TRANSITIONAL JUSTICE IN PEACE OPERATIONS: SHAPING THE TWILIGHT ZONE IN SOMALIA AND EAST TIMOR[1]

Michael Kelly[2]

1. INTRODUCTION

Much has been written about transitional justice in the circumstances of organised states progressing towards democracy.[3] Another category of transitional justice demanding equal study and resolution has, however, emerged. That is the interim administration of justice in the vacuum of the disrupted state following traumatic internal conflict, usually involving war crimes and crimes against humanity. Two things are characteristic of this circumstance: first, the requirement for a deployed international military force to do 'something' about fundamental law and order while waiting for the civil administrative 'cavalry' to arrive; second, the fact that a civil administrative element will eventually have to take over from the military and will also be required to do 'something' about the immediate law and order problem but in a manner that leads into the long term reconstruction and 'end state' process. In the future, this environment may also include the operation of the International Criminal Court (ICC), where many issues of jurisdiction, investigation, prosecution and the impact on long term rehabilitation will need to be managed.

Two examples of the worst case 'justice vacuum' scenarios faced by the international community have been Somalia and East Timor. This paper will look at general principles that have emerged from these case studies, concentrating on the issue of the interim administration of justice by military forces deployed on peace operations. In both cases, there was in place a coalition force facing an immediate problem of restoring order, which was followed on by a UN force and administration that faced the challenge of leading the transition from interim arrangements to a self-sustaining indigenous apparatus.

---

1. © M. Kelly, 2002.

2. Michael Kelly is Director of the Australian Defence Force Military Law Centre and Deputy Director of the Asia Pacific Centre for Military Law. He served with the Australian Defence Force in Somalia in 1993 and in East Timor in 2001-2002 and on secondment with the International Committee of the Red Cross in Bosnia and Croatia in 1996.

3. M.E. Fischer, ed., *Establishing Democracies* (Boulder CO, Westview Press 1996); R.G. Teitel, *Transitional Justice* (New York NY, Oxford University Press 2000); A.J. McAdams, ed., *Transitional Justice and the Rule of Law in New Democracies* (Notre Dame ID, University of Notre Dame Press 1997); and N.J. Kritz, ed., *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, Vols. I-III (Washington DC, United States Institute of Peace Press 1995) are a sample.

Yearbook of International Humanitarian Law
Volume 4 – 2001 – pp. 213-251

In looking at these two examples of complex emergency, this paper will focus on the approach taken by Australian forces to the interim justice issue. The reason for this focus on the Australian perspective is due to the unique solutions Australian forces have applied to the interim administration of justice and the fact that these solutions have been relatively successful. A comparison of the two cases is instructive in assessing whether there are general principles that can be applied across cultural and circumstantial contexts. They also serve to illustrate particular elements that can complicate the problem such as where there is a continuing high level security threat or where there is no remaining local expertise to draw on.

In the case of Somalia, the Australian contingent occupied an area closely aligned with the Bay Province, whose capital was Baidoa. This contingent was subordinate to the UNITAF HQ in Mogadishu, and UNOSOM II briefly, and while able to exercise great discretion in its Area of Operations was not in a position to dictate overall policy approaches to the issue. In East Timor, however, the Australian approach became critical as Australia was in the policy setting position.

2. THE CASE OF SOMALIA

2.1 **Restoring and maintaining order**

2.1.1 *The legal foundations and the reluctance to act*

Operations in Somalia and East Timor were to unfold in similar phases with some similarities but very different results. In Somalia, a UN-mandated coalition force led by the United States, known as UNITAF (Unified Task Force), deployed in December 1992 in response to a massive humanitarian crisis resulting from a number of years of civil war.[4] Somalia had effectively ceased to exist as a state, having no functioning government, administration or infrastructure. Under Security Council Resolution (UNSCR) 794,[5] UNITAF was to use all necessary measures to secure the environment for humanitarian relief. UNITAF handed off to a UN 'Blue Helmet' force known as UNOSOM II in May 1993. This had a mandate under UNSCR 814[6] to engage in pro-active nation building with a distinct focus on law and order.

It quickly became apparent to UNITAF that the area presenting difficulty for the force would be the handling of detainees and regulating relations with the community in maintaining order and providing security for relief operations. 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

4. For a good summary of the background and lead up to the intervention, see J.L. Hirsch and R.B. Oakley, *Somalia and Operation Restore Hope: Reflections on Peacemaking and Peacekeeping* (Washington, United States Institute of Peace Press 1995).

5. SC Res 794, 47 UN SCOR (3101st mtg), UN Doc. S/RES/794 (1992).

6. SC Res 814, 48 UN SCOR (3188th mtg), UN Doc. S/RES/814 (1993).

and procedures. The rules of 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. These qualifications were later adopted by HQ UNITAF. Most property related crimes were excluded, except theft of relief material. Neither UNSCR 794 nor the Rules of Engagement indicated what was to be the overall legal framework for this action or for relations with the community in general, given that there was no government to negotiate with and hence no Status of Forces Agreement or Memorandum of Understanding.

Subject to this broad authority, the UNITAF Commander was then obliged to produce clearer guidelines and procedures. The detainee handling 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.[7] 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 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.[8]

For the Australian contingent, this system no longer applied once a justice administration was reestablished 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 to the UNITAF mission. 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*

7. UNITAF, Staff Judge Advocate After Action Report (SJA AAR) p. 16, TAB E (1) & (2).
8. Memorandum to All Subordinate Unified Task Force Commanders, 'Detainee Policy', Lieutenant General Johnston, 9 February 1993.

> *from attack by military units, but also from crimes, riots, and other forms of civil disobedience.*'[9] (emphasis added)

This was further evidenced in the US Army Military Police Special Operating Procedure for Operation Restore Hope, which outlined the authority 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.*'[10] (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.

The major flaw, however, was that no system was 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.'[11] 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.[12] 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

---

9. 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., willful killing, torture or inhumane treatment, rape, willfully 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.'

10. United States Army, 720th Military Police Battalion, Joint Task Force Somalia, APO AE 09896-0631, Special Operating Procedure, 'Detainee Confinement Facility, Operation Restore Hope', Lieutenant Colonel A.J. Stamilio.

