

*Michael J. Kelly and Timothy L.H. McCormack*

## **International and Regional Action with regard to Conflicts in Multicultural Societies**

### **1. Introduction**

“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 members of the United Nations (UN) 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”.<sup>1</sup>

The relationship between the topic of military intervention in states fragmented by multicultural conflict and federalism is probably the least obvious of any of the topics under consideration in the current conference. That does not mean that the connection is tenuous. On the contrary, there are a number of federal issues that arise here. It is simply the case that they may not be as immediately apparent as with other topics under consideration.

First, it should be acknowledged that when the international community takes collective decisions on whether to intervene militarily within states, it usually

does so in a manner akin to federal decision making. Although the UN itself often bears the brunt of criticism about, for example, perceived failures to intervene in crises quickly enough, or about the inadequacy of a particular military deployment, the reality is that the UN is subject to the political will of its member states. The organisation itself is utterly dependant upon the willingness of member states to commit troops, finances, military equipment, and support to a particular deployment. In this sense, UN decision making is heavily decentralised and subject to the same vagaries and benefits as federal decision making.

Secondly, some collapsed states that are the subject of military intervention have federal structures of governance. In choosing to intervene in such states, the international community may have to decide whether or not to attempt to preserve the integrity of the constituent parts of the federal structure. This happened, for example, in the military intervention in Bosnia and Herzegovina. The international community, following the leadership of the European Union (EU), worked hard to preserve the territorial integrity of Bosnia and Herzegovina against the military and political realities of disintegration of Bosnia and Herzegovina as a unitary entity. In extending *de jure* recognition to the separate republics of the former Yugoslavia in acknowledgment of the *de facto* reality of the dissolution of the federation, the international community comforted itself with its non-violation of the doctrine of *uti possidetis* – the preservation of existing territorial borders. In the case of Bosnia and Herzegovina, however, the desire not to disturb the territorial integrity of Bosnia and Herzegovina is, in reality, a fiction – particularly because of the Bosnian Serb control of the Republika Srpska.

Thirdly, the international community will sometimes need to decide whether or not a federal, or decentralised, solution will be the most appropriate for the longer-term resolution of a multicultural conflict. Had the UN not abandoned its intervention in Somalia, the longer-term solution to the conflict there may well have involved a decentralised system of governance. The conflict was fought more on the basis of familial or clan-based membership than on the basis of culture or ethnicity. A negotiated settlement to the conflict and the first steps of nation building in Somalia – had the intervention been permitted to reach such a stage – may well have focused on a political allocation of the territory of Somalia on the basis of clanship.

The federal model of governance also finds resonance in the manner in which many internal conflicts must be stabilised and managed in the transition from conflict to peace. In Bosnia and Herzegovina, Kosovo and Somalia, for example, internal groupings that are distinguishable by one means or another have been engaged in such brutal violence that the first priority is some kind of separation. This separation on peace operations will often become the subject of, or be emphasised by, administrative demarcations.

The peace operation's administrative separation in the case of Bosnia and Herzegovina and Kosovo not only closely resembled a federal model in the constitutional sense, but in these cases also evolved into some form of federal solution as a final form of political entity. The international community desires that this construct will be lightly drawn, and that resettlement, inter-mixture and interrelation will be fostered across the boundaries. The reality is that the strong elements in these communities at present see, or would like to see, these boundaries as defensive walls of total separation, closer in nature, or in

fact, to sovereign statehood. In Somalia the concept of using a federal model by creating semi-autonomous provinces containing the separated major clan groups was seen by some Somalis as the answer to the problem of reassembling some type of viable political entity.

The positive aspect of this type of solution is that it tends to prolong the period of peace following conflict. The negative aspect is that it also has the tendency to reinforce division and the sense of irreconcilable “otherness”. The merits of the former tend to outweigh the demerits of the latter, as the longer the period of peace, the better the chance of gradually reconstructing some form of dialogue which in the longer term may reach the desired level of civility and interrelation.

In any event, when there is international intervention in such situations and the first priority is to stop the killing, administrative solutions will be based on this urgent need and will be characterised by their interim nature. The main concern for these interim administrations will be establishing the legitimacy of their right of initiative in defeating violence, and achieving this victory in practical terms. The battle for legitimacy is essential to maintain local and international support as well as the support of the domestic communities of the troop-contributing nations. This explains why the legal framework for administrative action is so critical. In this context then, we look to the challenge of crafting the overall framework.

A discussion of the role and responsibility of the international community to intervene militarily in fragmented societies is a multidimensional one. It involves debate over the moral and legal right or obligation to “do something”

about a situation that usually involves human suffering on a large and unconscionable scale, the financial ability or commitment required, and the administrative and social complexities of implementation. A major area of legal discourse in recent times concerns the legitimacy of humanitarian intervention,<sup>2</sup> whether under the auspices of the UN or on a unilateral basis. The existence or otherwise of a legal “right” of humanitarian intervention in the absence of UN Security Council authorisation has been discussed at length – particularly since the NATO intervention in Kosovo. It is clearly unsatisfactory for the decision making of the Security Council to be obstructed by the narrow political interests of one of the five permanent members of the Council – particularly in the face of gross violations of human rights, and where the political will exists among the remainder of the Security Council members to act. At the same time, it is also unacceptable to extend a *carte blanche* to any state (or group of states) to intervene militarily in the internal affairs of another state on any pretext. The temptation to misuse the purported justification to cloak aggression will be real indeed. If there is to be an emerging “right” to intervene militarily on humanitarian grounds without Security Council approval, the criteria for a valid exercise of this “right” will need to be agreed and clearly articulated.

