules of international customary law any longer apply." Schwarzenberger, op cit., Vol II, p. 167.

88 Benvenisti, op cit., (Chap 5, n. 1) pp. 84-86.
division with the total supplanting of sovereign government by the Allies. A microcosm of this division was established in Berlin. Well before the Allies entered German territory they had agreed on the essential objectives of the occupation as we have seen in Chapter 3. Many promulgations were made concerning key features of the occupation, such as security and justice, before the Germans had been defeated and the whole country captured. The overall framework of the occupation was dominated in the West by the US. Although there were variations in the approach to the US promoted policies, such as that governing de-nazification, the key foundations of the occupation relating to economic, justice and institutional reform were sufficiently coordinated to achieve the objectives of the occupation and minimise jurisdictional anomalies. Eventually this was symbolised in the Occupation Statute of 1949. Naturally what took place in the Soviet zone was a different matter and bore very little relationship to policy or implementation in the Western zones. The policy there quickly became one of creating a separate East German entity modelled on the Stalinist centralised state, subject to Soviet control.

6.37 In the only significant post World War II cases of coalition occupation, the second Gulf War and Somalia, there was no question but that the US exercised authority in relation to policy in dealing with traditional occupation issues. In the second Gulf War the main populated area occupied was Kuwait and the US deployed 1,000 civil affairs personnel to assist in re-establishing
The Kuwaiti government was also able to quickly re-commence its functions. In Somalia the issues regarding which the US issued policy directives for the whole coalition force included the detention of locals, force security and humanitarian responsibility in relation to the civilian population while the occupied area was once again broken up into areas of responsibility, roughly equating with existing territorial entities.

6.38 Although, as von Glahn points out, no really satisfactory answer has been found to this question of overall administration and responsibility in a coalition occupation some things have emerged from state practice in this area. Firstly an overarching authority, with the predominant coalition force and command assuming chairmanship, should be established incorporating consultative mechanisms. This authority will promulgate regulations governing fundamental matters such as justice, force security and humanitarian issues in relation to the civilian population. The Fourth Geneva Convention has largely obviated the need for an Occupation Statute but general ordinances may still be desirable to define particular aspects of the temporary administration, such as for policing regulations and/or a temporary justice code if necessary. To give the best effect to the law of occupation the territory should be divided into areas of responsibility that equate with pre-existing territorial entities. These areas of responsibility should be discrete to individual national contingents to give maximum effect to the existing framework and application of the law, based as it is on the responsibilities of states. This has the added benefit of allowing for

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the establishment of a relationship and understanding between the contingent and the population, provided the training of the troops and the civil affairs/civic action aspects are well catered for. This can also aid the morale and commitment of the contingent in having its own area to identify with and measure its input by. This is, in any event, how many deployments have been organised as we have seen.

Blue Helmet Operations

6.39 The next crucial issue that must be determined is whether the laws of occupation are applicable to UN forces, the 'blue helmet' operations. With regard to the status of the UN itself, it was established by the advisory opinion of the International Court of Justice in 1949 in the Reparations case\(^94\) that while the UN has international legal personality it is not a state and does not have the same rights and duties of a state. While it is not a state the UN is nevertheless given the authority to deploy forces for enforcement operations under Chapter VII of the UN Charter. In order to execute this authority the organisation would have the legal personality to engage in dealings, exercise rights and assume duties.\(^95\) Peacekeeping as opposed to peace enforcement forces were not


\(^95\) "But to achieve these ends (of the UN Charter) the attribution of international personality is indispensable. The Charter has not been content to make the Organisation created by it merely a centre “for harmonising the actions of nations in the attainment of these common ends” (Article I, para. 4 (of the UN Charter)). It has equipped that centre with organs, and has given it special tasks”. Ibid., p. 178

"In the opinion of the Court, the Organisation was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate on an international plane. It is at present the supreme type of international organisation, and it could not carry out the intentions of its founders if it was devoid of international personality. It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties
specifically provided for under the Charter but the International Court of Justice in the Expenses case\textsuperscript{96} of 1962 nevertheless determined that the UN is also constitutionally competent to deploy these forces.\textsuperscript{97} The UN is therefore an organisation that can command and deploy forces which themselves will or may be engaged in combat or use force as authorised by the UN. The UN is also empowered to administer territory in relation to trusteeships and non-self-governing territories or assume administrative functions in the context of maintaining international peace and security, although it cannot have territorial sovereignty.\textsuperscript{98} This lack of capacity to assume sovereignty sits well with the fundamental nature of the laws of occupation as a purely temporary status having no bearing on the matter of sovereignty (unless occurring in the context of \textit{debellatio}).\textsuperscript{99} In this particular respect occupation has much in common with the administration of territory pursuant to a trusteeship.\textsuperscript{100}
6.40 It is established that the UN has the capacity to enter into and be bound by international conventions, depending on the terms of the convention in question, particularly in view of the Vienna Convention on the Law of Treaties Between States and International Organisations or Between International Organisations of 1986.\footnote{The Convention entered into force on 21 March 1986. It enabled the participating organisations to become parties to conventions by signing and executing acts of formal confirmation as the equivalent to ratification by states.} It seems clear from the Expenses case that the UN has capacity to engage in treaties which are not restricted to states as parties, that are in accord with or authorised by the Charter of the organisation.\footnote{Expenses Case, op cit., p. 168, "...when the Organisation takes action which warrants the assertion that it was appropriate for the fulfillment of one of the stated purposes of the United Nations, the presumption is that such action is not ultra vires the Organisation."} The Charter delineates humanitarian objectives and the manner of the regulation of international peace. The Organisation is also tasked under Article 1 to promote and encourage respect for human rights. It could be asserted that promotion and encouragement is hardly served by the organisation itself attempting to avoid responsibility in this area. When viewed in tandem with the powers of Chapter VII to engage in enforcement action there is a case to be made, albeit highly contentious, that engagement in international humanitarian law conventions regulating armed forces is not only within the capacity of the UN but that this is a positive obligation in reference to the Charter. In this respect Finn Seyersted was led to the conclusion that:

...the United Nations has a general inherent capacity to conclude treaties, and that there is no basis for making an exception in respect of law-making multilateral conventions between states. This is confirmed
in practice by the fact that the United Nations and other inter-governmental organisations have in fact become parties to such conventions, fully or in part.... Thus there can be no doubt that the United Nations has the inherent capacity to become a party to the conventions on warfare if their terms permit it to accede.\textsuperscript{103}

6.41 Following this argument it would be open to the UN to accede to the conventions regulating armed conflict and military presence if the conventions themselves permitted this. It is the opinion, however, of the legal office of the UN that the Geneva Conventions of 1949 do not provide for the participation of international organisations in their final clauses.\textsuperscript{104} This approach is disputed by a number of commentators.\textsuperscript{105} Seyersted points out that, while the issue was not specifically debated in the Diplomatic Conference of 1949 nor in the \textit{travaux preparatoires}, the drafting of the Conventions clearly did not intend to restrict adherence to its provisions to 'states', 'governments' or 'countries', none of these terms being used in the Conventions. The Conventions refer instead to 'Powers', 'Contracting Parties', 'Parties to the conflict', 'Detaining Power', 'Occupying Power'. "The three military Geneva Conventions even provide expressly that they apply to 'members of regular armed forces who profess allegiance to a Government or an authority not recognised by the Detaining


It could be put in support of this argument that the 1949 Conventions, and the Protocols that followed, sought to regulate the *de facto* circumstances of conflict or occupation situations and eliminate as far as possible the legal qualifications on the application of the law. They also emphasise individual responsibility and liability, drawing focus away from the State, rendering the argument of the UN that it is not a State to a large degree irrelevant in this area of the law.

6.42 The Conventions are concerned with 'military power' and the protection to be afforded to the victims of conflict or subjects of an occupation. In Stephen Boyd's phrase the Conventions are "people-oriented" not "territory-oriented" with all the consequential debates that might then have arisen concerning sovereignty and state relations. The term 'Power' in the Conventions could be argued to encompass UN forces as a 'military power', party to a conflict, or occupying power where it has organised forces under a chain of command responsible to UN Headquarters in New York. The conclusion of this argument would be that the Organisation's capacity to deploy forces and engage in conflict or occupy territory brings it within the scope of the 1949 Conventions and the Protocols as a potential adherent.

6.43 Not only was the UN from the very beginning projected as a potential combatant and/or occupying force but, had the intention of those who drafted the Charter been fully realised, the UN would have been involved in every

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conflict between States or the prevention of them, as the body charged with maintaining international peace and security. This can be seen reflected in Article 1 and Chapter VII, and, in particular, in the unutilised provisions of Articles 43-50 by which states were to assign military forces and support to the UN. Following this line of argument interpreting the Conventions and Protocols to allow for the adherence of the UN would therefore be justified in reference to their purpose, that being to govern all conflict and occupation circumstances.\textsuperscript{108} Seyersted, writing prior to the advent of the Protocols, concluded in this respect that:

\textit{...both the 1907 Hague and the 1949 Geneva Conventions are open for accession by the United Nations. It is submitted, furthermore, that if the Organisation accedes formally under the accession clause, it becomes a contracting party not only in the substantive, but also in a formal sense, ie it acquires the same rights and duties as contracting states, not only under the substantive provisions of the conventions, but also under the final clauses, all of which speak of 'Power' or 'Party'.}\textsuperscript{109}

6.44 Notwithstanding this argument the issue remains that even if the UN is legally competent and permitted to adhere to the Conventions it has not done so and therefore it must be determined to what extent the general customary laws of armed conflict apply to the UN. There is a significant body of opinion

\textsuperscript{108} Seyersted, \textit{op cit.}, p. 350.
\textsuperscript{109} \textit{Ibid.}, pp. 352-353. The rights which a UN force would be entitled to exercise would include those specified under Hague Regulations and Fourth Convention for the temporary administration of justice, the maintenance of order and taking measures for the security of the force.
that these laws do apply to UN forces, including Professor Yoram Dinstein,\textsuperscript{110} Adam Roberts,\textsuperscript{111} Finn Seyersted\textsuperscript{112} and the ICRC.\textsuperscript{113} The UN also now appears to concede that the general customary laws of armed conflict will apply to enforcement operations, when it is in combat situations, but that it will not apply to peace-keeping forces who are not in fact party to a conflict and have no mandate to engage in combat.\textsuperscript{114} In the 'model agreement' prepared by the UN for use between the UN and contributing states, it is in fact now stated that UN operations will "observe and respect" the principles and spirit of the general international conventions governing the conduct of military personnel.\textsuperscript{115} It appears that the UN is looking to include this acknowledgment in the 'model status of forces agreement' which is executed between the UN and the host state in future missions.\textsuperscript{116}

\textsuperscript{110} "Incontestably, the predominant opinion today is that United Nations forces must comply with international humanitarian law", see also his reference to the position of the Institut de Droit International which stated that all the humanitarian rules of the law of armed conflict including the 1949 Geneva Conventions must be observed without fail by UN forces. Dinstein, "War, Aggression, Self-Defence", op cit., p. 162.

\textsuperscript{111} Roberts, "What is a Military Occupation", op cit., pp. 289-291.

\textsuperscript{112} Seyersted, op cit., pp. 297-298.


\textsuperscript{115} Model Agreement Between the United Nations and Member States Contributing Personnel and Equipment to United Nations Peace-Keeping Operations, Annex to Report of the Secretary General to the General Assembly, A/64/185, 23 May 1991., Article X, "Applicability of International Conventions" para 28, "The United Nations peace-keeping operation shall observe and respect the principles and spirit of the general international conventions applicable to the conduct of military personnel. The international conventions referred to above include the four Geneva Conventions of 12 August 1949 and their Additional Protocols of 8 June 1977 and the UNESCO Convention of 14 May 1954 on the Protection of Cultural Property in the event of armed conflict. The Participating State shall therefore ensure that the members of its national contingent serving with the United Nations peace-keeping operation be fully acquainted with the principles and spirit of these Conventions." The references to "peace-keeping operation" are bracketed as variable to the case of peace enforcement.

\textsuperscript{116} Interview with UN Legal Staff at UN Headquarters New York, December 1994. The Model Status-of-Forces Agreement Between the United Nations and Host Countries, Annex to Report of Secretary General to the General Assembly, A/45/594, 9 October 1990 did not contain such a provision.
6.45 There is also another level on which the general laws of armed conflict will attach. As the UN has often pointed out it is not a State. The basis upon which forces are contributed to the UN is through a formal 'model agreement'\textsuperscript{117}. Under Article V of the agreement forces are made available to the UN on the basis that they \textit{remain in their national service} but are under the command of the UN. Responsibility for disciplinary action with respect to the military personnel rests with the officer designated by the Government of the participating state for that purpose. As set out in Article VIII the participating state exercises jurisdiction with respect to crimes or offences which may be committed by its military personnel. Specifically Article X indicates that it is the responsibility of participating states to ensure that the members of their national contingents be fully acquainted with the principles and spirit of the Conventions applicable to the conduct of military personnel. Clearly the various national contingents are supplied to the UN on a contractual basis but do not lose their status as national contingents. They bring to the UN operation all the applicable international conventions to which their respective governments have acceded and are bound by them. This is emphasised by the fact that discipline remains exercisable by the contingent commander only. The disciplinary law that the commander will apply will be the national municipal law governing the particular force and those imposed by the international conventions to which its government is party.

6.46 This is the same situation that applies, as we have seen above, in the case of coalition forces. It is true that the respective forces may not have signed

\textsuperscript{117} See note 115.
up to all the conventions, although we have noted this is becoming less likely. Even in the case where countries have not signed they will still be bound by all the provisions which have reached the status of customary international law and of course the remainder of customary law. For example in relation to the US non-accession to the Additional Protocols of 1977, in practical terms the US appears to have acknowledged that most of the provisions of Protocol I have attained the status of customary international law and operate accordingly.\textsuperscript{118} The point being that these matters can be addressed so that they are not a practical impediment. UN operations have the same status, with respect to the provisions of international humanitarian law, as a coalition operation; responsibility and application founded in the individual contingents. Everything, therefore, set out above in relation to the applicability of this body of law to national forces will apply to UN forces. It will be the legal responsibility of each contingent commander to ensure these laws are being adhered to. In practical terms, as in coalition operations, there must be a coordinated approach among the contingents with the UN command taking the lead.\textsuperscript{119}

\textbf{6.47} The question that must be determined for the purposes of the present analysis, however, is whether, and to what extent, the laws of occupation apply to the UN. Adam Roberts' view of the matter is that:

\begin{quote}
It is uncontentious that in an enforcement action United Nations forces could well find themselves in belligerent occupation of territory, and that
\end{quote}

\textsuperscript{119} Roberts, \textit{op cit.}, (Chap 5, n. 13) p. 290.
most or all of the customary and conventional laws of war would then apply. As for United Nations peace-keeping forces, where these act within one State on the basis of status of forces agreements between the United Nations and the host State... they would not be in occupation of the territory.... It is just conceivable, however, that in different circumstances a peacekeeping force could find itself organising some kind of 'occupation by consent'. Moreover if central authority in the host state were to collapse, a peacekeeping force might find itself extending its authority and taking full charge of such matters as public order and safety.120

6.48 This was, in fact, the case in the Congo in the early 1960s, Cambodia in 1991,121 Somalia in 1993 and in Bosnia in 1995. The application of both the convention regime and the customary law of non-belligerent occupation, as we have seen, are not dependent on whether forces are party to a conflict or engaged in combat. It is dependent on the fact of the presence of a force on foreign territory where they are the sole or primary effective authority. In occupations pursuant to a treaty, the terms of the treaty and the laws of pacific occupation will govern the situation. The issue in this respect for the UN is whether it will have the capacity to assume the responsibilities and employ to advantage the rights that result.122 The array of rights that accrue under the

120 Ibid., pp. 290-291.
121 In Cambodia the UN operation was governed both by the pacific occupation treaty framework of the Paris Accords and by a Status Forces Agreement, concluded with the Cambodian Supreme National Council (the interim transitional body), that dealt with simple administrative and disciplinary matters. Report on Australian Defence Force Participation in United Nations Operations in Cambodia Nov 91 to Nov 93 (Internal ADF Report) Enclosure 1.
122 See Chapter 5, supra.
Convention, which may have provided answers to some of the greatest dilemmas the UN has faced in recent times, is often forgotten.\textsuperscript{123} If the UN has concluded agreements with the contingents that it will follow the principles of the conventions and if the majority or all of the contingents are party to at least the Fourth Convention then the fact that the UN has not acceded to it should result in no legal impediment to reliance on, and implementation of, its provisions. At the least it would seem safe to say that the UN as an organisation is bound by the Hague Regulations as customary law, the humanitarian provisions of the Fourth Convention\textsuperscript{124} and customary law in general when involved in operations.