11. UNITAF, SJA AAR, TAB A (1).

12. Facsimile transmission, US Third Army SJA to Major Coulter dated 6 December 1992. Art. 5 refers to Art. 5 of the Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949.

possibly against the faction leaders and their forces who were hostile to UNITAF.[13] 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.[14]

Following serious accusations against the faction leader Omar Jess and his subsequent apprehension[15] by UNITAF, there was some speculation that a 'war crimes' tribunal would 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. However, a political decision was made not to proceed against Jess and he was released.[16] It was also determined that no tribunals would be 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.[17]

2.1.2 *Attempts to stimulate a local solution*

The desire not to have to deal with offenders was perfectly understandable. The alternative, however, was to throw the problem over to UNOSOM II which proved 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.[18] 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

13. Interview with Colonel F.M. Lorenz (USMC), former UNITAF SJA, Townsville 27 June 1994.

14. UNITAF, SJA AAR, p. 43.

15. 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.'

16. Briefing by HQ UNITAF Judge Advocates attended by author on 8 February 1993.

17. UNITAF, SJA AAR, p. 44. F.M. Lorenz (UNITAF SJA), 'Confronting Thievery in Somalia: The Use of Non-Lethal Force During Operation Restore Hope', paper dated 13 April 1993, pp. 6, 9.

18. That is the requirement to follow detention with a fair trial as specifically required by Art. 71 of the Fourth Convention. See also Arts. 9-11 of the UDHR and Art. 9 of the ICCPR. 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 Art. 71, which states that offenders be brought to trial as rapidly *as possible*.

based on the desire to relieve the patrolling and security burden on the force.[19] 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 Caribbean).[20] Ironically, had the application of the laws of occupation been acknowledged, this could have been used to distinguish the situation from the coverage of the FAA.[21] 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.[22] 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).[23] It was hoped by UNITAF that UNOSOM would fill the remaining holes by providing most of the logistic support with help from donor countries specifically volunteering for this task.

A Police Committee was constituted in Mogadishu but it became 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.[24] There were three key deficiencies in relation to the ASF. First was the factional problem in Mogadishu; second, the ASF was unarmed and had no chance of reestablishing order in the armed camp that was Somalia without the force itself being armed, while at the same time, a disarmament campaign was ongoing. Finally, even if the ASF did apprehend someone there was still no judiciary to hand a suspect over to. Overcrowded prisons would simply become more overcrowded and the violations 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'.[25]

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

19. Hirsch and Oakley, op. cit. n. 4, at p. 88.

20. UNITAF, SJA AAR, TAB S (1).

21. 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 did not have to. Anything else was considered 'beyond the mission'. Interview with Colonel Lorenz, *supra* n. 13.

22. Hirsch and Oakley, op. cit. n. 4, at pp. 87-89.

23. UNITAF, SJA AAR, p. 46. Also personal observations of author in dealings with LTCOL Spataro.

24. 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.

25. Memorandum from Provost Marshal to UNITAF J-3, 'Auxiliary Security Force', 27 January 1993.

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 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.[26]

Difficulties were soon to emerge, however. The Political Committee in Mogadishu, made up of the warlords, 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.[27] While there was some support for reestablishing the police force, there was never any substantive commitment to assisting a judiciary to compliment it on the part of UNITAF or the UN in these crucial early days.[28] The Steering Committee languished due to this lack of support and the hostility of the warlords.

2.1.3 *The dividend of inaction*

This failure also had serious consequences for the morale of the troops and their relationship with the community.[29] Because there was no system of justice or framework for dealing with offenders against the security and property of the force, 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

---

26. Report by J. Hirsch of USLO to US State Department, 'Somali Jurists Meet at UNOSOM', 3 March 1993. F.M. Lorenz, 'Will the Rule of Law Replace the Law of the Gun?' 48 *Washington State Bar News* (1994) p. 19. Also personal observations of the author, who was in attendance at the 3 March meeting and the meetings with the southern Mogadishu jurists.

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

28. Once again, this was considered 'beyond the mission'. The initiatives in this direction came from proactive 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. n. 13.

29. 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', 24 *Security Dialogue* (1993) pp. 157-158.

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. There was no means of bringing even Somalis who killed members of the force to trial. On the other hand, the troops lost face with the community and the bandits when this was realised. 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.[30] There was nothing that could be done with intruders into the encampments but hand them over to the elders or let them go.[31] Even in Mogadishu the central prison proved to be unreliable, with key bandits being able to secure release. As a 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.[32] In this environment of frustration and tension, some troops determined that their only option was to administer rough justice themselves or snapped under the strain and used inappropriate lethal force in cases of simple theft.[33]

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.[34] 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. It was incumbent on those who put the troops in such a position to provide a proper framework for handling criminal activity. 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.

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.[35] In

30. Briefing HQ Australian Forces Somalia, 6 February 1993.

31. Lorenz, op. cit. n. 17, at pp. 7-8.

32. Ibid., at p. 5.

33. Ibid., at p. 4. See also M. Martins, 'Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering', 143 *Military LR* (1994) at p. 130.

34. P. Cheney, 'Canada... Canada', *The Sunday Star* (Toronto, 10 July 1994) Section F. Report of the Board of Inquiry: Canadian Airborne Regiment Battle Group, Phase I, Volumes XI and XII, National Defence Headquarters, 31 August 1993. Commission of Inquiry into the Deployment of Canadian Forces to Somalia, 1997.

35. 'Although we would not seek to enter as an occupying force, recent experience in Iraq 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, *supra* n. 13. 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

particular, they were concerned that occupation of a part of 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.[36]

---

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'.