Given the extent of the attention paid to the discussion of the scope of the right of humanitarian intervention, we do not intend to focus on that aspect of the problem in this paper. It is sufficient for our present purposes to note that there would appear to be a reasonable consensus that the UN Security Council has the authority to mandate humanitarian interventions, and that there have been, and will continue to be, crises warranting intervention

resulting in international action. It is our intention to focus on the issues consequent upon the execution of such interventions. From this perspective, a discussion of the legal role and responsibility of the international community for dealing with fragmented societies revolves around the provision of appropriate frameworks and resources. There are two main approaches to the issue:

- Establish a regime that might be available under general treaty/customary law;
- Establish a regime that is UN-centred, either under the auspices of a new or existing institution, or as laid down in a more comprehensive case-specific Security Council resolution framework.

When we talk of the role and responsibility of the international community in fragmented states we really mean how far the international community can and should go in intruding on the sovereignty of the state – traditionally considered the inviolable province of that state. A legitimate military intervention on humanitarian grounds in a failed state situation can involve a minimalist provision of some aspects of governance, such as basic public and external security to ensure the delivery of humanitarian relief, or it can involve the provision of the entire apparatus of governance. The dilemmas involved in selecting the most appropriate level of assistance are compounded by the fact that the military and Non-Governmental Organisations (NGOs) are usually on the ground well before civil administrative elements are able to assume any governance functions. The intervention then involves two distinct phases. First, immediate actions of the military and the NGOs to secure the

environment and avert a humanitarian catastrophe; second, the civil administrative assumption of interim functions and the identification of broader functions that remain to be addressed. The crucial dimension to these two phases is transition. This includes transition from military/NGO primacy to international civil administration, and then transition from international civil administration to sovereign control by the emergent indigenous authorities. In achieving the second transition, crucial issues will emerge as to how to produce a polity and constitutional framework that will match the social/economic and physical landscape. The resulting solutions will, by definition, be different in each case. The constant, however, should be a fundamental legitimacy underpinning both the international as well as the national succession, particularly in the key areas of constitutional and criminal law.

The second of these two transitional phases, from a humanitarian focus on securing the environment to prevent further atrocity to the institution of interim administrative authority and the consequent decisions about institutional structures and procedures, is the focus of discussions in the subtheme entitled “Constitution Making and Nation Building”. Our focus is upon the application of a legal framework governing the initial military deployment, and the role of the military before the transition to interim administrative authority.

## **2. The search for a legal framework**

The Australian military approach both in Somalia and in East Timor in the initial transitional phase of military intervention, has been to rely upon the provisions of the Fourth Geneva Convention of 1949 to provide an interim

reference for establishing a basis for administrative action, including the temporary administration of justice. This Convention is well suited to such situations as it is in effect designed to provide for an ad interim sovereignty over a civilian population, while leaving as far as possible the fundamental laws and institutions of the temporarily occupied state intact. In Somalia this was exercised to the extent of rehabilitating and facilitating the re-establishment of local indigenous governance in a particular area of operations (Kelly, 1999b, 33-63). In East Timor the policy was employed to provide, under the broad and necessarily vague mandate of Security Council Resolution 1264, for the full responsibility of temporary governance throughout the territory during the INTERFET phase (Kelly, McCormack, Muggleton and Oswald, 2001, 130-136). This approach has been taken due to the lack of a clear legal framework for such situations.

The search for a framework for international action is compelled by a number of factors. States are reluctant to be bound by the laws of military 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 law of occupation is an interim framework, and there may be a need for a much longer-term administrative framework that is more in tune with an environment in which armed conflict is no longer taking place. As the context for these interventions is removed from inter-state conflict and involves the complexities of internal conflict resolution, such situations may be viewed as requiring a “tailor-made” regime. What then should the framework be?

The options for a legal framework for interim and longer-term administration that will be considered here will include:

- Reliance on the laws of occupation as guidelines without recourse to a legal debate over de jure application;
- Inclusion of the laws of occupation as the point of reference for specific peace operations by their adoption in the Security Council resolution creating or authorising an operation;
- Amendment of the Fourth Geneva Convention;
- Development of an entirely new convention dealing specifically with military intervention in failed state situations;
- Reliance on the evolution of custom through state practice;
- Revitalisation 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;
- Creation of a new UN mechanism which could be designated as a “conservatorship” or “stewardship” to be raised on an ad hoc basis;
- Utilisation 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;
- Assumption of sovereign functions within a formal agreement framework if the possibility of dealing with local agents exists.

These options will be considered from the perspectives of practicality, appropriateness (legal and moral), 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 paper, but to illustrate the need for a more considered approach to this issue by the international community.

### **3. Treaty and customary law options**

#### **3.1. The law of occupation as guidelines**

The inevitable bureaucratic rush to respond to humanitarian crises often precludes a full and deliberate consideration of the appropriateness or otherwise of the proposed actions under international law. Suggestions that a particular international law regime is appropriate will often meet with scepticism and a reluctance to unambiguously adopt the regime, for fear of possible ramifications that are not yet comprehensively considered. There may also often be a reluctance to risk being held strictly to account under clear “black letter” international law provisions, which may restrict liberty of action. The labels “occupying power” or “neo-colonialism” carry with them sensitivities associated with images of the Nazi occupations of the Second World War, the Afro-Asian colonial experience, or the international ignominy attached to Israel’s management of its occupied territories. One approach then, is to simply avoid the discussion of de jure application of the law of occupation by stating that, as a matter of public policy, a military force or an operation will rely on the laws of occupation as guidelines to the extent that they are relevant or appropriate. This was the approach taken by Australia during the INTERFET phase of operations in East Timor from 20 September 1999 – 23 February 2000 (Kelly, McCormack, Muggleton and Oswald, 2001, 115).