**The Question of Acceptance**

6.49 There would appear to be some difficulty with the acceptance of the term 'occupation' by states in recent times. It is difficult to find a case other than that of Israel's occupation of the Gaza Strip and West Bank where a state has openly acknowledged the application of even the humanitarian provisions of these laws to circumstances where they clearly do apply.\textsuperscript{125} Certainly the term 'belligerent' occupation is no longer relevant to a description of this body of law given the change wrought by Article 2 of the Fourth Convention and Article 3 of Protocol I. The origins of the word 'belligerent' itself reflects international law

\textsuperscript{123} This will be highlighted in Part III.
\textsuperscript{124} See discussion at paras 6.17 - 6.20, supra.
\textsuperscript{125} Israel also acknowledges the full application of the Hague Regulations of 1907 to the territories. See for example the Israeli Supreme Court decision in Jerusalem District Electricity Company Ltd v (a) Minister of Energy and Infrastructure, (b) Commander of the Judea and Samaria Region, 1980, reproduced by F. Domb, "Judicial Decisions: Judgements of the Supreme Court of Israel Relating to the Administered Territories", *Israel Yearbook of Human Rights* 11 (1981) p. 356.
notions of pre-1945 declared or technical states of war. Quite often the law will be applied *de facto* without the formal recognition that it applies *de jure*. This has been characteristic of the US approach, for example, in Somalia.\textsuperscript{126}

6.50 There seem to be two aspects of this issue that are the source of the political concern in accepting *de jure* application. The first is simply the word 'occupation' itself which is perceived as carrying negative public relations connotations either of colonial domination, as in the case of South Africa's occupation of Namibia, or oppression, harking back to the experiences of World War II and more recently in the negative portrayal of the Israeli occupations. The second and most important difficulty appears to be with the obligations imposed by the Fourth Convention. The UN particularly baulks at this aspect given its frequent assertions that, as it lacks the mechanisms and resources of a state, it cannot assume many of the burdens flowing from international humanitarian law relevant to armed forces. This concern would appear to be based in an unjustified apprehension of the extent of these obligations which ought to be weighed against a proper consideration of the utility of the rights that also accrue under the Convention. In addition the UN's relief, development and disaster agencies, which have almost always been present at the same time as recent UN military interventions, uniquely place the organisation to meet a significant level of responsibility. In fact this capacity is well beyond that of most states. While the UN may never again assume direct command of

\textsuperscript{126} United States Army Field Manual 100-23, "Peace Operations", December 1994, p. 49. The Diplomatic Conference of 1949 had recommended in its Resolution 1 that disputes on interpretation or application of the Conventions be referred to the ICJ. No government has ever done so. ICRC IHL CD-ROM, *op cit.*
enforcement operations it ought still to ensure that its authorised agents are prepared to assume such responsibilities or coordinate an international effort to support the military operations to deal with them.

6.51 With respect to terminology this can be dealt with by referring to the application of international humanitarian law generally, or to the Fourth Geneva Convention in general terms in political/official or public information pronouncements and documents. Due to the nature of this body of law it is suggested that it is more accurate to refer to it in any event as the 'international law regulating civilian/military relations'. This term is general enough to describe all dimensions of the law from pacific and conflict occupations to simple status of forces agreements. With the greater focus on adherence to international regulation and standards in recent times, the ability to cite an authority for proposed actions would be a positive public relations asset.

6.52 In relation to one issue in particular the UN could find this body of law very useful. One option for implementing the Fourth Convention is that the UN could execute a status of mission agreement if any surviving authorities exist, whereby the authorities would accept that the mission would operate in accordance with the applicable provisions of the Fourth Convention, Hague Regulations and Protocol I, assuming the obligations and exercising the rights therein specified and listing any exceptions. Where there was no authority at all, or none that could legally and morally be dealt with, then the UN could fall back on the general assertion in its model agreements that it will operate in
accordance with the 1949 Geneva Conventions and related instruments. Both these options would be based on the UN's treaty and contract capacity together with the authority available under Chapter VII of the Charter. In fact it has been asserted that there is a separate branch of the law known as "trustee occupation". This assertion was framed in the context of failure to appreciate the change wrought by Article 2 of the Fourth Convention and to understand that trusteeship is an inherent aspect of this law. How this is derived is illustrated by Eyal Benvenisti:

The power exercising effective control within another sovereign's territory has only temporary managerial powers for the period until a peaceful solution is reached. During that limited period, the occupant administers the territory on behalf of the sovereign. Thus the occupant's status is conceived to be that of a trustee.

There is great potential utility here for the UN and those authorised by it to conduct complex peace operations. It can be the basis for a proper and clearly defined legal framework for future operations, dealing with many of the dilemmas that have caused such embarrassment to the UN in recent times, such as detention action in Somalia. It is stressed that this is suggested as an

128 "The Hague Regulations and the 1949 Geneva Convention IV can be interpreted as putting the occupant in a quasi-trustee role. Von Glahn refers to occupants as exercising 'a temporary right of administration on a sort of trusteeship basis'. All this diminishes still further any case for regarding 'trustee occupation' as a separate category of occupation". Roberts, *op cit.*, (Chap 5, n. 13) p. 295.
129 Benvenisti, *op cit.*, (Chap 5, n. 1) p. 6.
130 See Chapter 3, *supra*. 
interim option to deal with immediate practical problems on the ground in the
initial stages of a deployment. As time permits of greater deliberation
frameworks for the long term ought to be developed, specifically tailored for the
scenario.

Conclusion

6.53 The introduction of the Fourth Geneva Convention brought together for
the first time the evolutionary strands of the law of occupation, belligerent and
non-belligerent (except pacific occupation). It was designed to remove
contentious and evasionary legal argument as to the circumstances in which an
occupation takes place. As a victim oriented convention it sought to deal with a
defacto situation; military forces having foreign citizens within their control
where they have displaced or stand in the place of civil authority without the
consent of the sovereign. As a military presence that met that description the
UNITAF deployment was subject to the law for the areas in which it was
present until its departure. The same conclusion applies to the UNOSOM II
deployment for at least a portion of its presence in Somalia. It is a circumstance
that also applied to certain safe haven operations. Many humanitarian elements
of the Fourth Convention are part of customary international law. It will bind all
those contingents to UN commanded or authorised operations in those
respects and in whole for those nations who are party to the Convention. The
extent of the application, should the occupation extend past one year, will vary
depending on whether the contingent is from a state party to Protocol I. Given
the potential that currently exists for internal conflicts and collapsed states that may give rise to humanitarian disasters or genocides on a massive scale, demanding international intervention, the circumstances in which the Fourth Geneva Convention could become a factor may well occur again. It therefore becomes necessary to evaluate whether this is desirable and whether the law of occupation is suited to such contemporary scenarios. To do this we must proceed to an analysis of the provisions of the Fourth Geneva Convention as relates to the specific issue of the public security function.
CHAPTER SEVEN: OBLIGATION MEETS UTILITY - THE
PROVISIONS OF THE LAWS OF OCCUPATION

While political rights and the legal interpretation of a given set of factual circumstances are of far reaching consequence for the fate of nations, and cannot be excluded from consideration, any possible separation between the decision on political issues and the pragmatic application of humanitarian rules should be considered positively.

Meir Shamgar

Introduction

7.1 No matter what the true position is with regard to the *de jure* determination of the application of the law of occupation, the political reality is that this debate will always be preceded in policy making circles by a consideration of what the consequent obligations will be. The extent and acceptability of these obligations will shape the attitude to the arguments for or against the application of the law that a state then adopts. In this chapter the focus will therefore be upon the extent and nature of the obligations relating to law and order in an attempt to determine whether forces in occupation circumstances have anything to fear from them. Following on from this the rights that attach to the force will be closely analysed. The less contentious prohibitions will also be briefly considered. From this analysis of obligations, prohibitions and rights the issue that must then be addressed is the utility of the law in the context of the current demands in the arena of peace operations. Particular issues to be examined will be how the laws of occupation can assist

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in addressing the needs of a force to take detention action, the maintenance of public order, the reconstruction of the administration of justice, the prosecution of offenders against the security of the force or international personnel such as NGOs and 'War Crimes' in general. From this it will be seen how the law could have provided valuable assistance in the situation described in Part I regarding the UNITAF and UNOSOM operations in Somalia.

7.2 As international law has developed in its codification and practical influence it has become more and more necessary for states to justify their actions by reference to international law. The activities of human rights NGOs, and the ongoing efforts by bodies such as the ICRC and International Law Commission to promote respect and awareness of international law, have had the effect of enlisting public opinion in attempting to hold governments accountable to international law. Even when the resort to military action is lawful, it will be difficult, if not impossible, for nations to sustain operations unless the actual conduct of operations is perceived to be lawful. This combination of prerequisites was well demonstrated in the Gulf War of 1991.3 The government and the military force, therefore, that can point to 'black letter' legal provisions will have an important edge in their struggle. It has been

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demonstrated many times how easy it is for an operation to lose support when a government is unable to effectively communicate justifications for its actions. Effective communication presupposes that there is a case to communicate and a government and its military force must ensure their houses are in order if they intend to invite inspection.

The Obligations

Restoration of Public Order

7.3 The obligation to restore public order has its origins in Article 43 of the Hague Regulations of 1907. The provision states that the occupant is to, "take all the measures in his power to restore, and ensure, as far as possible, public order and life". Although this is cited as an obligation it also constitutes the conferral of highly significant rights. It is this provision that gives rise to the misconception that two undesirable consequences flow to the military force. First, that the force must take this action regardless of its capability, and second the fact that it interferes with the mission or increases the risks involved. These provisions, however, govern the situation where hostilities have ceased, and the force has no other ongoing mission, in the occupied area. As in all other

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5 Article 43, "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety (or 'civil life', see discussion below), while respecting, unless absolutely prevented, the laws in force in the country". ICRC's "Conduct of Hostilities", op cit., p. 28. It will be recalled that the operation of Sections II and III of the Hague Regulations of 1899 and 1907 in relation to the Fourth Geneva Convention was preserved by Article 154 of the Fourth Convention, including Articles 22-56.  
6 This is based on the principles of "effective control" of the territory and the reasonable expectation that can be placed on forces engaged in action. "...as long as the territory as a whole is in the power and under the control of the occupant and as long as the latter has the
areas of the Law of Armed Conflict the principle of 'military necessity' applies and therefore the attainment of the military objective comes first.\textsuperscript{7} The normal presumption is that there are no ongoing operations in an area being occupied but where this is the case the attention of the force will be directed to the military objective and so otherwise applicable obligations will not be relevant.

7.4 Circumstances in which this may be the case include where the force is engaged in combat, dealing with significant security threats which it is preoccupied in repelling, and where it is tasked to perform a specific mission such as food distribution, refugee handling or infrastructure restoration related to the needs of force maintenance which absorb all its capacity.\textsuperscript{8} The wording of Article 43 confirms this, as it states that the measures that are to be taken are those within the power of the force. Similarly the requirement is limited by the expression "as far as possible" which clearly involves an assessment of all the circumstances including the capability of the force and the scope of the problem. There is also no requirement on a commander to assume

\textsuperscript{7} "It is perfectly true that the interests of the occupant are paramount and that every act and measure undertaken by a military government has to be judged by the yardstick of military necessity and usefulness in concluding the conflict successfully and preserving order in the occupied area", Von Glahn, \textit{op cit.}, p. 264 and also pp. 224-229. "Although active warfare has ceased in these areas, the necessities of war must claim there a high priority and, in some instances, are even decisive in shaping the operative rules". Schwarzenberger, \textit{op cit.}, vol II, p. 178 and also pp. 128-136.

unacceptable risks to his force. The second misconception is that the provision obliges the force to remain until order is restored. As we have seen this last point has absolutely no basis in the law.

7.5 What then does the provision require? It is suggested the prescription may be stated as follows. Where a military force is present in the circumstances described in Chapter 6, not being currently engaged in operations, having the capability to do so and the risks not being too great, it must do what it can to restore and ensure order, while it remains in location. In reality the force present in the circumstances in which the law applies will have a very strong vested interest in the restoration and maintenance of order, but what exactly does this entail if it is within the capability of the force? Yoram Dinstein's formulation in this respect is that:

...the occupant must see to it that (to the extent that this depends on him) anarchy will not be rampant in the occupied territory or life be paralysed. The occupant cannot sit idly by if marauders pester the occupied territory, killing local inhabitants, even though no soldiers of the army of occupation get injured. The occupant must maintain law and order, and he is not at liberty to tolerate a situation of lawlessness and disorder in the occupied territory.

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9 There is clear recognition throughout the development of the law that the security of the force is a primary consideration, reflected in the Chevreau case cited above (Chapter 6, para 6.10 and n. 30) and Article 64 of the Fourth Convention. Dinstein, "Belligerent Occupation", op cit., p. 114, Schwarzenberger, op cit., pp. 181-182

10 See Chapter 6, paras 6.22 - 6.25, supra.

The key phrase in Article 43 in this respect is "as far as possible". Clearly there may be some circumstances where the situation deteriorates to such a degree that no improvement is possible, or where it may be a major accomplishment to raise the situation from Hobbesian total anarchy to mere chaos.

7.6 One difficulty that emerged in the drafting of this provision was the differing expressions used in the original official French version of the document and the English translation. The English translation of the French phrase "l'ordre et la vie publics [sic]" is commonly rendered "public order and safety". Some have asserted that vie publique goes beyond the concept of "safety", encompassing the entire commercial and social life of a country. Examples of alternative translations used by the commentators are "public order and civil life", and "public order and life". Most treaties of modern times have equally authentic versions in English, and often other languages, but in the case of the

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12 The official French text in fact contains a further qualification in the phrase "en vue de" or "with a view to restoring and ensuring as far as possible", as opposed to the common English version "to restore and ensure". In other words the admonition is to work towards this goal rather than making the actual restoration an obligation.

13 T. Hobbes, "The Leviathan", Prometheus Books, 1988., pp. 63-66. Bertrand Russell summarises the view of Thomas Hobbes, expressed in "Leviathan", of man's natural state where there is no government as "...every man desires to preserve his own liberty, but to acquire dominion over others; both these desires are dictated by the impulse to self-preservation. From their conflict arises a war of all against all, which makes life 'nasty, brutish, and short.' In a state of nature, there is no property, no justice or injustice; there is only war, and 'force and fraud are, in war, the two cardinal virtues'". B. Russell, "History of Western Philosophy", George Allen & Unwin, eighth impression 1962., p. 535. Such a scenario was close to fulfilment in Somalia although there were many dimensions to that situation that defy categorisation. It may therefore be all that can reasonably be expected if such a condition is redeemed to the point where there is no longer widespread and barbaric violence, famine and disease.