36. 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 in the south, however, which is where the relief agencies were experiencing the most difficulty. As the mission was, in the eyes of the US Administration and in terms of the specific UNITAF mandate, about enabling the relief agencies to do their job, this limited deployment would be justified by that criteria. As noted, UNSCR 794 did refer to much broader issues such as the restoration of 'peace, stability and law and order with a view to facilitating the process of a political settlement under the auspices of the United Nations, aimed at national reconciliation in Somalia', as well as the prevention of breaches of international humanitarian law. These objectives would certainly have been facilitated by a nationwide deployment by UNITAF, it being infinitely more capable of doing so than UNOSOM II ever was. See United Nations Department of Public Information Reference Paper, *The United Nations and the Situation in Somalia* (April 1995) pp. 7-9. J.R. Bolton, 'Wrong Turn in Somalia', 73 *Foreign Affairs* (January/February 1994) pp. 59-61.

Had a different approach been adopted 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 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. To gauge the merits of an alternative approach to the overall UNITAF policy, the Australian experience will now be examined.

2.2 The Australian force in Somalia

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.[37]

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.[38] Both UNITAF as a whole and the individual national contingents had occupied a clearly distinguishable area and 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. 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

37. 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.' D.J. Hurley, 'Operation Solace', *Australian Defence Force Journal* (January/February 1994) No. 104, p. 31.

38. These points are relevant to assessing what if any aspects of the law of occupation applied to the deployment. The principal issue in this respect is whether the deployment is with or without the consent of the sovereign.

force was capable of exercising control and in fact staked out clear areas of authority that are traditionally exercised by the sovereign. It appears that this could readily be described as the partial occupation of the territory of one High Contracting Party by another[39] 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.[40]

2.2.1 *The Auxiliary Security Force (ASF)*

From the beginning, the re-establishment of a police force in the area was a high priority of the Australians and detailed intentions in this respect were communicated to HQ UNITAF on 8 February 1993.[41] 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. The position of the commander of the ASF was obviously crucial and a person was nominated by the Australian Battalion Commander, LtCol Hurley who proved acceptable to all parties.[42] The ASF commenced operation in Baidoa on 15 February 1993 with an initial force of 20 personnel.[43] Eventually, 260 ASF were recruited and distributed throughout the Bay region.[44] Initially, the ASF was remunerated on a food for work basis with the assistance of the World Food Program (WFP) and the ICRC.[45] Later, they were paid intermittently in Somali shillings by UNOSOM. Copies of the old police regu-

---

39. Somalia had ratified the Conventions in 1969. All contingents of UNITAF were from states which had ratified the Fourth Geneva Convention.

40. The Somali Democratic Movement (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.)

41. Maj. R.H. Stanhope, Minute to LtCol. J.M. Smith, Army Force (ARFOR) SJA, 8 February 1993. (In possession of author.)

42. 1st Battalion RAR Group Post Operation Report (1 RAR POR), 31 May 1993, Enclosure 4, p. 6.

43. Maj. R.H. Stanhope (OC CMOT), Minute to ARFOR SJA, 8 February 1993.

44. Capt. S. Bagnall, Australian Liaison Officer, Minute to Provost Marshall's Office, 16 April 1993.

45. P. Vercammen, *Auxiliary Security Force in Baidoa.* Report to UNOSOM, 10 April 1993.

lations 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.[46]

2.2.2 *Police cells and prisons*

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 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.

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.

2.2.3 *The judiciary*

The next key aspect of the reconstruction process involved the judiciary. This 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.

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. 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

46. These materials were supplied by the UNITAF Provost Marshall, LtCol. Spataro, in English. Also included were extracts of the Criminal Procedure Code.

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.

Following the meeting at HQ UNOSOM between the northern and southern Mogadishu Somali jurists on 3 March 1993, an eight-person Technical Committee was formed to determine the process of reestablishing a court hierarchy. Elected to a key position on this committee was Dr Ossable. At the meeting, Dr Ossable had maintained 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 democracy prior to Barre. This position was supported by attendees at the meeting and the Steering Committee.[47] 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.

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.

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.[48] 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.[49] 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

47. Observations of the author, who attended the meeting, later confirmed by Dr Ossable and Mr Mohamed Mohamed Isgow of the committee at a meeting in Baidoa on 6 March 1993.

48. M. Ganzglass, 'Evaluation of the Judicial, Legal, and Penal Systems of Somalia', Report to the Special Representative of the UN Secretary-General (SRSG) UNOSOM II, 22 April 1993, pp. 4-5, 35.

49. Discussions between author and Baidoa judiciary as well as Dr Ossable and other members of the Mogadishu Steering Committee.

pre-civil war model. This structure was as follows: Maxamada Degmada – District Courts for each of the main towns; Maxamada Gobolka – Regional Court located in Baidoa for the Bay region; and Maxamada Rafkaanka – Court of Appeal located in Baidoa for the Bay region.

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 three 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.[50] In the interim, some tents were set up at the back of the police compound for the judges to commence working from.[51] While ideally such facilities ought to be separated to preserve the image of impartiality, the security situation did not permit this, and moreover the old court buildings were too badly damaged to be used.

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. By the end of the Australian 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.[52]

2.2.4 *Criminal Investigation Division (CID)*

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

50. 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.

51. 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.)

52. P. Vercammen, Report to UNOSOM, 24 March 1993. Personal observations of author and discussions with local Somalis while based at Police Compound. Interview with Superintendent Bill Kirk, Canberra, 15 August 1995.

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 the reestablishment of the CID within the Police Committee in Mogadishu. It will be recalled 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.[53] 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.

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 CID were provided with initial direction from, and assigned specific investigations by, the Australians in the areas and matters with which the force was primarily concerned. They were tasked, in the first instance, with investigating major crimes, such as murder, rape and organised crime; corruption monitoring; and monitoring major crime figures held in the cells and prison to ensure they were securely held and that 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 security-related information to UNITAF.

2.2.5 *Prosecutions*

As mentioned earlier in discussing the re-establishment of the judiciary, one of the key elements in the negotiations was the acceptance that 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. The Somali version also included some elements of Islamic law and Somali custom. The Somali Criminal Procedure Code of 1963 was based upon an amalgamation of the pre-independence Italian Criminal Procedure Code of 1935, the British

53. M. Ganzglass, 'The Restoration of the Somali Justice System', in W. Clarke and J. Herbst, eds., *Learning From Somalia: The Lessons of Armed Humanitarian Intervention* (Boulder CO, Westview Press 1997) pp. 24-25.