Denying the application of the law of occupation, or stating that the law will be applied only as a matter of policy can promote an argument that international human rights law is the appropriate international legal regime (Benvenisti, 1992).<sup>3</sup> It is not intended here to debate the application of human rights law versus international humanitarian law. It is sufficient to make the point that the *lex specialis* takes precedence over the *lex generalis*, so that whenever the laws of occupation apply *de jure*, they will exclude the operation of the international human rights regime.<sup>4</sup> In the exigent circumstances of the initial phase of intervention, where military operations are paramount and civil administration is yet to form, it is more appropriate that a humanitarian law regime should apply. We are of course considering a collapsed-state scenario where the normal machinery of interaction between state and citizen has disintegrated or was, in fact, an instrument of human rights abuse in the first place. Those who would deny the application of humanitarian law in such situations may find they are bound by an even more demanding human rights law framework that provides for the rights of the administered, but gives no guidelines or framework for the administrator.

### **3.2. Treaty amendment/generation**

Amendments could be made to the Fourth Convention to clarify the extent of its application and affirm in clear terms that peace operations, including those that are UN commanded, are governed by it. New provisions could also be introduced to specifically address peace operations scenarios. One element of reform that would be timely, given the gradual decline in 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 punishment

provisions from the local law for at least the duration of the military occupation. The Fourth Geneva 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 in 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 who could, perhaps, share some of the protecting power responsibilities with the International Community of the Red Cross (ICRC).<sup>5</sup> An alternative to amending the Fourth Convention could be the creation of an entirely new convention designed specifically for peace operations.

The major problem with either the 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 negotiation of the Anti-Personnel Land Mines Convention<sup>6</sup> 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.<sup>7</sup> 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.

### **3.3. Custom and state practice**

The alternative to these more proactive solutions is to adopt the passive, evolutionary approach. Such an approach allows the law to evolve by observation of state practice in peace operations situations. The problem with

such an approach is that there are insufficient peace operations to date to be able to draw firm, and at least relatively uncontroversial, legal principles. This approach would also leave a great deal open to opinion and uncertainty, particularly in determining clear *opinio juris*.<sup>8</sup> 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.<sup>9</sup> 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 issues such as detention and the administration of due legal process.<sup>10</sup>

## **4. UN institutional options**

### **4.1. Security Council resolutions**

One prospect that has materialised since the termination of the Cold War is the greater use of Security Council authority under Article 25 of the UN Charter. While there has been a greater recourse to Security Council resolutions for a broadening array of peace operations, the resolutions themselves have tended to be rather limited documents establishing broad mandates for missions, but often posing more questions than they have answered.<sup>11</sup> Given the binding nature of a Security Council resolution as a type of *lex societatis* (Schwarzenberger, 1968, 48) 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. UN Security Council resolutions could state, for example, that “the Fourth Geneva Convention will be applied as a matter of

policy and guidance, where appropriate, by all UN or UN-authorized forces in their dealings with the civilian populations in their area of operations resulting from the absence of a recognised state authority". An alternative approach for the UN Security Council 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 (Chopra, 1996, 355; Plunkett, 1994, 75-77; Evans, 1993, 56; Vieira de Mello, 2001, 20-21). Such a code could be endorsed through Security Council resolutions. The problems with such an approach include issues of retrospectivity and fairness, as well as respect for local law and custom, and the rehabilitation of local capacity. Formulating a standard code would also prove quite difficult in welding together different legal traditions and approaches. The idea of a standard code has been rejected by the legal office of the UN for these very reasons (Corell, 2000, 8-9).

Endorsement by UN Security Council resolution of the application of the Fourth Convention as policy in the military phase of administration is possible given the preparedness of the UN Security Council 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, reflect the limitations of the UN Security Council itself – the potential for politicisation and the whims of the Permanent Five (Righter, 1995, 67-89; Evans, 1993, 180-181; Roberts and Kingsbury, 1993, 1-104, 441-445). UN Security Council endorsement may no longer be necessary in any case, given the possible interpretation of the Secretary General's Bulletin on the Application of the Law of Armed Conflict to UN Forces.<sup>12</sup> Under the Bulletin,

the principles of international humanitarian law are to be applied by UN forces as far as they are relevant to an operation.

#### **4.2. Administrative functions assumed by agreement**

With regard to the international civil administration phase of an intervention, it is noteworthy that, since the inception of the UN, there have been proposals for, and occasions during which, UN administration of territory has occurred by agreement. It was once assumed that there would never be any other situation in which a UN administration of territory might occur (James, 1969, 130-174). Agreement would be either a means of settling a dispute between conflicting states, or of facilitating a post-colonial transition. It was not envisaged that agreement might have to be between internally conflicting parties. This occurred in relation to the United Nations Transitional Authority in Cambodia (UNTAC) operations in Cambodia, relying on the Paris Accords (Kelly, 1999b, 163-164) and the International Fellowship of Reconciliation (IFOR) / Stabilising Force in Bosnia and Herzegovina (SFOR) operations in Bosnia, based on the Dayton Agreement (Kelly, 1999b, 166). Another interesting example of non-Trusteeship Council UN administration occurred in West New Guinea (to become West Irian or Irian Jaya). That was not based on Security Council action but instead involved the initiative of the General Assembly (GA) from 1962-1963 (Russell, 1964, 126-133; Bowett, 1964, 255-261). While the Paris Accord set out wide-ranging powers for a UN administration to run Cambodia on behalf of a Supreme National Council, the Dayton Accords provided for significant intrusions on aspects of sovereignty, without assuming a comprehensive administrative role for the international community in 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.