14 Article 43, (official text) "L'autorité du pouvoir legal ayant passe de fait entre les mains de l'occupant, celui-ci prendre toutes les mesures qui dépendent de lui en vue de restaurer et d'assurer, autant qu'il est possible, l'ordre et la vie publics [sic] en respectant, sauf empechement absolu, les lois en vigueur dans le pays". ICRC IHL CD-ROM, op cit.

15 Von Glahn, op cit., p. 34., C. Greenwood, "The Administration of Occupied Territory in International Law", in Playfair ed., op cit., p. 246.

Hague Regulations the French text was the only official version. Had there been an official English text the issue of interpretation would have been assisted by the ruling of the Permanent Court of International Justice (PCIJ) in the *Mavromatis Palestine Concessions* Case in 1926.\(^{17}\) In a similar interpretation issue the Court there dealt with the phrases "public control" and "controle public" from the equally authentic English and French texts of the Palestine Mandate. The Court determined that:

...where two versions possessing equal authority exist one which appears to have a wider bearing than the other, it is bound to adopt the more limited interpretation which can be made to harmonise with both versions and which, as far as it goes, is doubtless in accordance with the common intention of the Parties.\(^{18}\)

In the case of the Hague Regulations this ruling cannot be relied upon as the French version is the only official text. The *travaux preparatoires* are also of no assistance as the meaning of the phrase was not debated or deliberated upon in the 1907 Conference.\(^{19}\) The identical expression used in the 1899 Hague Code was also not the subject of comment.\(^{20}\) There was one comment passed on the point at the Conference on the 1874 Brussels Code by the Belgian

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\(^{17}\) PCIJ Reports (1926), Series A, No. 2.


\(^{19}\) *Deuxieme Conference Internationale de la Paix; la Haye: 15 Juin - 18 Octobre, 1907, 1908*, tome I, p. 636 and Appendix pp. 305-308. Articles 42 and 43 were adopted from the 1899 Code without discussion. In fact there was little discussion of any of the occupation provisions with most mention being made of Article 44. (*Ibid.*, pp. 99-101., tome III, pp. 11-14, 111-112,122, 135-136). There were passing references and in some cases amendments to Articles 45, 46, 52 and 53. (*Ibid.*, tome I pp. 101-103., tome III, pp. 14-15, 112-113, 122-123, 141-143).

\(^{20}\) *Conference Internationale de la Paix, la Haye, 18 Mai - 29 Juillet, 1899, 1899.*, (Article 43).
delegate who stated that la vie publique meant, "des fonctions sociales, des transactions ordinaires, qui constituent la vie de tous les jours".21 Interestingly the other influential document of that period, the Oxford Code/Manual of 1880 prepared by the Institute of International Law, in its Article 43 stated "The occupant should take all due and needful measures to restore and ensure public order and public safety".22 The Oxford document was framed in reference to the Brussels Code and was clearly taken into account in the drafting of the Hague Codes, which probably explains the common use of this translation.23

7.7 The expansive approach which asserts that the phrase la vie publique entails a legal responsibility to step in and regulate or reconstruct every aspect of the economic and social life of the country, it is submitted, goes beyond the purpose of the Hague Regulations and the Fourth Convention. These codes seek to ensure fundamental humanitarian standards and reflect the humanitarian concern of restoring the basic functions necessary for the survival of the population.24 Beyond this the occupant is required only to allow the local population, as far as possible and with due consideration to force security, to resume normal life, as reflected in the words of the Belgian delegate to the 1874 Brussels Conference above. Any other interpretation would be contrary to the temporary nature of this body of law and its foundation on and reinforcement of the principle that sovereignty does not pass to the occupant. In

21 "the social functions and normal transactions which constitute every day life". Actes de la Conference Reuni a Bruxelles, du 27 Juillet au 27 Aout 1874, pour Regler les Lois et Coutumes de la Guerre, Nouveau Recueil Generale de Traites, 2e Serie, 1879-1880., (Article 2).
22 ICRC IHL CD-ROM, op cit.
24 "Humanitarian law concerns itself essentially with human beings in distress and victims of war, not States or their special interests". M. Shamgar, "The Observance of International Law in the Administered Territories", Israel Yearbook of Human Rights (1971) vol 1, p. 263.
addition the obligation is framed in the Hague Regulations in reference to restoring the situation prior to a conflict in which the occupant was a participant, usually having caused some or all of the damage.\textsuperscript{25} In the context of the Fourth Convention and the UN Charter, in a non-belligerent occupation resulting from a humanitarian intervention where the situation is already anarchic from a conflict or circumstance to which the occupying force was not a party then the legal obligation is even less extensive, based as it is on restoring the status quo \textit{ante} occupation.\textsuperscript{26} In such circumstances the obligations will be fundamentally humanitarian, related to food and sanitation, and based on the capacity of the force.\textsuperscript{27}

7.8 The parameter placed on this latitude in the case of the Israeli occupied territories was described by Justice Cahan of the Israeli Supreme Court in the \textit{Jerusalem Electricity} case:

\ldots generally, in the absence of special circumstances, the Commander of the region should not introduce in an occupied area modifications which, even if they do not alter the existing law, would have a far reaching and prolonged impact on it, far beyond the period when the military administration will be terminated one way or another, save for actions undertaken for the benefit of the inhabitants of the area.\textsuperscript{28}


\textsuperscript{26} Benvenisti, \textit{op cit.}, p. 11.

\textsuperscript{27} Roberts, \textit{op cit.}, p. 304.

\textsuperscript{28} Jerusalem Electricity Co Ltd v Minister of Energy, Israel Yearbook of Human Rights (1981) vol 11, p. 357.
7.9 The goals of an occupation in peace operations will be defined by the governing Security Council mandate. To accord, however, with the principles of the UN Charter, the Universal Declaration of Human Rights and non-belligerent occupation, the primary goal will be the termination of the occupation by, "the gradual emergence (or re-emergence) of autonomous political institutions within the territory, which assume increasing responsibilities culminating in sovereignty and independence." This is the process that was the essence of the agreement negotiated between Israel and the PLO in relation to the Israeli occupied territories and the Paris Agreement on Cambodia.

7.10 The requirement under Article 43 of the Hague Regulations for the occupant to respect, "unless absolutely prevented, the laws in force in the country", was further complemented by the introduction of Article 64 of the Fourth Geneva Convention. This provision requires that:

The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present convention.

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30 E. Benvenisti, "The Israeli-Palestinian Declaration of Principles: A Framework for Future Settlement", European Journal of International Law, (1993) vol 4, no 4, pp. 542-544 note esp. p. 550 and the continuing responsibility of the IDF. The point to stress is that the issues considered here in relation to Article 43 are equally applicable to UN peace operations occurring in the circumstances to which the law applies as discussed in Chapter 6, supra. See Roberts, op cit., p. 65. For details of the Paris Accords see Chapter 6 para 6.27 and n. 65, supra. For discussion of the Israel/Palestinian Agreements see Chapter 6 para 6.28, supra.
31 The provision goes on to state, "Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws. The Occupying Power may, however, subject the population of the occupied territory to
These provisions are obviously intended to promote the minimum interference in the domestic laws of the territory reflecting the central concern of the law not to confer sovereignty on the occupant. In peace operations the principle of minimum interference will not be contentious for the forces involved, which would normally be seeking to ease the burden on their own resources and adopt procedures in harmony with the cultural context in which they are working. The difficulty arises where, as we have seen in the case of the Allies in World War II, there are laws in place that do not threaten the security of the force but are contrary to fundamental humanitarian standards, the "standards of civilisation". As noted above, in such circumstances the general principle of international law that these fundamental standards of civilisation must be adhered to, will alleviate the obligation to respect such laws. In addition there is the qualification in Article 64 which states that the laws need not be preserved if they would constitute an obstacle to the application of the Convention. The Convention's concerns with an administration which does not permit racial, ethnic or religious discrimination and guarantees fundamental principles of legal process would clearly establish a conflict with laws violating these standards.

provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them." ICRC "Geneva Conventions", op cit., pp. 177-178.


Ibid., p. 195. This view is supported by the judgement of the Israeli Supreme Court in Haetzini v Minister of Defence et al, which stated that, "...a military commander should not uphold the validity of a law whose content is contrary to fundamental principles of justice and morality, such as the laws of the German National-Socialist rule...", HC 61/80, summarised by Domb, op cit., pp. 358-361. See also Chapter 5, para 5.28, supra.

See Articles 5, 27, 65-78. Pictet states that the reservation enabling the occupying
The extent of the requirement to respect local laws was also the subject of judicial deliberation in the Mixed Arbitral Tribunal hearings\textsuperscript{35} conducted following World War I. In particular the case of \textit{Miliaire v Germany}\textsuperscript{36} described the principles disclosed in Article 43 of the Hague Regulations. First, it was implied in the Article that unless a law was specifically abrogated it remained in force, particularly in relation to the normal civil law. Secondly, alterations to the law would be permissible in the circumstances of the necessities of war or the maintenance of public order. The phrase "unless absolutely prevented" was interpreted to encompass these two exceptions and this approach was confirmed in the decision by the same tribunal in \textit{Ville d'Anvers v Germany}\textsuperscript{37} and by the Arbitrator in the \textit{Chevreau} case.\textsuperscript{38} This meant that the term "absolutely" should be read as incorporating the concept of military necessity, which would nevertheless be placed at a high threshold.\textsuperscript{39} This was echoed in the framing of Article 64 of the Fourth Geneva Convention when it refers to the exceptions of removing laws constituting a threat to the security of the force or an obstacle to the application of the Convention.\textsuperscript{40} Subject to the issue of the security of the force and the effective administration of justice the occupant is power to subject the population to provisions to enable it to comply with the Convention, "...is in the interests of the population and makes it possible to abrogate any discriminatory measures incompatible with humane requirements. It refers in particular, to provisions which adversely affect racial or religious minorities, such provisions being contrary to the spirit of the Convention.... This means that when the penal legislation of the occupied territory conflicts with the provisions of the Convention, the Convention must prevail". Pictet, \textit{op cit.}, pp. 335-336.

\textsuperscript{35} Established under the Treaty of Versailles, 28 June 1919.
\textsuperscript{36} (1923) 2 \textit{MAT} p. 715.
\textsuperscript{37} (1925) 5 \textit{MAT} p. 716. See comments regarding these cases in Schwarzenberger, \textit{op cit.}, vol II, pp. 192-193.
\textsuperscript{38} See Chapter 6, para 6.10, n. 30, \textit{supra}.
\textsuperscript{40} \textit{Final Record of the Diplomatic Conference of Geneva of 1949}, vol II-A, pp. 670, 771 and 833.
also obliged under Article 64 to allow the tribunals of the territory to continue to function in relation to the penal laws of the territory.

7.12 Under Article 54 of the Fourth Convention the occupant may not alter the status of public officials and judges. If they abstain from fulfilling their duties on the grounds of conscience the occupant may not apply sanctions, coerce or discriminate against them. Finally Article 136 of the Fourth Convention obliges the occupant to institute some form of official information mechanism with which to handle the reception and transmission of information concerning protected persons in its power in relation to those held in custody lasting more than two weeks or confinement to assigned residences and internment. In most peace operations to which the law of occupation applies it is unlikely that there will be mass internments. The obligation would, therefore, relate particularly to those detained for offences against the force, for crimes under the jurisdiction of an international tribunal or for serious crimes against the person where there is no law enforcement and the force has intervened. The number of detainees in such circumstances is unlikely to be great and so the burden of maintaining information would not be significant and in any event should be considered as a justified consequence of the right to detain.\footnote{These points are illustrated in Part I which deals with detention issues in the case study of Somalia.}

7.13 These provisions complement the objectives of contemporary peace operations which seek to maximise indigenous responsibility and the rehabilitation of local institutions. They also constitute no impediment to the
occupant as measures required to be taken to secure legitimate military objectives will be permitted and local laws which clearly violate fundamental human rights standards can be set aside. More importantly however they provide a clear guide to the force commander and a legal framework within which he may approach dealing with law and order issues and the security of the force. It is also a solid reference the commander can provide to an inquiring world as the basis for his actions and approach. As was described in the examination of the Australian experience in Somalia in Chapter 2, this framework was an extremely useful tool in that situation in bolstering the mission and activities of the force.

The Prohibitions

General Treatment of the Population

7.14 The fundamental prohibitions governing the occupant's treatment of the population should present no particular difficulty for forces engaged in peace operations as these are fundamental standards of international humanitarian law and should therefore be at the heart of the purposes and methods of such an operation. These prohibitions are also clearly of the humanitarian category which are declaratory, or have reached the status, of customary law, discussed above. Articles 44 and 45 of the Hague Regulations and Article 31 of the Fourth Convention, for example prohibit forcing the inhabitants to furnish information, or compelling them to swear allegiance to the occupant. Article 47

42 Chapter 6, paras 6.17-6.20, supra.
of the Hague Regulations and Article 33 of the Convention prohibit pillage, while private property can generally not be confiscated as specified by Article 46 of the Hague Regulations. Article 34 of the Fourth Convention prohibits the taking of hostages, while Article 28 prevents the use of 'human shields' to attempt to prevent attack on military targets. One provision which would not foreseeably cause problems for a peace operation but has done so in the Israeli occupied territories is Article 49 of the Convention, which proscribes individual or mass forcible transfers or deportations, regardless of motive.  

7.15 The Israeli use of deportations has been sporadic and limited. The question of how effective it has been is an open one. The primary Israeli position is that the Fourth Convention does not apply de jure to the territories. Secondly if it did apply it is argued that Article 49 is qualified by the general right of the occupant to maintain order and under Article 64 to protect its forces. Israel also argues that deportation is a measure that is included in the local

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44 From 1981-1985 there were no deportation orders. In 1985 there were 12, 1986, one and in 1987, eight, with five being actually carried out. During the Intifada this increased. Between 8 December 1987 and August 1988 there were 56 deportation orders of which 55 were carried out. From 1988 to November 1992 there were no further orders. The last deportation action occurred on 17 December 1992 when 415 members of Hamas and the Islamic Jihad were deported to Southern Lebanon. Yahav, op cit., pp. 130-131, 134.  
laws which govern the territory, specifically the British promulgated Defence (Emergency) Regulations, 1945.\textsuperscript{46} Another ground offered by the Israeli Supreme Court is that Article 49 was intended to regulate the class of mass deportations perpetrated by the Nazis in World War II and should not be seen as prohibiting the deportation of a few individuals on the grounds of findings against an individual that they pose a significant security danger to the area.\textsuperscript{47}

An example of the type of case where this would be justified is offered by the Israel Defence Force (IDF) Military Advocates Corps where:

...less severe security measures are insufficient to meet the threat posed to public safety, etc. This could be the case, for example, if administrative detention were ineffective because the individual in question continued to direct terrorist activities from inside a prison or because he was responsible for prison riots or the murder of fellow prisoners suspected of collaboration.\textsuperscript{48}

\textbf{7.16} Other circumstances that could be envisaged where an occupant may consider deportation desirable would be in the case where an offender, who has been convicted of offences against public safety or the force, cannot be secured in the territory with any confidence. This may be due to the inadequacy of local facilities, and the threat of action by forces at the individual's call to

\textsuperscript{46} Promulgated by the British Mandate government on 27 September 1945 pursuant to the Palestine (Defence) Order in Council, 1937. For discussion of the regulations see Yahav, \textit{op cit.}, p. 131-132.

\textsuperscript{47} \textit{Abu Awad v The Military Commander of Judea and Samaria Region} summarised in Israel Yearbook of Human Rights (1979) vol 9, p. 343. (decision of the Israeli High Court of Justice). The case approved a deportation by the IDF commander.