Criminal Procedure Ordinance of 1956, and the Indian Evidence Act of 1872, which in turn is derived mostly from British criminal procedure. This reflected the amalgamation of the British and Italian colonial territories. The civil laws were based on Egyptian civil law.

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 reestablished. 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.

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. Other evidence concerning Warsame's crimes indicated the terrible nature and extent of the threat he represented for the community.[54] Warsame was the chief weapon in the regime of intimidation and terror established by the overall warlord of the area, Hassan Gutaale Abdul (Gutaale).

Warsame was arrested on 13 March 1993. 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 against Warsame, that he was in poor health and

---

54. 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 nickname), '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.

was entitled to temporary freedom. Warsame's release shattered confidence in the efficacy of the Mogadishu system, and the responsible judge was arrested by UNITAF and held at the UNITAF detention facility. Subsequently, an inquiry was conducted by the Somali Steering Committee. After receiving a response from the Australian contingent, the inquiry accepted that procedural irregularities had occurred and orders were made for the re-arrest of Warsame.[55] However, Warsame had disappeared into his clan area in Mogadishu and was not seen again. 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.[56]

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.[57] 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 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.

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 reestablished 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 of funds for Aideed and wealth for his local bandit agents, and thereby reducing criminal activity to unremarkable levels.

2.2.5.1 The Gutaale trial

It had also become clear that something had to 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

---

55. Report by Steering Committee, 1 April 1993.

56. With the exception of the Gutaale case, as described at section 2.2.5.1 *infra.*

57. 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 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.'

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.[58] Gutaale took his orders from one of Aideed's trusted subordinates, 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 applied to the widespread internal conflict in Somalia, and that the crimes alleged of Gutaale amounted to serious breaches in violating the provisions of Article 3.[59] The issue would then have been whether common Article 3 offences constitute grave breaches, in relation to which the view was not certain. Regardless of the answer to that question, it was firmly believed that international jurisdiction pertained to breaches of common Article 3 and crimes against humanity generally.[60] Given the evidence suggesting genocidal activities by Gutaale and his

58. The evidence uncovered in the investigations and supported by the observations of the NGOs satisfied the test outlined in Art. 2 of the Convention on the Prevention and Punishment of the Crime of 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 a *prima facie* case against Gutaale existed. Given the extent of the deaths (40 percent of the population, including 70 percent 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 Art. 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.'

59. 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* (Geneva, ICRC 1958) p. 36. Additional Protocol II did not apply as Somalia had not become a party to the Protocols.

60. See the recent jurisprudence from the International Criminal Tribunal for the Former Yugoslavia (ICTY) emerging from the *Tadić* cases, *Prosecutor* v. *Duško Tadić A/K/A 'Dule'* (Decision on the Defence Motion on Jurisdiction), 10 August 1995, especially paras. 65-74 in reference to common Art. 3 and paras. 75-83 on crimes against humanity. See also International Court of Justice in the *Nicaragua* case (Military and Paramilitary Activities (*Nicaragua* v. *US*)) *ICJ Rep.* (1986) p. 4 (Merits Judgment of 27 June 1986) relating to the customary law status of common Art. 3.

militia, it was felt that the force could also have been open to claims that it bore prevention and punishment obligations under the Genocide Convention.[61]

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:

> ... 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 might 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.

---

61. Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 *UNTS* 1948 p. 277. Art. 1 of the Genocide Convention states:
'The 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.' See also P. Hakewill, 'Murderous Complacency', *The Australian* (6 April 1995) p. 15.

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. Gutaale was arrested on 29 March 1993 and he was then processed back to the UNITAF detention facility.

It was determined from the evidence gathered that two major incidents would form the basis of the prosecution. The first concerned the massacre of 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, eight were women and seven children. The incident occurred in front of a large number of townsfolk who recalled in graphic detail the result.[62] 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.

The trial commenced on 24 April before the Maxamada Gobolka (Regional Court) sitting in Baidoa. Eleven eye witnesses gave testimony as to Gutaale's involvement in the murders and identified him in court. After an initial trial and appeal, the sentence of death was imposed on Gutaale. It was determined that no extenuating circumstances had been made out under Article 39 of the penal code but that aggravating circumstances did exist, as indicated under Article 40 of the Somali penal code, and so there were no grounds upon which to mitigate the sentence.[63] The President of the Court of Appeal, 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.

Regarding 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 concurred with by the Australians.[64] It was felt that they also derived authority

---

62. '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.

63. Under Arts. 228-229 of the Somali Criminal Procedure Code, the higher courts have discretion to raise or lower sentences in cases taken on appeal. A. Wekerele, *Somalia: A Country Law Study* (Washington DC, Library of Congress 1990) p. 11.

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

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.[65] 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 accordance with the UN's Economic and Social Council (ECOSOC) rules on the death penalty, the execution was carried out with the minimum possible suffering.[66] All aspects of this process had been discussed in consultation

---

65. Art. 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.' M.R. Ganzglass, *The Penal Code of the Somali Democratic Republic* (New Brunswick NJ, Rutgers University Press 1971) p. 112.

66. *Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*, Economic and Social Council Resolution 1984/50, adopted 25 May 1984.
'In countries which have not abolished the death penalty, capital punishment may be 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.'
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 Arts. 68, 70 and 75 of the Fourth Geneva Convention,

with the UNITAF SJA, UNOSOM officials and an expert on Somali criminal law.

2.2.5.2 The consequences of the trial and the strategy

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 either in prison awaiting trial (three), had fled to Mogadishu (two), or, in Gutaale's case, dead.

The trial had been monitored closely by UNITAF and UNOSOM and the results were officially approved and received with much approbation.[67] 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.[68] This was not possible, in view of other important force administration tasks still to be performed in the short time remaining before re-deployment 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/human rights law violators and criminals who constituted a threat to reconstruction and the security of UNOSOM.[69]

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 Baidoa model.[70] UNOSOM would provide the central administration and responsibility

---

which would have been pertinent to the matter were the trial conducted by the Contingent, had been complied with.

67. '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). J. Schofield, 'Australians Help Convict Somali Bandit of Murder', *The Age* (4 May 1993) p. 11.