After a lengthy dispute between the Netherlands and Indonesia over the territory of West New Guinea, an agreement was concluded on 15 August 1962.<sup>13</sup> The agreement provided for the temporary transfer of administration of the territory to a UN Temporary Executive Authority, established by, and under the authority of, the UN Secretary-General, to be assisted by a security force. Sovereignty of the territory was to pass to Indonesia subject, by implication, to a plebiscite that was to be held by 1969.<sup>14</sup> In the interim, the UN was to assume extensive sovereign functions over the territory, and was 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.<sup>15</sup> The UN Security Force 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.<sup>16</sup> In fact the UN Security Force 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 the UN Temporary Executive Authority (Bowett, 1964, 258). To conduct the administration, the UN Temporary Executive Authority was authorised to employ former Dutch, Papuan and Indonesian personnel as part of its apparatus, with the requirement that as many Papuans as possible be brought into administrative and technical positions.<sup>17</sup> The UN Temporary

Executive Authority had the power to amend existing laws, and promulgate new ones within the spirit and framework of the agreement. Existing laws that were consistent with the agreement were otherwise to remain in effect.<sup>18</sup> The rights of the inhabitants were set out in terms of basic human rights guarantees, as were arrangements to ensure that the transfer to Indonesia was in accord with the self-determination and will of the Papuans.<sup>19</sup> The provisions of the Convention on the Privileges and Immunities of the United Nations were recognised as applying to all UN personnel and property.<sup>20</sup> The agreement was to enter into force with its adoption by resolution of the General Assembly.<sup>21</sup>

Here was an example of a non-Trusteeship Council administration of territory. The essential ingredient, however, was that the administration was handed over to the UN by agreement of two powers while 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 the responsibility and carry out the task? There was no real challenge or debate about these issues at the time, nor was the constitutional basis or the agreement between the parties set out in the General Assembly resolution, so the search for an answer lies in an examination of the UN Charter. It appears that the authority for the approach was based on Article 98 of the UN Charter.<sup>22</sup> This article allows for functions to be entrusted to the Secretary General by the organs of the UN. These functions would also be exercised in accordance with the Secretary General's powers, provided for in Article 97, as the Chief Administrator of the

Organisation which has as its primary function the maintenance of international peace (Higgins, 1970, 120). 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 International Court of Justice (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.<sup>23</sup> The substantial limitation on the General Assembly is that it cannot authorise enforcement, or Chapter VII-type operations that are exclusively the preserve of the Security Council. As the collapsed-state scenario is often one where there is either no state authority with which the General Assembly or Secretary General can come to an agreement, and/or the deployment is a Chapter VII action, the use of a UN Temporary Executive Authority-type mechanism would have to be effected through the Security Council. The Security Council 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.<sup>24</sup> Laying out the authority of a UN transitional administration in a document similar to that employed for UN Temporary Executive Authority would be the best approach to take, perhaps supplemented with interim regulations where necessary. Particular problems likely to be encountered would relate mainly to achieving a framework, and employing interim regulations that were 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.

Other versions of the assumption of administrative responsibility by agreement have been the UN authorities established in Kosovo (United Nations Interim Administration Mission in Kosovo (UNMIK)) and East Timor (United Nations Transitional Administration in East Timor (UNTAET)). Neither agreement specifies any detail of the administration or creates a framework for them. The details of the administration were left to be included in regulations promulgated by the UN administrations themselves on the basis of the implementation of the Security Council mandates under Chapter VII of the Charter. The difference between the two examples is that UNMIK seeks to return Kosovo as a province to Yugoslav sovereignty (and must therefore eventually reconcile their actions with Yugoslav domestic and Constitutional law),<sup>25</sup> while UNTAET seeks to establish an independent state, and therefore is presented only with the issue of transition to a new state polity and succession.<sup>26</sup> For the purposes of this paper UNTAET is the more interesting example of the two, due to the total assumption of sovereign functions by a UN administration, pending a lengthy process to create an indigenous legitimised polity. It also had to contend with an almost total absence of local administrative capability, as all the functionaries had been either Indonesian or pro-integrationist who fled after the referendum on autonomy in September 1999. This process involved establishing local administrative capabilities at the same time as actually administering, registering an electorate and political parties/candidates, conducting an election, and creating a constitutional assembly. This assembly drafted a constitution and then became the national

Legislative Assembly, conducted a presidential election, and transferred independence on 20 May 2002.<sup>27</sup> Given the scope of the task the mission has proved to date to be very successful, with the main area of difficulty being the administration of justice.

The UNTAET mission involved the careful balancing of many sensitivities and challenges, which increased as the operation matured and progress was made. This, at various times, involved reconciling and dealing with the threats, mandates, roles and interests of UNTAET civil administration, the East Timorese political actors, popular expectations and conditions, the Peacekeeping Force (PKF), the International Civilian Police, the Human Rights Office, and UNTAET Justice Department including the Office of the General Prosecutor and its Serious Crimes Investigation Unit. In addition, it was necessary to deal with the emerging East Timorese Police Service, the emerging East Timorese Defence Force, the Indonesian government, the West Timorese based Indonesian National Army (TNI) and their Commander in Denpasar, Maj. Gen. Da Costa, the militia, and refugees in West Timor. Added to this were the ponderous problems of budget, reconstruction and planning for an economically sustainable future.

It is interesting to note the provisions under UNTAET Regulation No. 1999/1 of 27 November 1999 concerning the applicable law in East Timor. These state that:

- “3.1. Until replaced by UNTAET regulations or subsequent legislation of democratically established institutions of East Timor, the laws applied in East Timor prior to 25 October 1999 shall apply in East Timor insofar

as they do not conflict with the standards referred to in section 2,<sup>28</sup> the fulfillment of the mandate given to UNTAET under United Nations Security Council resolution 1272 (1999), or the present or any other regulation and directive issued by the Transitional Administrator.

- 3.2 Without prejudice to the review of other legislation, the following laws, which do not comply with the standards referred to in section 2 and 3 of the present regulation, as well as any subsequent amendments to these laws and their administrative regulations, shall no longer be applied in East Timor.”