\textsuperscript{48} They cite in their support the \textit{Abu -Awad} case cited in n 46. (Official publication of the IDF Military Advocates Corps) ed., \textit{op cit.}, p. 132.
release him. Deportation would be a very unsatisfactory measure in this respect. A better alternative would be to seek external imprisonment provided by a volunteer nation.49

7.17 The difficulty with many aspects of the Israeli arguments would appear to be the emphatic nature of the provision, indicated by the fact that deportation is prohibited "regardless of their motive".50 It would also appear to be precluded by the provision in the Article for the only circumstances in which there will be an exception; that relating to evacuation for the security of the population or imperative military reasons. In these circumstances the population may even be moved beyond the occupied territory if for material reasons it is unavoidable, although they must be transferred back as soon as any hostilities have ceased. Even persons convicted of offences against the occupant are to serve their sentence in the occupied country, as specified by Article 76 of the Convention.

7.18 The issue concerning reliance on the provisions of local law is more difficult and raises important issues about the use an occupying power may make of domestic laws when they contradict a provision of the Convention. It was noted above that on one level the occupying power has authority to remove or ignore laws which offend the standards of civilisation or if they prevent the workings of the Convention. It would appear that the actions of the occupant are regulated by the Convention, which is the source of its authority, and therefore it will be unable to take advantage of domestic laws which would

49 There are legal issues arising from this option, however, which will be discussed below. Dinstein, "Belligerent Occupation", op cit., pp. 123-125.
contravene the specific obligations, prohibitions and rights expressed to bind it. The prohibition against deportation was also declaratory of customary international law as evidenced by the rulings of the International Military Tribunal at Nuremberg in 1946 and therefore would be binding on the occupant in any event regardless of accession to the Convention and any provision of domestic law. The law is clearly aimed at action taken in relation to a population by a foreign force with no exception available derived from what the domestic law permits the community to do to itself.

7.19 It is forbidden by Article 56 of the Hague Regulations to seize, destroy or wilfully damage institutions of religion, charity, education, the arts and sciences, historic monuments, works of art and science. This was expanded upon by Article 53 of the Fourth Convention which prohibits the destruction of property belonging to private persons, the State, public authorities or social or cooperative organisations, except where rendered absolutely necessary by military operations. Clearly where a force is engaged in actual military operations against an armed section of the population which is initiating attacks against the force from these places then the protection of the property disappears. The rules that will then apply will be those relating to weighing up the possible destruction against the military advantage and the minimisation of collateral damage. This would be in accord with the right of the occupant to defend itself and the maintenance of order.

51 Pictet, op cit., pp. 278-280.
53 Pictet, op cit., p. 302.
Prohibitions Relating to Maintaining Order

7.20 Article 50 of the Hague Regulations provides that the occupant may not impose general penalties of any kind on the population as a result of the actions of individuals for which they cannot be regarded as jointly and severally responsible. This was reflected in Article 33 of the Fourth Convention which expressed in clearer terms that no person could be punished for an offence they had not committed, specifically stating that collective penalties and all measures of intimidation, terrorism and reprisals are prohibited.

7.21 The Fourth Convention also went into greater detail regarding the individual rights of persons against whom the occupant exercised its powers of prosecution. With respect to the treatment of individuals the occupant is prohibited in Article 32 from causing physical suffering and extermination including murder, torture, corporal punishment, mutilation, medical or scientific experiments not related to treatment and any other measures of "brutality". The drafting of this provision was made with care not to include the test of intention by using the expression "of such a character as to cause", rather than "likely to cause".54 It should be stressed that the terms "physical suffering" and "corporal punishment" in this provision in no way prevent the occupant from employing riot control techniques involving physical force including the use of batons and riot control agents available to civil law enforcement agencies, in response to riots, major disturbances, looting and genocidal communal rampages.55

54 Ibid., p. 222.
55 R. Baxter, "The Duty of Obedience to the Belligerent Occupant", British Yearbook of International Law (1950) vol 27, p. 264. The Rules of Engagement for the UNITAF forces in Somalia permitted the use of riot control measures and contingents were equipped for this
intention of the provision was aimed at the abuses committed by the Axis forces in World War II and relate to interrogations, use of humans as guinea pigs and terror as a political policy.\textsuperscript{56}

The Rights of the Occupant in Restoring/Maintaining Order

7.22 Having examined the obligations of the occupying power under Article 43 of the Hague Regulations it is important to recognise that there are significant rights implied by the provision. These implied rights are founded in the obligation to "restore, and ensure, as far as possible, public order and life". The extent of the rights was not elaborated by the Regulations and they remained largely defined by customary international law. This situation was changed by the extensive provisions introduced with the Fourth Convention, governing the measures and legal regime which an occupying power may employ. These provisions can significantly contribute to the attainment of the objectives of the force in peace operations to which the law applies. One issue that is beginning to emerge is the relationship between the international human rights regime and international humanitarian law. Although the resolution of this issue is beyond the scope of this paper the answer has been provided to some extent in the decision of the ICJ in the \textit{Nuclear Weapons} case.\textsuperscript{57} The Court


\textsuperscript{57} Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996.
indicated that the resolution of any conflict on the application of the respective regimes would be based on the principle of the *lex specialis*.\textsuperscript{58} In other words, the fact that there is a specific body of law regulating the occupation situation will mean that this will override the human rights regime with respect to occupations to which it applies. Despite this assertion, however, there could be arguments made that the *lex specialis* principle means that the human rights regime will impinge whenever the law of occupation is silent on a point and does not mean that it covers the generic field it purports to deal with to the exclusion of everything else. It is submitted that this last view is not correct although the subject is worthy of further study.

**Administrative Aspects**

7.23 It was noted above that Article 64 of the Fourth Convention allows the occupant to repeal and suspend local laws which are a threat to force security or an obstacle to the application of the Convention. In addition to this concession the occupant is given the authority in Paragraph 2 of the Article\textsuperscript{59} to promulgate provisions which are essential to enable it to fulfil its obligations under the Convention, maintain orderly government and ensure its security and lines of communication. It is clear that enormous scope is provided here to deal with any situations where either the local law is silent, or where the local system

\textsuperscript{58} *Ibid.*, para 25.

\textsuperscript{59} Article 64, paragraph two, "The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them". ICRC, "Geneva Conventions", *op cit.*, pp. 177-178.
of justice has broken down or cannot be relied upon in reference to the particular needs of the maintenance of order and force security.\textsuperscript{60} It also provides options for dealing with individuals who cannot be processed in accordance with effective standards of justice in the local system and who pose a particular threat to the force. According to Article 65 penal provisions enacted by the occupant must first be published and effectively disseminated in the local language before coming into force and they may not be retrospective.\textsuperscript{61} Such requirements are fundamental and constitute no great burden weighed against the scope of the authority granted. Any special provisions which are created by the occupying power for the purposes of the occupation only will have legal validity for the duration of the occupation but will lapse when the occupation concludes, along with appointments of judges and public officials. Other lawful measures of the occupant will continue in effect until the sovereign authority that assumes governance of the territory, promulgates ordinances rescinding them, although in some cases retroactive denial will not be possible. These may include "valid rights acquired under the legislation, the judicial pronouncements, and legitimate transactions of the occupant".\textsuperscript{62} One restriction

\textsuperscript{60} Baxter, \textit{op cit.}, p. 266. In meeting its obligations the occupying power would also be entitled to introduce provisions governing, for example, child welfare, labour, food, hygiene and public health. \textit{Final Record of the Diplomatic Conference of Geneva of 1949}, vol II-A, pp. 672, 833.


on the creation of a legal regime by the occupying power is that it is not permitted to extend its own domestic law to the occupied territory. 63

7.24 Another highly significant right concomitant with the ability to enact regulations is the right to establish military courts to enforce them. In creating this option however Article 66 of the Convention lays down some basic guidelines. 64 First these courts must be "properly constituted". That is they may not be special tribunals but the ordinary military courts of the occupant which are to operate in accord with recognised and universal principles governing the administration of justice. 65 They must also conduct sittings in the occupied country while courts of appeal are preferably to sit in country but this is not obligatory. Reflecting the concern for process in accord with universal standards of justice and the independence of judicial officers, the courts must be "non-political". As a corollary the occupant would also be permitted to establish courts to deal exclusively with offences committed by the inhabitants against the force. 66 It may become extremely important for the occupant to have these options available to it, particularly in the circumstances where local courts have ceased to function and judicial officers are dead, have fled or are too intimidated, corrupt or politically influenced to faithfully execute their duties. 67 In this respect the right of the occupant to remove public officials,

64 Article 66, "In case of a breach of the penal provisions promulgated by it by virtue of the second paragraph of Article 64, the Occupying Power may hand over the accused to its properly constituted non-political military courts, on condition that the said courts sit in the occupied country. Courts of appeal shall preferably sit in the occupied country." ICRC, "Geneva Conventions", op cit., p. 178.
65 Pictet, op cit., p. 340.
66 Von Glahn, op cit., p. 111.
67 Ibid. The US in Germany following World War II was forced to suspend the German
provided in Article 54 of the Convention, is an important complementary provision for dealing with demonstrably unworthy office holders. The occupying power, while not able to impose oaths of loyalty to it, would be permitted to require officials such as judges or law officers to swear oaths of efficient and un-prejudiced service. In combination, therefore, options are available for the occupant to intervene selectively at points of weakness, establish an ad hoc legal regime or leave all matters concerning the civilian population to existing and functioning legal regimes. The key point to be made here is that the extent of the exercise of the rights available to the occupant, beyond the obligations discussed above, is discretionary.

courts by proclamation on 1 July 1945. This was because, "Twelve years of National Socialism had so affected the German judiciary that the German courts could not be entrusted with the responsibility of maintaining law and order, handling normal criminal matters, or administering impartial justice." These courts were finally 'de-nazified' and allowed to reopen in March 1946.


This includes policemen and council workers. There is no restriction whatsoever placed on this right of removal but it is suggested that in an occupation related to peace enforcement such action would be founded on either the malfeasance of the official, or for involvement in activities hostile to the force. The Article also makes clear that although the occupying power may not alter the status, apply sanctions to, coerce or discriminate against, public officials because they abstain from fulfilling their functions for reasons of conscience, this can be overridden by the right of the occupying power to compel work related to maintaining public utility services and the other categories of public necessity mentioned in Article 51. This would extend to judges and policemen where their failure to perform their duties would result in the break down of a functional justice administration. Pictet, op cit., pp. 305-308.

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69 Article 45, Hague Regulations.

70 Von Glahn, op cit., p. 133.

71 A difficulty which may face US courts established for this purpose is the ruling of the United States Court in Berlin in 1979, that any such courts operating in an occupation which is 'on behalf of the occupied and not 'against' them, remain bound by the US Constitution, even when dealing with foreign nationals, and therefore must institute jury trials in criminal matters. The ruling was qualified, however, by the statement that "...this Court does not hold that jury trials must be afforded in occupation courts everywhere and under all circumstances; the Court holds only that if the United States convenes a United States court in Berlin, under the present circumstances, and charges civilians with non-military offences, the United States must provide the defendants with the same constitutional guarantees that it must provide to civilian defendants in any other United States court.\". United States v Tiede and Ruske, op cit., p. 51. There is no provision of the laws of occupation that would require trial by jury generally as this is not a commonly applied principle in the international community. This ruling clearly allows some latitude depending on the exigencies of the circumstances. The circumstances applying in Somalia for example were completely different to those applying in Berlin at the time of the decision and the jury requirement would have been fraught with difficulty given the influence of
According to Eyal Benvenisti the category of occupation termed "Humanitarian Occupation" would open even greater scope for the occupying power in the area of reform. It is this category of occupation that would be the closest to that which peace enforcement missions would find themselves involved in. It is in fact another term for the historical non-belligerent occupation. The projected scope of action here depends on the particular case but one example offered by Benvenisti is the protection of a community from its government in a genocide or similarly massive human rights violation, such as occurred in Cambodia between 1975-1978. In this case:

...any measures taken by the occupant necessary for securing the well-being of that community would be justified. If the situation warrants the replacement of the government and central institutions, such acts would be deemed legal.

..the law of occupation can and should reflect the positive reaction of the occupied population by legitimising changes in local laws and institutions that go beyond the otherwise applicable limits imposed by the Hague Regulations and Fourth Geneva Convention.

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72 "(W)hen there is unequivocal evidence that a community is under imminent threat to life at the hands of its own government, humanitarian intervention and humanitarian occupation are then justified". Benvenisti, op cit., p. 167.

73 Ibid., pp. 166-167.
A source of authority that may be cited in one respect for this expanded activity follows modern theories holding that sovereignty inheres in the people that live in the territory. According to such reasoning the interests of an ousted regime that did not truly represent the sovereign people could therefore be ignored.74

7.26 Notwithstanding the obligation to respect the local laws in allowing them to continue in force in relation to the population, the occupying power, including all its personnel, are immune from them. The position with respect to these personnel is that they are not subject to any court or law of the territory unless expressly made subject to them by the occupation authorities themselves. Apart from the international laws of occupation, they are subject only to their own military and national laws.75

The Death Penalty, 'War Crimes', and 'Crimes Against Humanity'

7.27 The Fourth Convention then moves on to specify parameters concerning the operation of the legal regime the occupant may seek to establish. Article 67 emphasises that offences can only be dealt with by the occupying power's courts in accordance with laws in existence at the time of the offence. The occupant's regulations must be in accordance with the general principles of law such as that the penalty shall be proportionate to the offence. Article 68 confirms that the death penalty is available to the occupant for offences involving espionage, serious acts of sabotage against military installations or intentional offences causing death, provided that the death

74 Ibid., p. 183.
75 Schwarzenberger, op cit., pp. 183-190.
penalty was available in the local law for these offences prior to the occupation. There was significant debate over the qualification that the death penalty must have been available under the local law for the offence. Some countries, including the USA, UK, Australia, New Zealand, Canada and the Netherlands made initial reservations to this provision claiming the right to impose the death penalty regardless of the prior state of the local law. Australia withdrew its reservation in 1974. New Zealand, the UK and the Netherlands withdrew their reservations in 1976, 1971 and 1983 respectively. The reality is that the death penalty is highly unlikely to be sought in future peace operations in ordinary circumstances.

7.28 Is there a situation where the death penalty may be warranted? It could be argued that such a case may arise in the following circumstances: (i) the occupying power has in his custody a person who has been convicted of massive or gross violations of international humanitarian law; (ii) there are no states volunteering to imprison that person externally (where there has been a conviction pursuant to a violation of international humanitarian law); (iii) the local conditions are such that the force could not guarantee the security of existing facilities to hold the person for serving a prison sentence; (iv) there is a

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80 ICRC IHL CD-ROM, op cit.
81 There was clear sensitivity to this issue by US policy advisers in Somalia with the comment being passed that the US did not wish to be seen supporting the death penalty where this was a sensitive issue with coalition partners. This was despite the fact that the death penalty was available under Somali law. Discussion between the author and members of the United States Liaison Office, Mogadishu, February 1993.
significant likelihood that were the person to be released he would immediately recommence such violations; (v) the penalty is available under local law. The application of the death penalty in that instance would adhere to the requirements of Article 67 of the Fourth Convention that the penalty be proportional to the offence and that it be in accordance with general principles of law.\textsuperscript{82} It is also the case that grave breaches of international humanitarian law would remove the need to pay regard to the municipal laws of the territory in this respect as the punishment for an international crime of that nature would be determined by international standards or specific tribunal statutes such as those established for the International Tribunals at Nuremberg and Tokyo.\textsuperscript{83}

This is reinforced by Article 70 of the Fourth Convention where the authority of

\textsuperscript{82} The status in terms of the general principles of law may be in transition. Until 1989 the legitimacy of the death penalty for the most serious crimes was acknowledged not only in the Fourth Convention but also in Article 6 of the ICCPR., UNTS No 14668, vol 999, (1976), p. 171. It was again acknowledged as legitimate, although within stricter guidelines, in the UN Rules on “Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty” adopted by Economic and Social Council Resolution 1984/50 of 25 May 1984. In 1989 the Second Optional Protocol to the ICCPR, Aiming at the Abolition of the Death Penalty was created and entered into force on 11 July 1991. The Protocol sought the end of the death penalty for all crimes except “in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime”, Article 2, Australian Treaty Series 1991 No 19 1628/47/2. At this stage the Protocol has not been widely adopted with only 33 states party to it as at 26 October 1995. Australia ratified the Protocol on 2 October 1990 but had already abolished all death penalties under the Commonwealth Crimes Act 1900 through the Death Penalty Abolition Act 1973., Source, Treaty Section Department of Foriegn Affairs and Trade and Security Section Attorney General’s Department.