68. Memorandum, SRSG Admiral Howe to LTG Bir UNOSOM Forces Commander, 7 May 1993.

69. Minute to HQ UNOSOM, from HQ AFS, 18 May 1993.

70. M. Ganzglass, 'Evaluation of the Judicial, Legal and Penal Systems of Somalia: Report to the Special representative of the UN Secretary General UNOSOM II, 22 April 1993', pp. 18-21, 28, 31, 33, 37. Mr Ganzglass and Ms Wright travelled throughout Somalia, making a full evaluation of the justice

for the national operation, including in the breakaway northern Somaliland. The plan that was produced specified the appointment of 152 administrative personnel operating on a budget of US$ 41m.[71] At a meeting on 16 May 1993 at HQ UNOSOM, the SRSG presented the plan to then-Under-Secretary General for Peace Keeping, Kofi Annan.[72] 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.

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 help supplied by the European Community and the Life and Peace Institute among others, up to September 1995.[73] 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.[74] There was no evidence of any attempts to subvert the legal regime re-established by the contingent.[75] This came to an end on 16 September 1995 when Aideed, with 600 men and 30 'technicals', sallied out from Mogadishu and overran Baidoa and other areas in the Bay and adjacent regions.[76]

---

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.' 8 *World View* (Spring 1995) p. 3.

71. A. Wright (Police, Judicial & Prison Policy Advisor to SRSG), 'Task Force on Police, Judicial and Prison Issues', Memorandum detailing strategy, 20 April 1993. Also Budgetary Details document provided to author.

72. Meeting held at HQ UNOSOM, 16 May 1993.

73. 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.

74. Telephone report received from Mr Alexandros Yannis of the European Community (Somalia Operations) Nairobi HQ, 7 September 1995.

75. ABC journalist Mr James Schofield, letter to Maj. M.J. Kelly, dated 9 June 1995. Discussions with Somalis from Baidoa attending the UN Plainsboro Lessons Learned Conference on Somalia, 13-15 September 1995. See also details of general situation laid out in the comprehensive Life and Peace Report *Local Administrative Structures in Somalia: A Case Study of the Bay Region*, of June 1995.

76. 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.

2.3 Conclusion

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 problems 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 exact nature and scope of the obligations of the occupying power; and 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.

3. EAST TIMOR

3.1 Introduction

Between 20 September 1999 and 21 February 2000, a multinational force under unified command, with Australia as the lead nation, deployed to East Timor under the authority of the United Nations Security Council.[77] The deployment of the multinational force, known as the International Force for East Timor (INTERFET), was prompted by an humanitarian crisis in East Timor resulting from a collapse of law and order. INTERFET was replaced on 23 February 2000 with a peacekeeping force under UN command, which formed part of the UN Transitional Authority in East Timor (UNTAET).

Numerous actors had a role in creating the framework for the operation, including, the *de facto* 'host nation' Indonesia, the former colonial power Portugal, the United Nations itself, Australia as lead nation and all those nations actually or potentially contributing to the multinational force. It is noteworthy that there was no regional alliance equivalent to NATO to provide cohesion amongst troop contributing nations. Consequently, *ad hoc* arrangements regarding command and control and other key issues were required. The overarching operational framework for the deployment was under determination at a time when the situation on the ground was both in crisis and constantly changing.

77. UN Security Council Resolution 1264, UN Doc. S/RES/1264 (15 September 1999).

3.2 The context for INTERFET's deployment

3.2.1 *Pre-ballot*

The island of Timor, of which East Timor forms a part, has a history dominated by colonial occupation. The Portuguese first colonized it in 1520. Thereafter, the Spanish, Dutch and the British subjected it to successive colonization attempts. However, treaties in 1860 and 1893 affirmed Portuguese sovereignty over East Timor.

Japanese troops occupied Timor during the Second World War, but after the cessation of hostilities East Timor reverted to Portuguese possession. However, in 1975 Portugal flagged its intention to withdraw from East Timor. Subsequent internal and external negotiations concerning the future of East Timor accompanied a decline into civil war, with two main groups emerging. One group, *Uniao Democratica Tomorense*, favored some form of continued association with Portugal, whereas *Frente Revolucionaria Timor Lest Independence* (FRETILIN) supported complete independence. On 28 November 1975, FRETILIN issued a unilateral declaration of independence proclaiming the establishment of the Democratic Republic of East Timor. Other political groups in East Timor then issued a joint declaration of independence from Portugal in favour of integration with neighboring Indonesia (which had sovereignty over West Timor following independence from the Netherlands).

On 7 December 1975, Indonesia invaded East Timor and seized control of the region by force. On 17 July 1976, Indonesia annexed East Timor, proclaiming it to be its 27th province. The purported annexation of East Timor was never recognized by the United Nations but was recognized by Australia in 1979.[78]

The Indonesian military presence in East Timor met with violent opposition by FRETILIN, which conducted a campaign of insurgency. The intensity of the violence varied, but included saturation bombing by Indonesian forces and the constant ambushing of Indonesian ground forces by FRETILIN fighters. A ceasefire was attempted in 1983 but was short-lived. Indonesian military action was accompanied by attempts to integrate East Timor into Indonesia, through actions such as the forced movement of the local civilian population and the resettlement of Indonesian farmers in East Timor. *Bahasa* Indonesian was imposed as the official language in schools and the education process included a focus on the Indonesian State ideology of *Pancasila*.

---

78. See 8 *Australian YIL* (1978-1980) pp. 281-282 for extracts of speeches by the Australian Foreign Minister on Australia's *de jure* recognition of Indonesia's incorporation of East Timor. The recent public release of Australian government documents in relation to the Indonesian invasion and subsequent purported annexation of East Timor reveal more details of the government's thinking on the question of the extension of recognition to Indonesia's incorporation of East Timor. See 'Recognition by Australia of Indonesian Incorporation of East Timor – Submission to the Foreign Minister' in Department of Foreign Affairs and Trade, *Australia and the Indonesian Incorporation of Portuguese Timor 1974-1976: Documents on Australian Foreign Policy* (2000) pp. 839-840.