Through these provisions the UNTAET administration drew on the existing body of Indonesian law. This was not without controversy given that only one country had recognised Indonesian sovereignty over East Timor, while the UN and the remainder of the international community never had. Indonesian criminal law is based on its Dutch colonial predecessor, which shared the Napoleonic heritage of the Portuguese Criminal Code. After 25 years of Indonesian rule it was logical that the Indonesian Code be relied upon, given the local familiarity with it and the excising of some of the political laws that had been utilised for repression. This local criminal law was supplemented by a Regulation on Transitional Rules of Criminal Procedure to ensure fairness in accord with fundamental international human rights standards.<sup>29</sup> UNTAET was provided with the ability to promulgate laws and the Special Representative of the Secretary General/Transitional Administrator was empowered to issue Directives.<sup>30</sup> One problem that emerged was the attitude to the Regulations exhibited by the Special Representative of the Secretary General. This was illustrated in the deployment of the East Timorese Defence

Force in the period leading up to the elections on 30 August 2001. Under UNTAET Regulation No. 2001/1 of 31 January 2001, as amended by UNTAET Regulation No. 2001/9 of 29 June 2001, the East Timorese Defence Force was prohibited from being mobilised or utilised in matters linked to internal public order, police issues or social conflicts. The Special Representative of the Secretary General indicated his desire to deploy over 200 East Timorese Defence Force personnel to assist with security for the election, and to boost their public profile and their acceptance by the indigenous community. The PKF strenuously objected to this approach as it violated the Regulation, would send conflicting messages to the East Timorese Defence Force and to the local population about the role of the East Timorese Defence Force, could not be logistically sustained, and would interrupt training. Ultimately 66 East Timorese Defence Force personnel were deployed on civil assistance tasks compatible with the Regulation, which achieved the intention of the Special Representative of the Secretary General. However, this example points to the need for personnel in key positions to understand the critical importance of the promotion of the rule of law and other concepts which are critical to the efficacy of such missions.

The administrative framework for East Timor was adequate for the task from a juridical perspective, with the main difficulty arising in the administration of justice, which still remains an ad hoc solution and suffers from a serious delay in marshalling the requisite human and financial resources.<sup>31</sup> The current approach to the administration of justice in East Timor also results in significantly variable aspects of quality and approach, which ideally ought to be neutralised through a professional cadre under an organised response

mechanism. There is certainly a growing number of personnel with experience in performing these functions, but it has to be said that in the UNTAET experience, the energy of a few compensated for the inactivity, apathy or incompetence of the many. The efforts of the second Deputy Special Representative of the Secretary General, Mr. Dennis McNamara, to remedy these deficiencies demonstrates, however, that one determined and insightful individual in a key position can achieve a great deal even with limited resources. It must be stressed, however, that these are criticisms of detail in a broadly successful mission to date.<sup>32</sup> The Brahimi Report on Peace Operations makes many constructive suggestions that relate directly to this “professionalisation of response” issue and will assist greatly if implemented effectively.<sup>33</sup>

### **4.3. The Trusteeship Council**

The possibility also exists to revitalise and utilise the Trusteeship Council given its past record of successfully bringing administered territories to independence. This suggestion has been raised, for example, as a means of resolving self-determination disputes.

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 from humanitarian crises and avoid the devastation of civil war – tragedies that ultimately can imperil the very existence of a ruling government (Halperin, Scheffer and Small, 1992, 114).

There have also been calls for use of trusteeship mechanisms for collapsed-state scenarios, such as Somalia (Johnson, 1993; Krauthammer, 1992).

Yehezkel Dror, for example, suggested that:

“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” (Dror, 1996).<sup>34</sup>

The problems with such an approach are numerous. In relation to the resolution of self-determination disputes, many governments are unlikely to accept a role for a revitalised Trusteeship Council when those same governments have a vested interest in preventing the independence of territories currently under their own sovereign control. Where a civil war continues to the point of collapse of a central government there is a real difficulty in identifying who has the authority to make such an arrangement. Warring factions are inevitably reluctant to relinquish 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, there are no means by which the trusteeship system under the UN Charter can be used. Articles 75 and 77 of the UN Charter require that territories be

administered under this system only when an individual agreement between a sovereign authority and the UN has been arranged.<sup>35</sup> The charter emphasises the existence of an agreement as a necessary precondition for the activation of the Trusteeship system:

“ ... 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” (Goodrich and Hambro, 1949, 435-436).

This emphasis on agreement reflects the prevailing view in 1945 that the trusteeship system should not be part of the regime of collective enforcement under Chapter VII of the UN Charter. The agreements by which territories would be placed under trusteeship would be treaties between sovereign, independent states and the UN and, by implication, exclude any arrangement with local factions that did not carry the recognised authority of a state (Simma, 1995, 952). A further complication arises pursuant to the exclusion in Article 78: the system will not apply to territories that have become members of the UN.<sup>36</sup> One final problem with any attempt to revitalise the Trusteeship Council is the association of the Council with the political and historical context of the de-colonisation process (Goodrich and Hambro, 1949, 419-459; Simma, 1995, 933-948). Any attempt to amend the UN Charter to permit the extension of the original role of the Trusteeship Council would be subject to the predictable allegations of “neo-colonialism”, and would be unlikely to gain the necessary two-thirds majority in the General Assembly, let alone to escape the use of the veto by one or more of the P5 in the Security Council.

This was in fact the concern voiced by Mr Kofi Annan in his former capacity as the Under-Secretary General for Peacekeeping Operations, when considering a trusteeship for Somalia in 1993.<sup>37</sup> The proposal was raised more recently in relation to Rwanda and Burundi along with other possibilities – all of which were subjected to the similar objection of “benevolent colonialism” (Griggs, 1997, 10). From a purely practical point of view, however, 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 than to have to construct a new institutional regime.