In the Israeli occupation of the West Bank and Gaza the Military Court in \textit{Military Prosecutor v Abu Medin} determined that it was not bound by the provision of local law which imposed a mandatory death penalty for murder, substituting life imprisonment. The death penalty could be imposed, however, under s. 51 of the Israeli Defence Law 1970 by a three judge panel of the Military Court. Although the death sentence has been passed on three occasions by the Military Court it has always been commuted and no executions have actually been carried out. Z. Hadar, "The Military Courts", in Shamgar ed., "Military Government", \textit{op cit.}, p. 215. The most recent sentence (also commuted) was on 23 November 1994 on the planner of a suicide attack in April 1994 which left 5 Israelis dead and many people mutilated. In passing the sentence the Court referred particularly to the principle of ensuring public safety and the requirement that crimes attracting the death penalty be distinguished as "horrifying in their radicalism/extremism or their severity (such as: murdering children or mass murder)". Transcript of judgement provided by Israeli Military Judge Advocate’s Office, Tel Aviv, translation by Mr Petros Papadopoulos courtesy of the Department of Defence Library. The only execution performed in Israel itself to date has been that of Adolf Eichman for crimes against humanity.

\textsuperscript{83} Von Glahn, \textit{op cit.}, p. 120.
the occupying power to arrest and prosecute for war crimes is an exception to the prohibition against trying persons for crimes committed prior to the occupation. It must be noted, however, that while the Nuremberg and Tokyo Tribunals both included and exercised the death penalty this option has not been included in either of the Tribunals for Former Yugoslavia or Rwanda. Under Article 77 of the Rome Statute for an International Criminal Court (ICC) the maximum punishment that could be imposed is life imprisonment. It appears that, in the extremely limited experience of such tribunals, practice may have irreversibly moved beyond the employment of the death penalty in international tribunals. In any event the establishment of an ICC will open up the option of removing a person suspected of having committed war crimes or crimes against humanity from the area of operations, to be tried and imprisoned elsewhere, thereby removing the security threat. The establishment of the

84 Article 70, paragraph one, "Protected persons shall not be arrested, prosecuted or convicted by the Occupying Power for acts committed or for opinions expressed before the occupation, or during a temporary interruption thereof, with the exception of breaches of the laws and customs of war", ICRC, "Geneva Conventions", op cit., p. 179.
85 The Statute was adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998 in Rome. It was adopted by an un-recorded vote of 120 in favour, 7 against and 21 abstentions. The full text of the Statute can be viewed at the UN official web site (www.un.org/icc/).
86 Under Part 2 of the Statute the Court will have jurisdiction over crimes of; a) genocide, b) crimes against humanity, c) war crimes and d) agression. Cases can be referred to the Court by a State party, the Security Council acting under Chapter VII of the Charter, or can be initiated by the Prosecutor (Article 13). The Statute also specifically addresses the collapsed state scenario under Article 17 (1) (a) & (b), and (3) by allowing for the admissibility of cases where a State is unable or unwilling to take action or does so for the purposes of shielding the suspect (12) (a)). Further to this, under Article 57 (3), the Pre-Trial Chamber can authorise the Prosecutor to take specific investigative steps in the territory of a State, without the cooperation of the State, if its justice administration system has in effect collapsed. Article 86 of the Statute requires States party to the Statute to cooperate in these matters.
While Article 3 establishes the seat of the Court in the Hague it may sit elsewhere (3). The sentences may be served within States who have subscribed to the list of volunteers States under Article 103, which allows for the problem of a lack of facilities of security concerns in the locus delicti or home State of the accused.
court will assist in removing one more reason for retention of the death penalty option.

7.29 With the eventual establishment of the ICC, Article 70 will acquire greater importance. Clearly the occupying power is encouraged to enforce international humanitarian law and normal strictures on interference with or respect for local laws will stand aside for action taken in this regard. As Pictet puts it, "The universal character of the law implies universal jurisdiction." Taking action against 'war criminals' may even be expressed as a duty limited only by the capabilities of the force and/or arrangements with any existing local authorities concerning the division of responsibility in this area. Article 146 of the Convention specifies this duty and authorises the introduction of enactments for the purpose of seeking out and prosecuting offenders. These provisions complement the emerging responsibilities of peace operations in this area and the structure of future contingents on such operations should take this into account, particularly in the area of investigation. The strictures on trial process and punishment taken pursuant to this universal jurisdiction would necessarily have to adhere to international standards of due process, proportionality and humanity.

87 Pictet, op cit., p. 350.
88 "Repression in such cases is based on the principle that penal legislation relating to war crimes is of universal application. Whereas an ordinary criminal breaks only the law of the country, a war criminal breaks an international law or custom. The punishment of such crimes is therefore as much the duty of a State which becomes an occupying power as of the offender’s own home country. The universal character of the law implies universal jurisdiction". Pictet, op cit., pp. 349-350.
Minimum Standards and Due Process

7.30 The Fourth Convention also contains useful guidelines as to the minimum standards that will apply to the legal process established by the occupying power. Article 71 talks of a "regular trial" which refers to internationally accepted standards of process and general principles. The prosecuted persons must be informed in writing in their language of the charges against them and must be brought to trial "as rapidly as possible". Obviously there may be delays experienced in commencing trials during the initial phase of an operation while the mechanisms are put in place. The words "as possible" suggest such delays will not give rise to any breach of the Convention. Where the force will strike difficulties is if it takes detention action without also having a plan for placing the individual on trial, either by doing so itself or by making arrangements with indigenous authorities. Article 72 spells out some of the common standards expected of the occupant such as ensuring accused persons have the right to present evidence, call witnesses and be assisted by qualified counsel of their choice with access to them. If the accused does not make such a choice the occupant with the consent of the accused may supply representation in the case of serious charges. Unless the right is waived by the accused an interpreter must be provided.

7.31 The accused is to have the right of appeal in accord with the procedures of the military court and is to be fully informed of these rights and of applicable time limits. Where there is no provision for appeal in the military
court process the convicted person has the right to petition the competent authority of the occupant.\textsuperscript{89} It would be in the best interests of the occupant to establish a streamlined appeal mechanism, able to deal with matters in country if at all possible.\textsuperscript{90} In a multilateral operation each national contingent could adhere to the provisions of their respective military law in this regard. Alternatively a mechanism could be established by the lead nation which could ensure uniformity throughout the territory and be constituted by representatives of the various contingents, either presided over or solely staffed by the lead nation. If the contingents were too numerous then representation could take place on a rotational basis. If the exigencies of the deployment do not permit this then the obligation could be met by simply having appeals dealt with by a senior officer delegated by the force commander who is preferably either a military or civilian lawyer or is advised by one.\textsuperscript{91} Article 75 provides one further stipulation in this regard in that in no case is a person condemned to death to be deprived of the right to petition for pardon or reprieve. If there is a Protecting Power\textsuperscript{92} nominated then the sentence is to be delayed for six months after that Power has received notice of the final judgement, although this requirement

\textsuperscript{89} Article 73, Fourth Geneva Convention.
\textsuperscript{90} For example, in the occupied territories Israel established under the Security Provisions Order, single and three judge Military Courts, whose decisions were subject to review by the Regional Military Commander. The Regional Commander could take no action in relation to the courts without the advice of the Military Advocate General, whose duties were performed under a separate chain of command to avoid command influence. Appeal from the Military Courts could be made to the Military Court of Appeals and the Israeli Supreme Court. The Regional Commander made the appointments to the courts on the recommendations of the Military Advocate General from Israel Defence Force officers. In the case of single judge courts this officer had to be legally qualified, while in the case of three judge courts the presiding member had to be legally qualified. Hadar, \textit{op cit.}, pp. 179-183.
\textsuperscript{91} Von Glahn, \textit{op cit.}, p. 117.
\textsuperscript{92} See discussion of the Protecting Power provisions in Chapter 4, para 4.7 esp n. 4, \textit{supra} & Chapter 8, para 8.18, \textit{infra}. 
may be waived where there is a grave emergency involving an organised threat to the force.

7.32 Article 76 provides that detained and convicted persons are to be held in country. In country could legally include, in the case of coastal states, any islands belonging to the country or its territorial waters, should mainland detention present a security threat. In addition this stricture would not apply to any person convicted of breaches of the laws of armed conflict given the special jurisdiction that applies in such cases.93 Should the Convention for the Protection of UN Personnel94 be adopted it would appear that it will turn attacks or threats against UN personnel or their liberty into international crimes. The jurisdiction that may be exercised by a state is set out in Article 10 of the Convention for the Protection of UN Personnel to include situations where the crime is committed with respect to a national of that state or in an attempt to compel the state to do or abstain from doing any act.95 In accordance with Article 2 the Convention for the Protection of UN Personnel would not apply to Chapter VII enforcement actions where the forces are engaged in combat against organised armed forces to which the law of international armed conflict

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93 As the occupying power is given the right to pursue war criminals in the occupied territory the normal provisions relating to the handling of offenders who have committed grave breaches of the Conventions will apply. The common Article of the Four Geneva Conventions of 1949 in this respect (Article 49 in I, Article 50 in II, Article 129 in III and Article 146 in IV) all permit the handing over of offenders to another High Contracting Party. They also state that such persons, regardless of their nationality, can be brought before the courts of a High Contracting Party into whose hands they have fallen, which means that they could be removed and taken to the home territory of the occupying power for trial if necessary.


95 Ibid., pp. 8-9.
applies. Therefore, if an action is committed against UN personnel in a Chapter VII operation not involving a combat situation to which the law of international armed conflict applies, but in the broader circumstances where the Fourth Geneva Convention applies, then criminal prosecution can occur, and the convicted person may be detained or imprisoned externally. This is due to the fact that the offence would be an international crime dealt with by a specific, overriding instrument, not prohibiting detention or imprisonment outside of the country in which the offence occurred.

**Arrest and Detention Issues**

7.33 With respect to the treatment of detainees, Article 76 of the Fourth Convention specifies the basic humanitarian standards. The key points to note here are the right of access to the detainees granted to the ICRC and the fact that the standards applicable to the detainees must be at least equal to the conditions normally obtaining in prisons in the occupied territory. This means that the occupant is not obliged to ensure that the prisons or detention facilities are the equal of what may be found in its own country but must at least ensure basic humanitarian standards of health, hygiene and spiritual assistance are not denied and that women are detained separately.

7.34 The Mixed Arbitral Tribunals conducted between 1921 and 1930 under the Treaty of Versailles for disputes arising from World War I, have provided

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96 Ibid., p. 6.
97 This of course would await the entry into force and widespread adoption of the convention.
98 Pictet, op cit., p. 364.
further guidance in relation to detention and arrest. In the Chevreau case a number of principles relating to arrest were laid down. Arbitrary arrest and detention measures taken in good faith and upon reasonable suspicion, particularly in a zone of military operations, are permissible. The suspicions have to be verified by a serious inquiry, offering the legal safeguards customary among civilised nations. The arrested person must be given the opportunity to defend himself and the right to communicate with counsel. The inquiry should not be unduly delayed or the detention unnecessarily prolonged. A detainee is to be treated in accordance with the standards practiced by civilised nations, or in other words general principles of international law. In the case of Paliros v Germany it was held that any arrest or detention not followed by criminal proceedings was contrary to international law.

The case concerned the detention and, as the Arbitrator found, mistreatment of a French national (M. Chevreau) in British occupied Persia, by the British authorities during the war. M. Chevreau was suspected of German sympathies and of having engaged in incendiary contact with local dissident Islamic militants. As noted in Chapter 6, the Arbitrator, having found that the law of occupation applied, laid down the ground rules of detention in such circumstances:

"Les regles principales qui sont en jeu dans la presente affaire et qui notamment ont ete appliquees par differentes Commissions internationales, peuvent etre resumees comme suit.

1. L'arrestation, la detention ou la deportation arbitraire d'un etranger peut donner lieu a une reclamtion en droit international. Mais la reclamtion n'est pas justifiee si ces mesures ont ete prises de bonne foi et sur des soupcons raisonnables, surtout s'il s'agit d'une zone d'operations militaires.

2. En cas d'arrestation, les soupcons doivent etre verifies par une enquete serieuse qui donne a la personne arrete l'occasion de se defendre contre les soupcons dont elle fait l'objet et notamment de communiquer avec le Consul de son pays si elle le demande. Si cette enquete fait defaut, s'il y est procede trop tardivement, ou enfin, en general, si la detention est prolongee au dela du necessaire, une reclamtion est justifiee.

3. Le detenu doit etre traite d'une maniere appropriee a sa situation, et qui corresponde au niveau habituellement admis entre nations civilisees. Si cette regle n'est pas observee, une reclamtion est justifiee." (1931) 2 RIAA, pp. 1123. See also pp. 1124, 1139-1140.

These rules apply equally to the general population as there is no distinction in the law concerning neutral and allied nationals in the occupied territory. Article 4, Fourth Geneva Convention. Schwarzenberger, op cit., p. 221. Pictet, op cit., pp. 38-50.

This case involved a Greek restaurateur in Bucharest who was detained by the Germans for three months. III (2) Zeitschrift fur auslandisches öffentliches Recht und Volkerrecht (1933), p. 119. summarised in Schwarzenberger, op cit., pp. 221, 584. This is confirmed by Article 71 of the Fourth Convention.
7.35 Important latitude regarding security concerns was, however, granted to the occupant in the Fourth Convention. Article 5 for example deals with the situation of the individual detained as a spy or saboteur, or under suspicion of activity hostile to the security of the occupant and the allowable derogations from the rights of detainees. Specifically, where absolute military security requires it, such persons can be deprived of their rights of communication. They will still be entitled to a "fair and regular trial" as set out in the later provisions. This provision has utility where the force has detained a key figure in the orchestration of activities against it and whose continuing contact with outside elements would present a grave security problem. Another right afforded the occupant is provided by Article 49 of the Convention which allows for evacuation of the civilian population in an area due to imperative military reasons. This would encompass, for example, the evacuation of an area "in which illegal combatant activities are rife".

A further significant right under the Convention is contained in Article 78. This provision permits the occupant to confine individuals to assigned residences or administrative internment. Such action must be justified on the grounds of imperative reasons of security or as safety precautions for protected persons. The Article also stipulates that the internment decision should be subject to appeal which should be determined with the least possible delay. The internment decision should be periodically reviewed, if possible every six

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months, by a body established by the occupant. The conditions governing internment are spelled out in detail in Articles 79-135. This option is separate from the penal action open to the occupant and the related processes of investigation, charging, prosecution, conviction and sentencing of the suspect. Administrative internment can be used to deal with individuals who the occupant considers dangerous to its security without having to go through this criminal process.\textsuperscript{102} The key point here is that the action is temporary for as long as the imperative reasons of security exist. Essentially it is, "an exceptional measure to detain people who pose an extreme and imminent threat to security, not against a broad range of people who do not pose security dangers".\textsuperscript{103} Once the threat has passed, the interned persons are to be released. Such an option could be employed against a threatening 'warlord' figure, particularly where evidence exists of armed attack plans prior to their actual execution. This would be an even more practical option in the early days of a deployment when criminal procedure measures had not been put in place or the local system rehabilitated.