Although figures are uncertain, it is estimated that tens of thousands have died in conflict in East Timor since 1975, with several hundred 'disappearances'. Allegations of human rights abuses against Indonesian authorities declined after 1989, as the Indonesian authorities implemented a policy of 'opening up' East Timor to outside scrutiny. However, on 12 November 1991, at the Santa Cruz Cemetery in Dili, a significant event occurred. A parliamentary delegation from Portugal had been scheduled to arrive in East Timor on 4 November 1991. Pro-independence demonstrations had reportedly been planned. On 28 October 1991, two pro-independence activists who, with others, had been hiding in a church in Dili, were shot and killed. The Portuguese delegation's visit was postponed and a memorial mass and march to Santa Cruz cemetery were organized for one of the deceased activists. The security forces opened fire on the crowd. According to official figures, ten protesters were killed but other reports estimate the number of fatalities at about 100.

Following international condemnation, the Indonesian government established a seven-person commission of inquiry. It found that up to 50 people may have been killed and that security forces had used excessive force in responding to civil unrest. Criminal charges were subsequently brought against protesters and army and police personnel involved. Human rights groups criticized the trials of protesters for not conforming to international standards or with Indonesia's own Code of Criminal Procedure. Protesters received prison sentences of between nine years and life whereas security personnel received sentences from eight to 18 months.

In early-1999, the then-Indonesian President B.J. Habibie surprisingly announced a dramatic change in Indonesia's policy regarding East Timor. A major element of that policy was a popular consultation through referendum to be held in East Timor on the issue of integration with Indonesia. Three agreements were entered into on 5 May 1999 variously between Indonesia, Portugal and the United Nations, providing a framework for the resolution of East Timor's future status. That framework envisaged the People's Assembly implementing the results of the popular consultation in October 1999.

The UN established the United Nations Mission in East Timor (UNAMET) to organize and conduct the popular consultation in order to ascertain whether the people of East Timor accepted or rejected a constitutional framework proposed by Indonesia.[79] This framework provided for special autonomy for East Timor within the unitary Republic of Indonesia. President Habibe stated that the Indonesian government accepted that a vote against the proposal would be the equivalent of a vote for independence for East Timor. The ballot was originally scheduled for 8 August 1999[80] but eventually took place on 30 August 1999.

79. UN Security Council Resolution 1246, UN Doc. S/RES/1246 (15 June 1999).
80. Ibid.

3.2.2 *Post-ballot*

On 4 September 1999, the UN announced the results of the ballot, namely, a 78.5 percent vote against unity with Indonesia – effectively a 78.5 percent vote for independence. President Habibie announced that he accepted the ballot's outcome and directed Indonesian security forces to maintain order in East Timor. However, within hours of the announcement of the ballot results, pro-integration militias went on a rampage in Dili and other towns in East Timor.

On 6 September 1999, Australia began evacuating its nationals in East Timor with up to 150,000 civilians already being displaced by the violence. On 7 September 1999, Indonesia imposed martial law in East Timor. From 8 to 12 September, a UN Security Council mission traveled to Jakarta and Dili. On 10 September, the UN began evacuating all but essential staff from East Timor. Australia announced that it was canceling joint military exercises with Indonesia and that its general defence ties with Indonesia were under review.[81]

The Security Council mission reported that the violence in East Timor after the ballot could not have occurred without the involvement of large elements of the Indonesian military and police, concluding that the Indonesian authorities were either unwilling or unable to provide an environment for the peaceful implementation of the 5 May agreements. The mission also concluded that this situation had not altered with the imposition of martial law.[82] On 12 September 1999, the Indonesian government agreed to accept the assistance of the international community to restore peace and security in East Timor and to implement the result of the popular consultation. Thereafter, the Security Council adopted resolution 1264 on 15 September 1999 and, *inter alia*:

> *Determining* that the present situation in East Timor constitutes a threat to international peace and security; and
> *Acting* under Chapter VII of the Charter of the United Nations;
> *Authorizes* the establishment of a multinational force under a unified command structure ... with the following tasks: to restore peace and security in East Timor; to protect and support UNAMET in carrying out its tasks; and, within force capabilities, to facilitate humanitarian assistance operations; and
> *Authorizes* the States participating in the multinational force to take all necessary measures to fulfil this mandate.[83]

The multinational force began its deployment to East Timor on 20 September 1999. By that stage, the East Timorese infrastructure had been badly damaged. In Dili, few buildings were undamaged. The towns of Ainaro and Cassa had been completely destroyed, and an estimated 70 percent of Atsabe, Gleno, Lospalus,

---

81. *The Weekend Australian* (11-12 September 1999) p. 2.
82. Report of the UN Secretary General on the Situation in East Timor, UN Doc. S/1999/1024 (4 October 1999).
83. UN Doc. S/RES/1264 (15 September 1999).

Maliana, Manatuto and Oecus had been either burnt down or leveled. Extensive damage was also reported in Suai and Liquica. About 20 percent of Vineque had been destroyed, but Bacau was relatively undamaged. The judicial and detention systems were not operating and no commercial activity was being conducted. There was no effective administration, as administrative officials apparently left the territory after the announcement of the ballot results.

By the time of the deployment of the multinational force, the Indonesian armed forces still had significant numbers of personnel in East Timor, particularly in Dili. A contingent of Indonesian police remained in Dili with a substantial security detachment providing support. After consultations in New York and Dili, the Indonesian armed forces undertook to cooperate with the multinational force in the implementation of Resolution 1264, through a Joint Consultative Security Group established in Dili, with UNAMET participation.[84] On 24 September 1999, Indonesia lifted martial law and rapidly withdrew from the territory.

On 26 October 1999, the United Nations Transitional Authority (UNTAET) was established pursuant to Security Council Resolution 1272.[85] INTERFET formally transferred its responsibilities provided by UNSCR 1264 to UNTAET on 23 February 2000. UNTAET was given authority to 'exercise all legislative and executive authority including the administration of justice'.