#### **4.4. A new UN mechanism**

Given the legal and political impediments to the revitalisation of the Trusteeship Council, an alternative proposal is for the creation of an entirely new mechanism specifically designed to deal with collapsed states. Jarat Chopra, for example, has raised this possibility on the basis of the de facto circumstances in which the UN, and operations authorised by it, often find themselves in contemporary peace operations:

“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” (Chopra, 1996, 339).

Chopra claims the UN must establish a centre of gravity in such situations claiming jurisdiction over the 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 (Chopra, 1996, 339).

This is an argument for a move away from a concept of UN intervention as diplomacy based in the collapsed-state context, to an all-pervasive political framework, using an international mandate to give effect to local self-determination, and to break the nexus of oppressive “malevolent institutions” (Chopra, 1996, 339). Chopra points to failed administrative efforts by the UN in Cambodia and Somalia to illustrate how, without this conceptual approach, a peace operation can become dysfunctional. He talks of the error of relying on rather than challenging prejudicial local structures. Being also sceptical of the ability of 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 (Chopra, 1996, 340).

When dealing with the potential “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 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” (Chopra, 1996, 340-341).

Regardless of the merits of the logic of Chopra’s argument, there will still be a political and “perception” battle to be won for implementation of the proposal (James, 1969, 132-135). Given the increasing occurrence of the peace-building circumstances that Chopra refers to, the proposal may be worth fighting for. The legal basis for such a mechanism would rely upon expanded concepts of humanitarian intervention and the broader definition of a breach of international peace and security that have been applied in the course of recent UN Security Council decision making. It is also doubtful, in the worst-case scenarios of collapsed states that any legal entity that could be called a “state” actually exists.<sup>38</sup> In such circumstances, it is preferable that ad interim sovereignty, in trust for the local population post-conflict, be exercised by a dedicated multilateral organisation rather than on the ad hoc basis that currently prevails.

Chopra envisages the UN political directorate that he advocates as having the capacity to play four key roles (although not necessarily all of those roles in one operation):

- Governorship: the UN assumes full responsibility for government (obviously in the worst-case scenarios of total breakdown) either on its own, or by appointing a single power or group of powers to exercise the function under the authority of some UN mechanism to assure accountability;
- Control: the UN deploys through existing state instrumentalities, overseeing the conduct of civil administration and possessing the power to take corrective action where necessary;
- Partnership: where resources and structures may be reasonably adequate but there is a transition process required, for example from a totalitarian regime to democracy, 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;
- 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 (Chopra, 1996, 353-354).

Chopra’s identification of different functions leads him to the logical conclusion that such activities would require effective means of governance to be available to the UN authority. These would include, for example:

“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” (Chopra, 1996, 354).

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 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” (Chopra, 1996, 355).<sup>39</sup>

Similar views are expressed by Gerald Helman and Steven Ratner, who talk of the need for a UN “conservatorship” mechanism (Helman and Ratner, 1992-3, 12). 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” (Helman and Ratner, 1992-3, 17). These authors argue that consent would be required from a “host state”, but concede that:

“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” (Helman and Ratner, 1992-3, 13).

Helman and Ratner 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 notion of a request from the state for conservatorship in the knowledge that dysfunctionality is imminent, and voluntary surrender of temporary authority to the UN is in the longer-term interests of the state (Helman and Ratner, 1992-3, 18). This would seem highly implausible. Helman and Ratner advocate the use of the Security Council, perhaps establishing a subgroup “not all of whose members need be on the council” (Helman and Ratner, 1992-3, 19), 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 (Helman and Ratner, 1992-3,19).

To supplement such arrangements Helman and Ratner suggest the UN Secretariat develop a “management facility” to administer and coordinate the conservatorship and provide relief (Helman and Ratner, 1992-3, 19). This would involve centralising various activities undertaken by separate UN organs, and obtaining political acceptance for 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 that level of support 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 the age-old problem of “equitable geographical representation”, and the politicisation of personnel appointments rather than selection of staff on the basis of competence and efficiency that do not augur well for a new UN “management facility” (Righter, 1995, 93-202).

The proposal by Helman and Ratner is credible and welcome. However, as with all proposals for new initiatives within the UN system, it is unlikely that any such proposal would materialise expeditiously. An alternative model that may achieve similar results but have a greater prospect of more immediate implementation could be the establishment of a new international institute for good governance. Such an organisation could be established as an NGO or even, perhaps preferably, by an alliance of federal states and the organisation could address the need to develop a register of experts and veterans of collapsed-state interventions. There is an increasing body of expertise in the international community that currently tends to dissipate after each new intervention. These people could be drawn upon as human resources for future operations, or consulted in the development of a database of lessons learned and precedents for future operations. The organisation could provide support on a number of levels from advising and facilitating the evolution of legislative and good governance frameworks for developing or transitioning states through to involvement with international efforts under UN or regional

auspices to provide temporary administrative functions. We are not suggesting that there would be no role for the UN here – on the contrary, an organisation like the one proposed could well relate very closely to relevant UN bodies.

## **5. Conclusion**

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.

This would be best achieved under UN auspices, both from a juridical and a practical perspective. 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 likely to readily capture international public opinion for the application of pressure on the inter-governmental community to act. Similar difficulties would confront an attempt to construct a purpose-designed convention. The negotiation of any new multilateral treaty would have to be undertaken consistently with the provisions of the UN Charter and the principles of sovereignty. However, it is submitted that a supportive legal basis can be found in the expanded UN Security Council concept of the maintenance of international peace and security, and the consequent authorisation of military interventions on humanitarian grounds during the course of the 1990s.