**Punitive/Preventative Security Action**

7.37 One contentious aspect of Israeli security practice in the occupied territories was the forfeiture, destruction or sealing off of homes belonging to persons convicted of serious crimes against either the Israeli Defence Force

\textsuperscript{102} Pictet, \textit{op cit.}, p. 368.
(IDF), Israeli nationals or Arab residents in the territories. Israel justified this action on the grounds that, (a) this was provided for under the laws in place in the territories, specifically the British Defence (Emergency) Regulations, 1945 and the Jordanian General Defence Regulations, 1939,104 (b) it was a measure taken in pursuance of the maintenance of public order and safety and in accord with military necessity, (c) such action is not prohibited by Article 46 of the Hague Regulations nor Article 53 of the Fourth Convention relating to the destruction and confiscation of property, as these provisions deal with gratuitous action not penal sanctions imposed following a lawful conviction.105

The projected practical application of this test is summarised by Meir Shamgar:

Military requirement can be of two kinds: on the one hand, there is the necessity to destroy the physical base for military action when persons in the commission of a hostile military act are discovered. The house from which hand grenades are thrown is a military base, not different from a bunker... On the other hand, there is the necessity to create effective military reaction. The measure under discussion is of utmost deterrent importance, especially in a country where capital punishment is not used.106

7.38 Obviously the question of evaluating the domestic law in existence will be case specific to each occupation situation, so the primary issue in this

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104 Applying these provisions is therefore respecting the laws in force in the country as required by the Hague Regulations, according to the argument.
106 Ibid., p. 276.
analysis is whether the international law governing military presence permits
the sealing and demolition of houses. The governing provisions of the Hague
Regulations, Fourth Convention and Protocol I will in any case prevent the
utilisation of the local law where it is in contradiction of these codes. 107

7.39 In this respect it is clear from the above analysis that there can be no
argument when the force actually comes or has come under attack from
premises. This becomes a conventional military operation in accordance with
the right of self-defence, the maintenance of order and military necessity, and
the source of the attack may be neutralised using all appropriate force as
regulated by the broader principles of armed conflict. The situation where the
structure is the base of operations or residence of a person convicted of
terrorist acts or attacks on the force would also appear to be justified with
certain qualifications. The interpretation that the provisions of the Hague
Regulations and Fourth Geneva Convention relate only to gratuitous or
summary actions by the forces, appears to be correct. 108 Forfeiture, destruction
and sealing of houses would be a permissible penalty for a person convicted of
serious crimes subject to the provisos in the Convention relating to the
proportionality of the punishment and the prohibition against collective
punishment. If for example the person were convicted of verbally threatening
force members this would not justify such action. The criteria would be that it

107 M.B. Carroll, "The Israeli Demolition of Palestinian Houses in the Occupied Territories:
108 The words used in Article 147 of the Fourth Convention, which defines grave breaches
as including extensive destruction carried out that is not justified by military necessity but is done
'wantonly' and 'unlawfully', seem to bear this out. This is particularly persuasive when viewed
with the security rights of the occupant as a whole. See also Pictet, op cit., p. 302., von Glahn,
op cit., p. 227 & 230 at n. 15.
only occur in relation to extreme acts of terrorism or attacks on the force, particularly where the structure has served as a significant meeting place, safe house or bomb factory. If the structure were normally occupied by persons other than the convicted person, such as family members, and they were not convicted of related crimes such as aiding and abetting, then the premises could not be demolished as this would constitute a collective punishment.\textsuperscript{109} In the latter case sealing the room of the offender, as was Israeli practice, would appear lawful, but the utility of this option is dubious.\textsuperscript{110} It would clearly not be permissible to destroy the premises of a suspect.\textsuperscript{111}

\textsuperscript{109} Carroll, \textit{op cit.}, pp. 1213-1216.


\textsuperscript{111} Dinstein, "Belligerent Occupation", \textit{op cit.}, p. 128. The debate over the legality of the Israeli practice of house demolition/sealing is complicated by a number of factors. One of the main arguments against the practice centres on the status of the British promulgated Defence (Emergency) Regulations 1945, introduced pursuant to the Palestine Mandate. Regulation 119 of this ordinance is the basis of the demolition orders carried out by Israel. The Israeli argument is that it may rely on this law, in accordance with Article 43 of the Hague Regulations, as it remained in force in the territories when the occupation began. The counter argument is that it ceased to apply by virtue of the Palestine (Revocations) Order in Council 1948, by which the UK terminated its Palestine ordinances "as a matter of English law" and through the extension of the Jordanian Constitution 1952 during its period of control of the West Bank. The British Revocation Order, however, took place after the mandate authority expired and was a matter of tidying up English statute books, having no impact on the law in the former Palestine mandate. This was confirmed when both Jordan and Egypt continued to use the Emergency Regulations until the territories were overrun by Israel in 1967. Jordan's reliance on the Regulations indicates the constitution did not override them. M. Qupty, "The Application of International Law in the Occupied Territories as Reflected in the Judgements of the High Court of Justice in Israel", in Playfair ed. \textit{op cit.}, p. 107. Yahav, \textit{op cit.}, pp. 45-57. Carroll, \textit{op cit.}, pp. 1202-1205.

Another argument is advanced by Tom Farer ("Israel's Unlawful Occupation", \textit{Foreign Policy}, Spring 1991, no 82, p. 42) who asserts that the exception allowing the destruction of property due to military operations in Article 53 of the Fourth Convention concerns operations incidental to an armed conflict only. This does not appear to be the case, however, as the provision is set out in Part III, Section III headed "Occupied Territories", while there are separate provisions dealing with the destruction of property during hostilities in Article 23 of the Hague Regulations and also now extensively in Part IV, Section I of Protocol I. As the Pictet commentary states on the matter, "In order to dissipate any misconception in regard to the scope of Article 53, it must be pointed out that the property referred to is not accorded general protection; the Convention merely provides here for its protection in occupied territory. The scope of the Article is therefore limited to destruction resulting from action by the Occupying Power." The commentary goes on to state that Article 23(g) of the Hague Regulations covers all property in territory involved in war. Pictet, \textit{op cit.}, p. 301.

Much of the debate relates to actual cases of demolition and whether they constitute necessary military operations. The Pictet commentary on the meaning of this phrase states, "(l)
In Chapter VII peace enforcement operations the need to destroy, seal or confiscate domestic structures will be rare if it occurs at all. It may be necessary where such structures form the base of operations for a group or persons who have been convicted of committing significant hostile acts against the force or the public. Such action would obviously only occur in extreme cases and would not be the first option unless the structure itself was deemed to be an important factor in the effort to maintain order and the security of the force, or the deterrent value could be demonstrated.\textsuperscript{112} It is doubtful, for example, that the demolition of the houses of individuals who had killed NGO or force members would have served as a deterrent in Somalia, given the already widespread destruction and the inuring of the population to it.

Another issue relates to the imposition of curfews. There would appear to be no impediment to the imposition of curfews, provided they were aimed at maintaining order following such situations as riots or looting, or to assist in the apprehension of terrorists or assailants against the force.\textsuperscript{113} This would be

\begin{quote}
will be for the Occupying Power to judge the importance of such military requirements... The Occupying Power must therefore try to interpret the clause in a reasonable manner: whenever it is felt essential to resort to destruction, the occupying authorities must try to keep a sense of proportion in comparing the military advantages to be gained with the damage done". Pictet, \textit{op cit.}, p. 302. In this respect it should be noted that there has been significant state practice of demolition of structures harbouring armed insurgents. Ellis, \textit{op cit.} Reicin, \textit{op cit.}, p. 546 and n. 193. The United Nations Special Committee that investigated Israeli demolitions in 1971 determined that the demolition of houses of persons \textit{suspected of helping} members of the terrorist organisations violated Articles 33 (collective punishment prohibition) and 53. It did not find that demolition of the houses of terrorists convicted of serious crimes which were not otherwise inhabited, was in violation of these provisions. \textit{Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories}, United Nations Document A/8389 (1971), pp. 44-46.
\end{quote}

\textsuperscript{112} An example may be a building from which there has been a number of sniping incidents or which by its location and elevation may be a potential threat to the force from such activities. In Somalia the building known as K7 posed such a threat, dominating as it did the US Embassy Compound where the UNITAF and later UNOSOM II military headquarters were located. The building was occupied by both of those forces. Rather than destroy the building it was used as an observation post.

\textsuperscript{113} Reicin, \textit{op cit.}, pp. 543-546., N. Atway, "The Health and Welfare of the Palestinians
justified pursuant to Article 43 of the Hague Regulations and Article 64 of the Fourth Convention, provided it was not being employed as a form of collective punishment. It could also be justified as a safety measure for protected persons under Article 78 of the Fourth Convention.\textsuperscript{114} Curfews have been a common feature of occupations and are accepted practice, particularly when there is a clear threat to the security of the force.\textsuperscript{115} The recourse to curfews must, however, be balanced against the obligation in Article 43 of the Hague Regulations to restore and ensure the \textit{vie publique}.

\textbf{Security and Regulation of the Media}

\textbf{7.42} As a concomitant of maintaining order and the security of the force the occupying power also has clear rights to regulate local media. This right centres on preventing the promotion of hostile actions against the force. In traditional belligerent occupations the right has been absolute so that the press could be restricted and suppressed, and the publication of newspapers forbidden.\textsuperscript{116} US Army policy is illustrative of the custom in this respect:

\begin{quote}
...the belligerent occupant may establish censorship of the press, radio, theatre, motion pictures, and television, of correspondence, and of all other means of communication. It may prohibit entirely the publication
\end{quote}

\textsuperscript{114} A curfew in this case is equivalent to requiring the population at large to be confined to their assigned residence within the terms of the Article. Reicin, \textit{op cit.}, p. 544.
of newspapers or prescribe regulations for their publication and
circulation.\footnote{US Army FM 27-10, para 377, p. 144.}

This right is also delineated in Article 53 of the Hague Regulations. Under that
provision all facilities related to the transmission of news may be seized, \textit{even if}
they belong to private individuals.

\textbf{7.43} After World War II the Allies imposed a strict regime on all means of
communication in Germany with the main objective of waging the
de-nazification campaign and eliminating the anti-human rights aspects of
German society.\footnote{\textit{Ibid.}, pp. 549-552.} In a peace enforcement operation the necessity for such a
strict regulation may not exist. Cases where control should be exerted,
however, are such as the use of the radio station in the hands of the warlord
Aideed in Somalia, which constantly broadcast propaganda and incitements to
violence against UNITAF, the interpreters attached to UNITAF and UNOSOM.
These incitements did in fact result in large scale disorders and action to close
down the station early in the deployment, when this tendency was first
manifested, would have been justified. Similarly, had a peace enforcement
operation been mounted in Rwanda such that the legal state of occupation
ensued then the \textit{Milles Collines} radio station, which was responsible for inciting
genocide activity, could have been shut down.\footnote{Von Glahn, \textit{op cit.}, pp. 139-142.} No compensation need be
paid for the confiscation of media facilities which belong to the state or for
privately owned facilities that have been used as an instrument to provoke
attacks on the force or incite massive violations of human rights as this would be a legitimate security measure, not requisition as discussed below.

Requisition and Maintaining the Force

7.44 The Hague Regulations spell out clearly in Article 55 that the occupant is the administrator and usufructuary of public buildings, real estate, forests and agricultural estates belonging to the sovereign in the occupied territory, for the duration of its presence. The occupant is required to safeguard the capital of these properties and administer them in accordance with the rules of usufruct. The occupant is therefore entitled to make full use of state property as necessary to support its operations and maintain the force but must leave the property as intact as possible and cannot appropriate or remove it from the country. The rights in relation to the use of real property are particularly useful and would have answered many questions for the international forces in Somalia.120 If military necessity results in damage to the property, the occupying power will not be held accountable for it. In relation to other public resources von Glahn states:

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120 In relation to the use of real property for military purposes Von Glahn states that:
"If such use is contemplated, ordinary restrictions as to the rights of the occupant are permitted to be set aside and the buildings in question may be used in whatever way the occupant sees fit, even if they suffer considerable damage through such use". (Von Glahn, op cit., p. 179.)

In relation to private property he adds:
"...a temporary use of land and buildings for various purposes appears permissible under the plea of military necessity. Thus an occupant may well be within his rights if he uses, without payment of compensation, private dwellings for offices, storehouses, barracks, and so forth, if no other accommodations of similar character lacking private ownership are available to him". (Ibid., p. 186.)

Private property could also be utilised if it afforded important security advantages necessary to maintain order or protect the force. In another comment on the use of property he made a point of particular relevance to a humanitarian intervention, "an occupant appears to have the right to expropriate either public or private property solely for the benefit of the native population". (Ibid.)
Thus it is quite lawful for the occupant to sell crops from public lands, to cut and sell timber from state forests, to lease out to others or use for his own purposes any and all publicly (state) owned buildings devoted, originally, solely to its use by the enemy state.... At the same time an occupant may lawfully appropriate for his own use all revenue accruing from state properties, such as toll charges from the use of canals, bridges and roads.\textsuperscript{121}

The proviso being that the occupant may not overuse the resources beyond what had been normal usage prior to the occupation or such as to exhaust the resource, or impair the capital value of the property.\textsuperscript{122} In some countries there is a very high level of state ownership of property which may open up many more options for the occupying power in a peace enforcement operation to achieve its objectives. In a territory where the central state mechanisms have disintegrated and one of the objectives of the force is some degree of rehabilitation, the possibility exists for the occupying force to draw on whatever local resources are available to support such efforts. For example if the territory possessed an oil industry that was state owned the occupying power would be at liberty to operate the industry and apply the proceeds to its own maintenance and the restoration of public order and life.

\textsuperscript{121} \textit{Ibid.}, p. 177.

7.45 Article 53 of the Regulations allows the occupant to take possession of cash, funds and realisable securities which are the property of the State as well as depots of arms, means of transport, stores supplies and all movable property generally belonging to the State which may be used for military operations. All facilities for the transport of persons or things and all kinds of munitions of war may be seized, even those belonging to private individuals. The proviso is that this property must be restored and compensation paid when the occupation ends. These rights may be highly useful in peace enforcement operations as a legal basis for confiscating the vast arms holdings of private individuals who have destabilised or destroyed the state. If the private caches of arms have been used to attack the force or were employed to commit grave breaches of international humanitarian law then they need not be returned or compensation paid for them. The removal of arms used to commit violations against international law would be in accord with the responsibility of the force to prevent such breaches and to take action against offenders.

7.46 Apart from these exceptions, Article 46 of the Regulations specifies that private property cannot be confiscated. In this respect, state property which is dedicated to religion, charity and education, the arts and sciences, is to be treated as private property. The occupying power is permitted, however, to requisition in kind and services from municipalities and individuals whatever is required for the needs of the force. It would not be permitted to divert any resources to any recipient outside the country including the home territories of

123 Article 56, Hague Regulations.
124 Article 52, Hague Regulations.
the occupying power. Requisition action must also be in proportion to the
resources of the country while contributions in kind are to be paid for. The
authority for this action rests with the commander in the area.\textsuperscript{125} In a coalition
operation the approach taken to utilising local facilities would need to be
carefully coordinated.\textsuperscript{126} Repair of local facilities for use by the force and
supporting agencies can also assist in the rehabilitation process.