3.3 The INTERFET deployment[86]

3.3.1 *The international force*

INTERFET was established under unified command rather than UN command. Major General Peter Cosgrove, at the time the Commander of the Australian Defence Force's (ADF) Deployable Joint Force Headquarters (DJFHQ), based in Brisbane, was designated Commander INTERFET (COMINTERFET). Headquarters INTERFET was formed by the DJFHQ, with supplementary support from other contributing states. Although the figures varied throughout the INTERFET deployment, 22 contributing nations were represented in INTERFET with a total force strength of approximately 12,600. Australia provided the largest contingent of 5,521 ADF personnel.[87]

---

84. Report of the UN Secretary General on the Situation in East Timor, UN Doc. S/1999/1024 (4 October 1999).

85. UN Security Council Resolution 1272, UN Doc. S/RES/1272 (24 October 1999).

86. Unless otherwise indicated, Colonel Mark Kelly, the inaugural Chief of Staff HQ INTERFET, provided the information contained in this section in a presentation to the ADF's Operations Law Course, RAAF Base Williamtown, 11 May 2000.

87. The Australian contribution was: HQ INTERFET (including a command support unit); a brigade headquarters; three infantry battalions; an engineer regiment; two artillery batteries (employed in security and civil affairs duties); a construction squadron; a brigade administrative support battalion; an aviation reconnaissance squadron; an aviation regiment; a field hospital; a force support battalion; a RAAF expeditionary combat support squadron; a RAAF airfield defence squadron; a RAN frigate; two landing craft heavy; and a clearance diving team. In addition, RAN sea lift and support units and RAAF

3.3.2 *Application of international law to the operation*

The complex nature of the international legal framework for the INTERFET deployment has already been noted. Issues which impacted on the framework included: the sovereign rights, if any, of Indonesia over East Timor and the recognition, if any, by members of the INTERFET coalition of those rights; the residual rights, if any, of Portugal as the former colonial power; the effect of the *de facto* control of East Timor by Indonesia as recognized by the 5 May 1999 agreements between Indonesia, Portugal and the UN; the effect of the unilateral act of Indonesia's People's Consultative Assembly on 20 October 1999 to withdraw Indonesian claims of sovereignty over East Timor; and the effect of UN Security Council Resolutions 1264 and 1272.

The controversial status of Indonesia's authority in East Timor itself contributed to the complexity of the multinational deployment and distinguished it from peace operations such as that which commenced in Kosovo in mid-1999.[88] Neither the UN nor most of the states contributing troops to the INTERFET coalition had recognized Indonesian sovereignty over East Timor following the Indonesian invasion in 1975 and purported annexation on 17 July 1976.[89] In fact, in a series of resolutions following the 1975 Indonesian invasion and subsequent purported annexation of East Timor, the UN Security Council and General Assembly rejected Indonesian claims of sovereignty over the territory.[90] For the UN and these states, the status of East Timor at the time of the INTERFET deployment was that of a UN-designated non-self governing territory.[91] The notable exception to this view was that of the coalition's lead nation, Australia.

Notwithstanding the UN's position regarding sovereignty, its acceptance of the reality of Indonesian control over East Timor was reflected in various framework documents, such as the 5 May 1999 agreements between Indonesia, Portugal and the UN and UN Security Council Resolution 1264 (1999) establishing INTERFET. Thus, although operative paragraph 3 of Resolution 1264 authorized 'the States participating in the multinational force to take all necessary measures' to fulfill its mandate, other provisions envisaged a continuing, although temporary, role for Indonesia in East Timor. Paragraph 5, for example, underlined the government of Indonesia's 'continuing responsibility under the Agreements of 5 May 1999 ... to

---

airlift capabilities supported the force. Source: Briefing paper provided by Strategic Command Division, HQ ADF.

88. United Security Council Resolution 1244 (1999) establishing KFOR and authorizing its deployment into Kosovo expressly recognized the sovereignty of the Federal Republic of Yugoslavia over Kosovo.

89. See the series of UN resolutions regarding Indonesian sovereignty referred to above.

90. See for example, General Assembly Resolutions 3485 of 12 December 1975, 31/53 of 1 December 1976, 32/34 of 28 November 1982 and Security Council Resolutions 384 (1975) and 389 (1976) of 22 April 1976.

91. This was, for example, the NZ view as reported in the written comments of LtCol. L.P. Maybee, Command Legal Officer, HQ Land Command, NZDF, presented to the ADF 'INTERFET Lessons Learnt Conference', Australian Defence Force Academy, Canberra, 17 March 2000.

maintain peace and security in the interim phase between the conclusion of the popular consultation and the start of the implementation of its result'.

Differing views on the status of Indonesia's claims to East Timor had an effect on key issues, such as the drafting of the framework documents[92] for the deployment and the determination of the law applicable in East Timor after the multinational force was deployed.[93]

Consistent with ADF policy, the principles[94] of the LOAC were applied, where relevant, by way of guidelines.[95] The same approach was taken with respect to international human rights law. The *rationale* behind the ADF approach has consistently been that the key international humanitarian and human rights law instruments usually reflect best practice, and, compliance with them, where relevant, is the appropriate expectation for force standards. Maintenance of the legitimacy of a peace operation is considered a key to mission success.

The ADF has adopted a similar approach to the law of military occupation in its deployment on peace operations. The Australian position is that a UN mandated force can be in at least *de facto* occupation of the area of operations. The INTERFET deployment drew extensively upon the law of occupation for the establishment of an interim justice system. While it is the ADF view that the law of occupation does not require an armed conflict for it to apply *de jure*,[96] INTERFET forces were not occupying East Timor because Indonesia consented to the deployment. Here, the law of military occupation provided a framework of guiding principles.

---

92. Australia, as lead nation, negotiated a diplomatic agreement (covering matters often contained in Status of Forces Agreements) with Indonesia on behalf of all participating nations.

93. In Kosovo, the applicable law was clearly that of the Federal Republic of Yugoslavia but for East Timor there were arguments about whether Indonesian law or Portuguese law was the most appropriate legal regime.