A fundamental challenge confronting the international community, however, is the approach to be adopted in the absence of a principled solution. No institutional framework yet exists to deal with the problems of ad interim

sovereignty, and is not likely to for some time. An 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 genocide or other massive violations of human rights are taking place. In such cases, whatever approach the international community adopts to the revival of the collapsed state, there is likely to be an interim period when the intervention forces are the only authority in the country capable of exercising control and influencing subsequent developments. In the absence of any institutional alternative, it is submitted that the law of occupation provides the only framework available, unless the details of intervention are more fully addressed in the UN Security Council mandate. If the latter is to occur, 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 preferred, 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.

Professionalising the civilian administrative dimension, providing for ready reaction and adequate resources, having an effective approach to the administration of justice, and a well-considered plan for sustainable self-rule both in economic and social/geographic terms, are the key issues still to be resolved, as illustrated by the experiences of Bosnia, Kosovo and East Timor.

In some cases federalism will provide the best chance of a peace “circuit breaker” (such as in Bosnia and as proposed by many Somalis for their country). In other environments the emphasis will be on transitional justice and reconciliation (East Timor). In either case there will need to be interim administrative frameworks and transfer to a legitimate indigenous authority.

The complexities of restoring and maintaining order in collapsed-state interventions mean 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. On the other hand, setting unrealistic standards could discourage the participation of states in such vital rescue operations and undermine the willingness to apply legal regimes.

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## Appendix A

In *Cyprus v. Turkey* International Law Reports (1978, Vol. 62, 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 authority and responsibility, not only when that authority is exercised within their own territory but also when it is exercised abroad" (230). This decision is limited by the fact that Turkey did not seek to argue that a military occupation was in place and that the laws of occupation applied and overrode the European Convention. It instead based its case on the fact that a new state had been created (the Turkish Federated State of Cyprus), and therefore it claimed no occupation existed and no jurisdiction by Turkey was being exercised in the territory of this entity (132-140). There was therefore no evaluation by the Court of the status of the human rights provisions of the European Convention in relation to the laws of occupation. In fact the violations complained of by the Republic of Cyprus against Turkey would also have constituted violations of the laws of occupation, and the situation would therefore have been adequately covered by the occupation provisions (102-130). The decision is also limited to situations involving High Contracting Parties of the European Convention. See Oraa, 1992, 256-257; Quigley, 1989; Demotses, 1992, 97-100; Fireman, 1991, 426-427; Meron, 1997, 97-105.

## Appendix B

At the UN Department of Peace-Keeping Operations-sponsored Comprehensive Seminar on Lessons-Learned From United Nations Operation in Somalia, Plainsboro, New Jersey, 13-15 September 1995, the possibility of a UN Ombudsman who could share some of the protecting power responsibilities with the ICRC 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" (Comprehensive Report on Lessons-Learned From United Nations Operation in Somalia, April 1992-March 1993. Stiftung, 1995). The concept of Protecting Powers has very old roots, but it 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" (Pictet, 1958, 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 in its 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. Those drafting 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 fulfil 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.

## **Appendix C**

UNMIK was established following the conclusion of an agreement with the Republic of Yugoslavia under Security Council Resolutions 1244 (1999) of 10 June 1999, and was provided with an administrative framework under the authority of the resolution through the promulgation of UNMIK Regulation 1999/1 of 25 July 1999. This regulation among other things established a democratically elected Assembly for self-government, its responsibilities, a judicial system and provision for reserved powers to the Special Representative of the Secretary General.

UNTAET came into being after a process involving a three-party agreement amongst Indonesia, Portugal and the UN which led to a referendum rejecting a provincial relationship with Indonesia, followed by Indonesian agreement to provide for the separation of East Timor and its placement under UN administration (UN Secretary General report to UN General Assembly 54 A/54/654 of 13 December 1999). The UNTAET administration was a fully responsible UN “government” providing all the organs of administration and staffing them with predominantly expatriate personnel. This was established under Security Council Resolutions 1272 (1999) of 25 October 1999 and 1338 (2001) of 31 January 2001, and through the promulgation of UNTAET Regulation No. 1999/1 of 27 November 1999. A later regulation (No. 2001/28 of 19 September 2001) established the Council of Ministers of the Transitional Government in East Timor. See also Martin, 2001.

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<sup>1</sup> Helman/Ratner, 1992-93.

<sup>2</sup> The definition of humanitarian intervention we will rely on for this paper is as follows:

“coercive action by states involving the use of armed force in another state without the consent of its Government, with or without authorization from the UN Security Council, for the purpose of preventing or putting to a halt gross and massive violations of human rights or international humanitarian law” (Kelly, 1999a, 11).

<sup>3</sup> See Appendix A.

<sup>4</sup> The *Legality of the Threat or Use of Nuclear Weapons* Case, ICJ, 8 July 1996, General List No. 95, para.25; Meyrowitz, 1972, 1098-1099; Roberts, 1987, 39; Qupty, 1992, 122-123; Bernstein, 1989, 533-537; Dinstein, 1985, 346, 349, 350-352, 355; Curtis, 1991, 476. It is interesting to note in this respect that during the Diplomatic Conference which drafted the Fourth Geneva Convention a proposal by the Mexican delegation to include wording that modifications to the law of the occupied territory could only occur in accordance with the Universal Declaration of Human Rights, was overwhelmingly rejected (Final Record of the Diplomatic Conference of Geneva of 1949, 2A, p. 671).

<sup>5</sup> See Appendix B.

<sup>6</sup> Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Landmines and on Their Destruction, Ottawa 3 December 1997.