7.47 Article 49 of the Hague Regulations allows the occupant to levy
monetary contributions for the needs of the force or the administration of the
territory. This does not permit the occupant to impose a system of taxation to
support the force, but to seek the necessary funds, as the needs arise, through
contributions. The occupant would be permitted, however, to increase existing
taxes or use revenues to meet expenditures arising from the maintenance of
public order and safety.\textsuperscript{127} A related right to the maintenance of order and the
financial rights of the occupant is the latitude granted the occupant to take
measures relating to the currency in the territory, including creating its own.\textsuperscript{128}

Conclusion

7.48 As can be seen from the above analysis the laws of occupation are an
extremely practical tool. While guaranteeing basic humanitarian standards of

\textsuperscript{125} J.W. Garner, "Contributions, Requisitions, and Compulsory Service in Occupied
Territory", \textit{American Journal of International Law}, (1917) vol 11, no 1, pp. 91.
\textsuperscript{126} The US command policy in the UNITAF operation in Somalia was to use the former
public buildings and Embassies only. Interview with COL F.M. Lorenz, Staff Judge Advocate to
\textsuperscript{127} \textit{Ibid.}, p. 151., E.H. Feilchenfeld, \textit{"The International Economic Law of Belligerent
Occupation"}, 1942, Jackson Reprint Corporation, 1971, p. 49.
233-276.
treatment of a population in the control of a military force, they also provide wide scope for the force to restore order, ensure its own security and to advance the interests of the population. The extent to which the occupant advances the interests of the population is largely a matter for its discretion and not legal obligation. The potential utility of the law in relation to peace enforcement operations is even greater, particularly where the force deploys into an area where there has been a total breakdown of order and administration as occurred in Somalia. As we have seen the obligations on the force are commensurate with its redundant capacity in relation to its military operations. Obviously if the military mission is centred on humanitarian objectives then the issue does not even arise. The whole capacity of the force will be geared to meeting the humanitarian objectives of the law and to achieve this task the parameters provided by the law are ideally suited. 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.

7.49 This analysis should demonstrate that the force has nothing to fear from the law of occupation and much to gain. Put at its simplest this law provides the basis upon which a force can relate to a civilian population, particularly in an indigenous authority vacuum where the occupying power has in fact become the sole effective authority. Prudent commanders will in fact see in this law a useful asset for the attainment of their objectives, particularly in low
intensity conflict environments. We have seen in the case study on Somalia exactly what dilemmas this body of law could provide the interim answer for.

7.50 This is not to say that the law of occupation answers all questions and is a panacea to all problems that a force will face. There are major issues of policy and coordination in coalition operations that will take some skill to resolve. Apart from this there is also the vitally important practical question of how best to take advantage of the opportunities and options the law provides.
Part III
Conclusion
CHAPTER EIGHT: THE CHALLENGE OF INTERVENTION AND THE LAWS OF OCCUPATION

Here we will learn that each of us bears responsibility for our actions and for our failure to act. Here we will learn that we must intervene when we see evil arise. Here we will learn more about the moral compass by which we navigate our lives and by which countries will navigate the future.

President George Bush, 15 February 1991

For laws not being made for themselves, but to be by their execution the Bonds of the Society, to keep every part of the Body Politick in its due place and function, when that totally ceases, the Government visibly ceases, and the people become a confused Multitude without Order or Connexion. Where there is no longer the administration of Justice, for the securing of Mens Rights, nor any remaining Power within the community to direct the Force, or provide for the Necessities of the publick, there certainly is no Government left. Where the laws cannot be executed, it is all one as if there were no Laws, and a Government without Laws, is, I suppose, a Mystery in Politicks, unconceivable to humane Capacity, and inconsistent with humane Society.

John Locke

When there is no central government, the occupying force in a Chapter VII operation can become the de facto government. The strongest criticism leveled at the UNITAF intervention in Somalia is not that it did so much but that it did so little. UNITAF did not disarm the warlords or establish law and order.

Ambassador Walter S. Clarke

Introduction

8.1 Interventionary peace operations have become increasingly common in recent times. Their frequency, scope and dynamics have promoted vigorous legal debate, not least over whether some or all of them should have taken

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1 Inscribed on the wall of the Holocaust Museum in Washington.
place at all. Recent peace operations have commonly had at their heart humanitarian imperatives. The articulation of legal principles in such missions is even more essential due to their unconventional nature (in the military sense) and the circumstances in which the forces will find themselves.\(^4\)

8.2 As ethnic tensions, collapsed states and civil wars continue to arise it is clear that the issue of humanitarian interventions involving military forces under UN command or authorisation will remain a significant element of international debate.\(^5\) It is therefore essential that the implications for military planners of such operations be fully explored and the essential universal principles and factors deduced. Key factors in this appraisal are;

a. the relationship between the military force and the civil communities it will encounter,


b. long term reconstruction issues,

c. aspects of the maintenance of law and order,

d. prevention of human rights abuses, and

e. force security.

8.3 The relevance of the law of occupation is a central issue in this respect and poses the question as to how this body of law may be enlisted to support military commanders and civilian policy makers in their attempts to come to grips with the many dimensions of a mission, particularly in the critical early phases.

Criteria for United Nations Authorised Interventions

8.4 The required criteria for humanitarian intervention which appears to have emerged from UN action, state practice and legal opinion since the introduction of the UN Charter, are that there must (a) be a large scale humanitarian crisis which; (b) must involve refugee movement across borders or the potential to threaten regional peace; (c) the degree of force and the degree of intervention in and assumption of sovereign rights must be proportionate to the level of the threat, the evil to be prevented and the degree of the break down of the state; (d) the intervention must actively facilitate the transition to self-determination, if this is in issue, as soon as possible; (g) there is no obligation to intervene and there is no obligation to remain if the situation
is determined to have become too dangerous for the troops and other personnel or financially unsustainable; (h) it must be pursuant to Security Council authorisation although it may be possible to act unilaterally in an emergency to stop a genocide in progress.6

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The legal framework within which such interventions are conducted will have significant consequences for the regimes of order that are applied on the ground. It is these consequences which are the concern of this work. It is instructive to note the recurring theme of the restoration and maintenance of law and order in these interventions and other contemporary peace operations.

This includes every aspect of the three arms of justice administration; the judiciary, the police and the prison system. Prime examples have been Iraq, Yugoslavia, Cambodia, Rwanda, Haiti, Mozambique, and Angola. It is
evident from these examples that a key issue for the future of collective security and peace operations is justice reconstruction and human rights monitoring. This work has attempted to address the specific issue of the appropriate legal framework for peace operations with humanitarian/human rights and law and order dimensions, particularly in the context of collapsed states.

The Challenge and Implications of Humanitarian Intervention

8.6 In his book "On Future War", Martin van Creveld has asserted that:


The rise of low-intensity conflict may, unless it can be quickly contained, end up destroying the state. Over the long run, the place of the state will be taken by warmaking organisations of a different type.\textsuperscript{15}

8.7 Certainly this prediction, written in 1990, has been borne out in many of the world's crisis points and nowhere more strikingly than in Somalia. This phenomenon poses two questions in particular: is the 'state' worth saving; and, if so, what is the best way to go about it?

8.8 Some might be tempted to say, for example in relation to Somalia, that the concept of the state in such developing countries is inappropriate and has not 'worked'. The argument may run that the Somalis will find their own level of social organisation; and who are westerners to judge whether that organisation is worthy or not? It may also be held that a loose collection of warring organisations ensuring the interests of their clan constituency through violence is perhaps a natural order more suited to Somali society. The conclusion of this argument is that any attempt to impose or promote western concepts of law and order or democracy is doomed to failure.

8.9 The flaw in this line of reasoning is that it assumes that the majority of Somalis are happy with their state of affairs. Such an argument does not demonstrate how this situation results in any positive benefits for the people in the short or long term. In the Somali situation those without a rifle, or who cannot muster a group of rifle possessors, are as disenfranchised and

\textsuperscript{15} van Creveld, \textit{op cit.}, p. 192.
powerless as it is possible to be. Those who support the warlords do so mainly because they have no other choice as this is their only hope of survival. Such a dissolution of the state does not herald a new liberty, only a new lawlessness and the rule of warlords. In this sense Somalia can be either the portent of things to come or the alarm bell that awakens the international community.

8.10 Where the dissolution of the state and internal conflict have come to concern the international community is where it is accompanied by massive violations of human rights or a man made humanitarian disaster\textsuperscript{16} such as to shock the conscience of mankind. Whereas it is clearly not possible for the international community to intervene in all these cases it has become difficult to avoid action in the most extreme of them. It is doubtful, following the post mortems of events in Rwanda, that the world will be able to avoid intervention where a systematic genocidal campaign is underway or where the loss of life is so great as to threaten the total annihilation of the unarmed elements of a society.

8.11 Somalia illustrates that deficiencies in law and order and a justice administration that fails to accord with basic human rights standards, are matters often at the heart of the causes of social breakdown. The mechanisms of order within the state failed to protect them physically or culturally, or these mechanisms were in fact the instruments and source of this threat. The only way to resolve such conflicts is to guarantee that the state mechanisms will be

\textsuperscript{16} Often these so-called humanitarian disasters are either brought on or exacerbated by the conflict such as where remedial aid is prevented from reaching the victims or the population is unable to plant crops, as in Somalia.
so transparent and probative that these fears will be dispelled, or the socio-ethnic group must be given either total or partial autonomy. Whatever the final result there will be an interim period during which any intervening force may have to assume certain of the burdens normally the preserve of the sovereign and will have to maintain some form of order.

8.12 Apart from this it is necessary that an operation, including all aid and assistance elements, is working towards making itself redundant. In the case of the military this often means reducing the security threat to a point where civil law enforcement agencies can cope with the situation. To conduct such operations there must first of all be a satisfactory framework, beyond the general mandate. The international community has been in a position to experiment with such frameworks in Cambodia and Bosnia because there were organised parties with whom to negotiate such agreements. Where there are no parties to execute such an agreement, the only option is to look for answers or models in international law. It is the submission of this work that in certain circumstances the laws of occupation provide this answer or model, at least on an interim basis. They can provide the necessary guidelines for issues such as side-stepping elements of a legal regime that are abhorrent to fundamental standards of international law, the restoration and maintenance of order, supporting and securing the intervening force and providing for the well-being of the population. Such a framework is likely to be necessary even in the case of a limited deployment to establish a 'safe haven'. In pacific occupations like Cambodia and Bosnia the customary law principles of pacific occupation can be
of assistance in dealing with grey areas or silences in the instruments such as aspects relating to the security of the intervening force.

The Applicability and Relevance of the Laws of Occupation

8.13 A historical survey of the laws of occupation demonstrates clearly that these customs and conventions developed to deal with an ambiguous phenomena of 19th and 20th Century military operations. That is where there is no actual fighting taking place and a military force has been left in control of territory where it is the primary authority. The international law of war up to the mid-19th century had evolved customs devoted only to the actual conduct of hostilities among combatants and to the protection of those non-combatants that may be in the vicinity of the fighting but was largely silent on this new 'administrative' dimension of military operations. At the heart of the development of the law of occupation was the simple factual state of affairs that the relationship between a foreign military force and the civilians within its power ought to be regulated in some way. In this respect the logic of the applicability of the law does not change whether the situation arises as a result of armed conflict or a humanitarian intervention where there is no consent from a state apparatus of the country the subject of the intervention. The breakdown of civil authority and law and order is often the precise cause of the conditions giving rise to the intervention.

8.14 We have seen how this evolution of the law recognised two conditions in which the relationship between foreign forces and a local population could
arise. This would be either in the context of a state of war (belligerent occupation) or where no state of war existed (non-belligerent occupation) including occupations by agreement (pacific occupation). All these elements were brought together in the form of the Fourth Geneva Convention of 1949. It added to, adapted and preserved the Hague Regulations of 1907 dealing with occupation and was in turn embellished by Additional Protocol I of 1977. The Fourth Geneva Convention was part of an attempt by the 1949 Conventions to remove some of the finer points of legal debate on application of the laws of war to concentrate on the factual circumstances where the need for regulation arises. This has led to the more generic descriptions of "the laws of armed conflict" or "international humanitarian law". It appears an inescapable conclusion from this process and the specific wording of the Fourth Geneva Convention that the laws of occupation will be applicable to situations equating to the Somalia experience set out herein. The extent of the application will depend on what instruments a State is party to and the circumstances. Such situations can be summarised as those where there is no consent to the intervention on the part of a recognisable sovereign apparatus and will be regardless of whether an armed conflict is in existence, either between the intervening force and the State or local armed elements.

8.15 The provisions of the law will obviously bind all those who are party to it but will also bind those not party, including UN forces, to the extent of the provisions which were either declaratory, or subsequently have attained the status, of customary international law. These customary elements will
particularly relate to the humanitarian provisions of the law. For UN forces it is submitted that all contingents forming part of the force will continue to be bound by the international law to which their respective states have subscribed.

8.16 The focus of this analysis has been on the utility of the provisions of the laws of occupation with respect to the issue of the restoration of law and order. It is submitted from this examination that these provisions are eminently suited to that purpose. There have been misapprehensions about the nature of the obligations that these laws may impose on the occupant. Given the realism with which the laws were drafted, occurring in the context of the very recent experience of those who had the responsibility for these very tasks during World War II, closer attention needs to be paid to the qualifications that exist in the provisions which delineate the obligations on the occupant. These are all to be weighed in the context of the capabilities of the force and its operational exigencies. They are designed to address a temporary state of affairs with no impact on the ultimate resolution of the issue of sovereignty and are therefore highly relevant to the circumstances of most intervention scenarios we have witnessed in recent times.

8.17 The essential interests that are addressed include the preservation as far as possible of the local character of the law enforcement regime, the daily life of the people and the security of the occupying force. Safeguards are included which ensure the application of general standards of justice. The utility of the law was amply demonstrated to the Australian force deployed in Somalia
where many difficult questions could be resolved and guidance gained by reference to the law in balancing these interests. Most importantly the laws of occupation provide the means by which a force can be held accountable according to realistic standards and by which it can justify its actions to the world.

Reform?

8.18 It is submitted that the laws of occupation are in themselves adequate for the circumstances they were designed to deal with and as much as can reasonably be expected for most humanitarian or inter-state conflict interventions. As is the case with international humanitarian law in general it is not so much a question of reform as ensuring compliance with the law that is the heart of the problem. It would perhaps benefit from amendments or a new protocol which would more clearly delineate the relationship with international human rights law and the circumstances where one may override or supplement the other. Some flexibility is needed to enable the occupant the discretion to override, dispense with or modify local laws requiring the death penalty for the duration of its occupancy. Another aspect that could perhaps be examined is providing greater certainty in the area of the Protecting Power mechanism. This could be done by designating for the task a specific UN agency, the ICRC or both. If both were nominated then the option would be available of having a neutral body (the ICRC) available for UN operations.
8.19 It would be even more desirable for the UN to adapt the Trusteeship Council to deal with collapsed state scenarios. If the support necessary to amend the Charter to enable use of the Trusteeship Council is not forthcoming then the UN should develop an alternative mechanism. With such a mechanism could be developed model statutes for intervention scenarios which could be endorsed by the Security Council for a given operation. These statutes could properly demarcate what is applicable from the international human rights regime with appropriate derogation provisions. At the moment however the laws of occupation are all we have.

The Practical Application

8.20 Clearly a force in circumstances such as were found in Somalia has wide-ranging authority under its mandate and the laws of occupation to take appropriate measures to ensure its own security, restore and maintain order and ensure the safety of relief workers and the civil population. The question will then become what measures would be in accord with this authority without breaching other obligations to minimise civilian casualties and property damage while at the same time minimise the risk to the forces carrying out the disarmament tasks. In Somalia there is no question that the population and the warlords expected disarmament to occur. Disarmament of heavy weaponry as well as all weapons held in caches, would have been achievable but it should have been undertaken immediately upon the arrival of UNITAF. The failure to

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disarm was identified as a mistake by some members of the US Congress as early as 17 December 1992\(^\text{18}\) and was also cited as a key failure by Admiral Howe.\(^\text{19}\) He was not alone in this assessment as this opinion was held by many other participants in every aspect of the operation.\(^\text{20}\)

8.21 In most similar situations the key concern for an armed community is their self preservation and cultural identity. If this can be guaranteed, and the fact that it is guaranteed effectively communicated, then concurrence with disarmament is more likely to follow. If this is done effectively there will not usually be a challenge to an overwhelming force that is acting and being seen to act fairly, that it is understood cannot be militarily defeated, and if challenged may result in a serious diminution of power to local warlords. Provided force is carefully applied in accordance with the law of occupation and accompanied by effective communication and follow up civic action, it will be less open to criticism and will avoid alienating the population. These are principles that can be applied universally, tempered with flexibility and adaptation. Using the rationale of the laws of occupation and citation of its provisions will assist in winning the battle of effective communication and provide the appropriate framework and guidance for disarmament action in collapsed states.
The dilemma that faces any peace operation is the appropriate use of force in establishing order. This becomes an even more complicated issue when there is no law enforcement agency of any form or civil authority capable of enforcing a code of law. The troops will often in these circumstances be caught between the force appropriate for combat situations and something more akin to civil policing. It is therefore imperative for common standards to be developed, in the application of force and the laws of armed conflict, for all troops that are nominated to become part of any UN commanded or authorised operation. To this end it is a matter of some urgency that a training package be created and adopted by the UN that focuses on the essential elements of behaviour and the application of force for peace operations. This package should then be provided to every prospective troop contributing nation and a training regime commenced for those forces who have been nominated as part of the standby force arrangements between the UN and participating countries. The UN should have a permanent training officer who can advise on the implementation of this training and monitor the standards attained. The advice of this officer could then be obtained as to whether a contingent being offered for a mission had achieved a satisfactory level of training in this respect, measured against the nature of the operation. Such a package could form the basis of a general standard to apply to all armed forces in the same manner as UN Rules relating to standards of criminal justice. The circumstances of peace enforcing occupations and humanitarian interventions dictates a standard higher than would apply in a state of war.

Justice Reconstruction and Interim Measures

8.23 It was illustrated herein how important an effective justice reconstruction programme was to the overall success the Somalia intervention hoped to achieve and how this was not reflected in the urgency, resources or efficiency with which the issue was approached. The recurrence of this central problem in peace operations requires that the international community find a way of addressing it at the outset of the contemplation of a mission. The two crucial aspects of creating an effective international response are funding and physical capability. The programme in Somalia suffered firstly because of the fact that the funds to support it could not come from the peace keeping budget for the mission. Funds had to come instead from donors. Perhaps the UN may have had greater success in raising funding support had it used the argument that the troop contributing countries had obligations in this respect under the laws of occupation. In missions of this nature in the future, where it is clear that the re-establishment of a justice regime is going to be involved, an estimate should be provided as to the costs involved. This cost should then be factored into the determination by the Security Council and contributions called for. In 'contracted out' operations, which appear to be the most likely for the foreseeable future, participating states should come prepared and be authorised in the mandate to organise an effective means of dealing with interim restoration of order issues in tandem with UN and other agencies.
8.24 It is therefore essential that some nations who are intending to offer stand-by forces to UN operations develop a deployable civil affairs capability geared to address this essential issue. This may indeed amount to an obligation in relation to laws of occupation factors. Such units could deploy rapidly, at less cost and in harsher environments than civilian alternatives. Once circumstances permit these units could either hand over to civilians or to local authorities who had resumed functioning. They would have the capability to establish interim measures such as *ad hoc* courts to hear cases involving major offenders against the force and public order. They could also deploy with an investigative unit from the ICC, when it is established, to deal with any major malefactors in relation to the jurisdiction of the Court. These units could use as their reference the provisions of the laws of occupation and international standards established by conventions, general principles and published UN Rules. Under these authorities a basic code could be drawn up which could serve as an interim regime in the worst case of no local code capable of application. Primarily the focus should be on rehabilitating pre-existing local codes pursuant to the obligations of the Hague Regulations. The world is predominantly divided into criminal law traditions derived from the Napoleonic Code or the English Common Law. The nation called upon to contribute a civil affairs unit to a mission could be selected on the basis of a tradition matching the assisted country so that familiarisation on deployment will be quicker.

8.25 UNOSOM failed to deal effectively with justice reconstruction for reasons of funding and capability. It was also critically undermined by the
approach taken during the UNITAF phase to the issue and the restoration and maintenance of order in general. This stemmed from the reluctance to recognise the need for a framework for the interim administration of justice and the rejection of the laws of occupation for this purpose. One option in this early phase according to Brigadier Ahmed Jama would have been to have foreign judges come in to operate courts until a transitional government was formed and enough judges found, trained and vetted to take over. He believed this was necessary at least in Mogadishu where it would take some time for the people to accept that a Somali judge would not be clan biased. He believed the foreign judges would have been required for at least a year. This would have created problems for UNITAF and UNOSOM because of the uncertainty both experienced over the authority for taking such action. It is submitted that this authority was available under the laws of occupation. A similar option was adopted in the pacific occupation arrangements of the Dayton Agreement where non-nationals of the conflicting parties have been nominated to the role of Human Rights Ombudsman and on the panel of the Human Rights Chamber.

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24 The Bosnia Agreement focused on human rights with great particularity beginning with a new Constitution for the country. The Preamble of the document set out clearly that it was inspired by the key international human rights instruments and went on in Article II to entrench the commitment to human rights and fundamental freedoms. Particularly noteworthy was paragraph 8 of Article II which provided for cooperation with and unrestricted access to "any international human rights monitoring mechanisms established for Bosnia and Herzegovina" as well as the supervisory agencies to be established by the Agreement and "any other organisation authorised by the United Nations Security Council with a mandate concerning human rights or humanitarian law".

Annex 6 went into some detail to provide the substance and mechanisms by which this agenda was to be implemented. The primary reference was to be the European Convention for the Protection of Human Rights and Fundamental Freedoms though the Parties were also required to secure the rights and freedoms enshrined in another 16 international conventions listed in the Appendix to the Annex. The mechanisms established to ensure compliance with these instruments included a Commission on Human Rights which was to consist of an
8.26 The failure to establish any form of law and order regime by either UNITAF or UNOSOM led directly to the frustration that emerged among the troops of contingents where no alternative had been attempted similar to the Australian initiatives. This frustration led to incidents which would only further alienate the troops from the population and which seriously damaged the international image of the operation. The frustration of troops who have their initial motivation to help restore order checked and the loss of faith of a population which has high expectations of what the force will do to restore security to their lives, combines to produce a tragic atmosphere of bitterness, futility and the decay of morale. There was also confusion for the commanders trying to come to grips with the complexity of the operation. In considering the detainee issue the first Canadian inquiry into the Canadian Airborne Regiment Battle Group (CARBG) made what, it is submitted, was a common error in

The Ombudsman was to be appointed by the OSCE and was responsible for choosing his or her own staff. The Ombudsman was not to be a citizen of Bosnia and Herzegovina, or any neighbouring state, until the transfer of responsibility for the appointment to the President of Bosnia and Herzegovina after five years. (Chapter Two, Part B, Article IV).

The Human Rights Chamber while composed of 14 members was to have only four of these appointed by the Federation of Bosnia and Herzegovina and two from the Republika Srpska, the remainder were to be nominated by the Committee of Ministers of the Council of Europe and were also not to be citizens of Bosnia and Herzegovina or a neighbouring state. The Committee of Ministers was to nominate one of its appointees as the President of the Chamber. (Chapter Two, Part C, Article VII).

The Ombudsman was given the power to investigate on his or her own initiative or in response to allegations by any Party, person, NGO or group of individuals or complaints on behalf of alleged victims. The Ombudsman could initiate proceedings before the Human Rights Chamber and intervene in any proceedings. He or she was also to have access to all official documents, including classified ones, judicial and administrative files. The Ombudsman could also require any person, including government officials to cooperate in providing this material and could enter and inspect any place where persons deprived of their liberty were confined or working. (Chapter Two, Part B, Articles V & VI). A finding that a Party had breached its obligations under the Agreement could lead to corrective action by IFOR while the Chamber was also empowered to order other remedies. (Chapter Two, Part B, Article XI).

Under Chapter Three, Article XIII the Parties undertook to promote and encourage the activities of human rights organisations, including an invitation for various agencies and NGOs to establish offices, observers, and rapporteurs. These bodies were to be afforded full and effective access, unhindered and with the full cooperation of the Parties.
Somalia; looking for guidance on the handling of detainees from the Third Geneva Convention of 1949 Relative to the Treatment of Prisoners of War, rather than the Fourth Convention. All troop contributing governments and the UN have a responsibility to ensure that the men and women of their armed forces are never placed in such a position again. No mission into a collapsed state or to establish a safe haven should proceed without an interim administration of justice plan and a concept of operations with the appropriate resources and assets for the longer term restoration of the local capability.

8.27 Perhaps the key issue a law and order regime would have had to contend with had it been established is the position to be taken towards the

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25 CARBG BOI, op cit., p. 3332.
26 "2 Commando (of the CARBG) was also given the task of re-creating the local police force. This was a part of the normalisation process and supported the UNITAF Phase Three integral task of re-establishing non-partisan institutions at the local level as the basis for a return to effective government. Although the task of training the Somali police force was assigned to the Battle Group by UNITAF through the CJFS (Canadian Joint Force Somalia) headquarters, there were major policy deficiencies and potential legal command and control problems associated with this project. These problems could have been resolved only at the UN/UNITAF level." (Ibid., pp. 3281-3282.)

"It was to be expected that OPERATION DELIVERANCE (the Canadian name for its participation in UNITAF) would at some point lead to the detention of Somalis. This was contemplated in the ROE in that they specified that detainees would be handed over to the appropriate military authorities. UNITAF Headquarters were formally queried the first week of January 1993, as to the procedures necessary to comply with this direction, but no practical solution was provided. There were, in fact, significant jurisdictional problems which were beyond the authority of the in-theatre commanders to resolve." (Ibid., p. 3288.)

"This was peacemaking, which might informally be described as falling somewhere between peacekeeping and low-intensity war. As noted in the statement by the Board, there was no government in Somalia, and no administrative, legislative or judicial structures in place. This new challenging environment posed problems to all levels of command who had not, in the opinion of the Board, fully contemplated, nor provided the required policy direction. This did have an effect on the actual application of the ROE in theatre.

For example, the ROE clearly anticipated the requirement for the detention of Somali persons. They directed that detainees be handed over to "appropriate military authorities". However, within the CJFS, clear legal authority to detain Somali persons on a long term basis did not exist. A detainee was certainly not a prisoner of war because Canada was not at war with Somalia. Nor could the detainee be considered subject to The Criminal Code of Canada, or the Code of Service Discipline. The Commander CJFS' attempt to obtain clarification from UNITAF, his next higher headquarters in the operational chain of command, resulted in a verbal response to simply avoid detaining Somali persons for any length of time. The Board concludes that this was an indication that the same problem was recognised at that level." (Ibid., p. 3331.)
warlords. It was advocated in some quarters that all the warlords who had been guilty of committing grave atrocities during the civil war, should have been arrested en masse and placed on trial.\textsuperscript{27} As described above,\textsuperscript{28} prosecution action greatly assisted the long term objectives of the Australian contingent in Baidoa. This poses the question as to what should have been the approach taken to the warlords. For the seizing of the warlords to have been effective, in the sense of being seen to be even handed and pre-empting conflict with any particular faction, all the warlords would have to have been arrested simultaneously. Clearly this would have been extremely difficult and fraught with great risk. There is also the important consideration that there ought to be some evidence connecting particular individuals with specific acts, in the possession of the force, that would justify every arrest if it was intended to bring the warlords to trial. Such evidence would not have been available, if at all, until after careful investigation. More sustainable would have been the detention of the warlords on the grounds of the threat they represented to public safety and the safety of the force. This would still have carried grave operational risk and would have been difficult to execute.

8.28 A more feasible approach would have been the establishment, once the force was effectively and securely established, of a humanitarian law violations investigation operation to gather evidence of atrocities committed during the internal conflict. Initially regional bandits could have been targeted for possible prosecution (as opposed to the approach taken in the hunt for Aideed). Once

\textsuperscript{27} "The Bandits on Their Donkeys", \textit{The Economist}, 1 May 1993, pp. 40-41.
\textsuperscript{28} See Chapter 2, paras 2.38 - 2.62, \textit{supra}. 
sufficient evidence was available the warlords could have been arrested when
the opportunity presented as quietly as possible without announcing
beforehand that these individuals were being sought.29 Targeting the lesser
regional figures would have sent a powerful message to the major faction
leaders to cooperate lest the same fate befall them. It would have had the
added benefit of eroding the regional support for these main players. This
proved to be the case with Gutaale in Baidoa whose demise resulted in a
reduction in revenue and support for Aideed, this in turn being a factor in his
reduction in strength relative to the other warlords, although still a significant
threat to be reckoned with.

8.29 Justice reconstruction should not focus solely on the issue of
maintaining order, however. As the Australian experience in Baidoa and the
operations in Haiti and Rwanda have demonstrated, an integral factor in laying
the foundations for long term order is the need to address the attempted
supplanting of ownership of land and property, sometimes accompanied, as in
Rwanda and Baidoa, by genocidal activities.30 It is essential to include a
mechanism for resolving land and property disputes in many operations and
this may include establishing a special tribunal. The same logic as was
discussed in relation to crimes tribunals applies here in that effort should be
directed primarily at creating an indigenous capability to deal with these
matters, albeit perhaps with close supervision. This can help relieve potentially

29 This has been a method used for apprehension of war crimes suspects in Bosnia under
the secret indictment arrangements, (See for example “Serb General Faces Genocide Charges”,
The Weekend Australian, 5-6 December 1998, p. 19., regarding the arrest of Radislav Krstic
under secret indictment.).
30 Cassanelli, op cit., pp. 4-6, 13-16.
explosive situations. Once again the framework for pro-active intervention in this area can be provided by the laws of occupation under the provisions governing the restoration of order and the *vie publique*.

8.30 An intervention should deploy with a capability and with experienced staff in key positions but should be prepared to be flexible and imaginative, adapting the mission to the circumstances and being as inclusive of the local population and sensitive to their culture and laws as possible. In this context the broad framework of the laws of occupation provides the only available basis at present for the regulation of the relationship between the force and the community and upon which to build an environment of law and order from which many other desired outcomes will flow. Accepting the application of the laws of occupation in the appropriate circumstances will also lead to the realisation that a force must come equipped and prepared to assume functions normally the preserve of the sovereign, for strong reasons of self-interest as well as for the benefit of the people they have come to help.
Justice must be made the principal ground of our actions. For with such support there is the best hope of success to our arms. But without that, any point which may be gained for the moment has no firm ground to rest upon.\textsuperscript{31}

\textsuperscript{31} Dion Cassius, cited in Grotius, \textit{op cit.}, p. 74.
Annexes
ANNEX A

UNITAF Area of Operations
DEC 1992 - MAY 1993

Kilometres

ETHIOPIA

A SELECTION OF MAJOR ROADS HAVE ONLY BEEN SHOWN WITHIN SOMALIA

SOMALIA

Gulf of Aden

Indian Ocean

Position of Humanitarian Relief Sectors

SCALE
1 : 6 750 000

Kilometres

0  150  300

Produced by Srg Sect LHQ1994
The boundaries and names shown on this map do not imply official endorsement or acceptance by the United Nations.
ANNEX D

UNOSOM II DEPLOYMENT AS OF 5 NOVEMBER 1993

The boundaries and names shown on this map do not imply official endorsement or acceptance by the United Nations.
ANNEX E

UNOSOM II DEPLOYMENT
AS OF
JUNE 1994

The boundaries and names shown on this map do not imply official endorsement or acceptance by the United Nations.
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