<sup>7</sup> The International Campaign to Ban Landmines (ICBL), launched in 1991, is coordinated by a steering committee of 11 organisations. It brings together over 1000 non-governmental organisations in over 60 countries who work locally, nationally, regionally, and internationally to ban antipersonnel (AP) landmines. It was able to generate worldwide enthusiasm for a stark humanitarian problem where it was easy to draw attention to horrific injuries and idle arable land. This led 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, nor would it be as easy to demonstrate its physical benefits. See for example the Internet sites maintained by the ICBL ([www.agora.stm.it/politic/c-landmines.htm](http://www.agora.stm.it/politic/c-landmines.htm)) and Vietnam Veterans of America ([www.vvaf.org/lanmine.html](http://www.vvaf.org/lanmine.html)).

<sup>8</sup> “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, 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, i.e. 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 Reports 1986, 14 (*Nicaragua* case), at 108-109.

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<sup>9</sup> See *Nicaragua* case, 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.”

<sup>10</sup> 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 behaviour 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 Villiger, 1997, 15-46.

<sup>11</sup> 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, Tuzla, 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 the United Nations Protection Force 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”).

<sup>12</sup> Secretary General’s Bulletin on Observance by United Nations Forces of International Humanitarian Law, 6 August 1999, UN Doc. ST/SGB/1999/13.

<sup>13</sup> Indonesia and Netherlands: Agreement (with annex) Concerning West New Guinea (West Irian). Signed at the Headquarters of the United Nations, New York, on 15 August 1962, 437 UNTS 273.

<sup>14</sup> Articles XVIII, XIX and XX.

<sup>15</sup> Articles IV-VI.

<sup>16</sup> Article VII.

<sup>17</sup> Article IX.

<sup>18</sup> Article XI.

<sup>19</sup> Articles XVIII-XXIII.

<sup>20</sup> Article XXVI.

<sup>21</sup> Article XXVIII.

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<sup>22</sup> “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 ...”

<sup>23</sup> *Certain Expenses Case*, ICJ Reports, 1962, 151 & 163; *Nicaragua (Jurisdiction and Admissibility)*, ICJ Reports, 1984, 392 & 434.

<sup>24</sup> SC Resolutions governing Northern/Southern Iraq (e.g. UNSCR 688, UN SCOR 1991, Somalia and Bosnia).

<sup>25</sup> See Appendix C.

<sup>26</sup> See Appendix C.

<sup>27</sup> UNSG Reports to UNSC S/2000/53 of 26 January 2000, S/2000/738 of 26 July 2000, S/2001/42 of 16 January 2001, S/2001/436 of 2 May 2001, S/2001/983 of 18 October 2001.

<sup>28</sup> “Section 2 Observance of internationally recognized standards

In exercising their functions, all persons undertaking public duties or holding public office in East Timor shall observe internationally recognized human rights standards, as reflected, in particular, in:

The Universal Declaration on Human Rights of 10 December 1948;

The International Covenant on Civil and Political Rights of 16 December 1966 and its Protocols;

The International Covenant on Economic, Social and Cultural Rights of 16 December 1966;

The Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965;

The Convention on the Elimination of All Forms of Discrimination Against Women of 17 December 1979;

The Convention Against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment of 17 December 1984;

The International Convention on the Rights of the Child of 20 November 1989.

They shall not discriminate against any person on any ground such as sex, race, color, language, religion, political or other opinion, national, ethnic or social origin, association with a national community, property, birth or all other status Law on Anti-Subversion; Law on Social Organizations; Law on National Security; Law on National Protection and Defense; Law on Mobilization and Demobilization; Law on Defense and Security.

Capital punishment is abolished.”

<sup>29</sup> UNTAET/REG/2000/30 of 25 September 2000.

<sup>30</sup> “Section 4 Regulations issued by UNTAET

In the performance of the duties entrusted to the transitional administration under United Nations Security Council Resolution 1272 (1999), the Transitional Administrator will, as necessary, issue legislative acts in the form of regulations. Such regulations will remain in force until repealed by the Transitional Administrator or superseded by such rules as are issued upon the transfer of UNTAET's administrative and public service functions to the democratic institutions of East Timor, as provided for in United Nations Security Council Resolution 1272 (1999).

Section 6 Directives

6.1 The Transitional Administrator shall have the power to issue administrative directives in relation to the implementation of regulations promulgated.”

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<sup>31</sup> See the Amnesty International Report on this subject (East Timor, Justice Past, Present and Future, AI Index: ASA 57/001/2001 of July 2001). While this report contains many justified criticisms, the enormity of the task and the lack of human and financial resources must also be taken into account.

<sup>32</sup> These are observations by Lt. Col. L Kelly from his tenure as Chief Legal Adviser to the PKF Force Commander in East Timor from 24 July 2001 to 31 January 2002. This period covered the constitutional assembly elections and formation of the assembly, the drafting of the constitution, the conclusion of key agreements with Indonesia, the Presidential election, the return and reintegration of the militia families and members, the establishment of the Truth and Reconciliation Commission, the conclusion of guidelines on the processing of returnees and the conduct of reconciliation meetings as well as cooperation between the International Civilian Police and PKF, the management of the operational deployment of the East Timorese Defence Force, and the establishment of the indigenous government.

<sup>33</sup> Report of the Panel on United Nations Peace Operations, A/55/305 S/2000/809, 17 August 2000 (The Brahimi Report).

<sup>34</sup> See also Weiss, 1995, 12-13.

<sup>35</sup> "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.

<sup>36</sup> 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."

<sup>37</sup> Meeting at United Nations Operation in Somalia (UNOSOM) Headquarters 16 May 1993 which also included the Special Representative of the Secretary General 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 Lt. Col. Kelly.

<sup>38</sup> 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 (1990, 72-3) defines "government" to mean a stable political community, supporting a legal order, in a certain area.

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<sup>39</sup> See however comments at note 16 & 17 para. referring. Perhaps such a code may be useful in the extreme conditions where there are no local functionaries, the law is ridden with unacceptable provisions and/or impossible to administer for other reasons.