94. The NZ position was different in relation to the application of LOAC. The NZ position was that not only the principles but the rules of LOAC applied to the deployment on the basis that the UN Secretary General's Bulletin of 12 August 1999 states that the principles and rules apply to enforcement actions or peacekeeping operations. The ADF position, by contrast, is that the Secretary General's Bulletin did not apply the principles and rules of LOAC to INTERFET as the Bulletin only applies to UN commanded forces or to peace enforcement or peace keeping operations where UN forces are a party to a conflict. The NZDF position was contained in the written submission of LtCol. Maybee, ibid., to the INTERFET Lessons Learnt Conference.

95. Comments of LtCol. Kelly, Directorate of International and Operations Law, Defence Legal Office, INTERFET Lessons Learnt Conference, transcript p. 134.

96. It will be recalled that the Australian contingent strongly advocated the application of the law of military occupation of the multinational force in Somalia. See also M.J. Kelly, *Peace Operations: Tackling the Military, Legal and Policy Challenges* (Canberra, Australian Government Publishing Service 1997). As we have seen, that law was in fact applied by the ADF in Somalia to good effect. This interpretation of the law has subsequently been asserted by Australia at the Meeting of Experts on the Fourth Geneva Convention of 1949 in Geneva, October 1998. Guidelines on the application of this approach have also been promulgated as Defence Legal Office policy.

3.3.3 *The legal framework for the operation*

3.3.3.1 Establishing the framework

As the lead nation for INTERFET, Australian authorities, in particular, the Department of Defence,[97] the Attorney-General's Department and the Department of Foreign Affairs and Trade (DFAT) assumed responsibility for the conception, drafting and negotiation of the framework documents. That responsibility normally falls to the UN Legal Adviser whenever an operation is UN commanded and controlled. These framework documents supplemented those created externally, such as the relevant Security Council Resolutions and the agreements of 5 May 1999.

The following framework documents were adopted:

—Exchange of Diplomatic Notes Constituting an Arrangement Between the Government of Australia and the Government of the Republic of Indonesia Concerning the Status of the Multinational Force in East Timor – which came into effect on 24 September 1999 and was known as the Status of Forces Arrangement (SOFA);

—Exchange of Diplomatic Notes Constituting an Arrangement Between the Government of Australia and UNTAET – which applied to the activities of the multinational force operating under a unified command structure in East Timor (INTERFET) from 26 October 1999;

—Agreement on Participation in INTERFET.

Difficulties experienced in reaching agreement with Indonesian authorities for certain technical issues has prompted the suggestion that, in future operations, rather than seek formal agreement by a process of negotiation, the mechanism of a unilateral declaration be employed in appropriate circumstances. The consent of the other party would thereafter be assumed if that party did not object. That is, after declaring the Australian position and intended course of action, operations would be conducted accordingly.[98] It is suggested that relevant circumstances for the use of this mechanism would be the strength of the UN mandate underpinning the operation.

97. Within the Department of Defence, primary responsibility for all aspects of this documentation development process was vested in the Directorate of Agreements within the Defence Legal Office in Canberra.

98. Ibid., Comments Cmdr. Letts, Naval Command, transcript p. 98.

3.3.3.2 Investigating alleged crimes against humanity[99]

A key reason for the Security Council's authorisation of the deployment of INTERFET was its deep concern over 'the continuing violence against and large-scale displacement, and relocation, of East Timorese civilians'.[100] However, no international tribunal has yet been established to try individuals alleged to have perpetrated atrocities in East Timor and the UN, at least for the initial period of the INTERFET deployment, had only limited investigative resources[101] available to conduct investigations of possible crimes against humanity.

The main challenge for INTERFET in relation to crimes against humanity, or indeed other serious violations of local criminal law, was the type and extent of INTERFET's involvement. Ultimately, that involvement was restricted to the conduct of limited investigations and attempts to preserve some crime scenes. A note on Guidance for the Multinational Peacekeeping Force in East Timor on the Preservation of Evidence provided by the Office of the High Commissioner for Human Rights was applied by INTERFET forces. The limited INTERFET involvement was driven in large part by a lack of available personnel resources – availability both in terms of numbers of military police and of personnel with relevant expertise (including, for example, forensic skills and crime investigation training). An additional reason for the limited INTERFET involvement related to perceptions that other agencies had a higher primary responsibility and possessed greater relevant expertise – particularly organisations such as the Office of the UN High Commissioner for Human Rights.

It is clear from the East Timor experience that some investigative role into alleged perpetration of international crimes will virtually always be required in future peace operations. Furthermore, this investigative role will most likely be required from the very commencement of the deployment.[102] External pressure for the peace force to be involved more extensively in such investigations than was the case for INTERFET will probably be applied from a variety of sources.[103] In future operations, particularly if other, more appropriate, agencies cannot deploy in sufficient time and the political will is present, an intervening military force may need to consider developing a more extensive crimes against humanity/war crimes

---

99. The expression 'crime against humanity' rather than 'war crimes' has been preferred to avoid the controversies of whether or not the acts in question in East Timor occurred in the context of an armed conflict. A 'crime against humanity' means certain acts, including murder, rape, deportation or forcible transfer, committed as part of a widespread or systematic attack directed against civilian population. For the most comprehensive treaty definition of the crime, see Art. 7 of the Rome Statute of the International Criminal Court – accessible at www.un.org/icc/part2.

100. Preamble to UN Security Council Resolution 1264 (1999).

101. At the time of INTERFET's arrival in East Timor, CIVPOL had only two members on the ground (Maj. Freeman Legal Officer, INTERFET Combined Legal Office, INTERFET Lessons Learnt Conference, transcript p. 118).

102. Here it is noted that the ADF did not deploy a trained investigator until after seven days after INTERFET troops deployed to East Timor. Comments of Maj. Freeman, ibid.

103. AD HQ fielded offers from civilian organisations during the INTERFET operation, *inter alia*, to provide civilian forensic teams to be attached to INTERFET.

investigative capability. Any such capability could include a mortuary, a forensic laboratory, forensic specialists, Military Police investigators, trauma counselors, translators and organic logistic support.[104]

3.3.3.3 The management of detainees

Within hours of deploying to East Timor, INTERFET troops found it necessary to detain a number of East Timorese.[105] To ensure that detainees received their basic legal rights, the Commander of INTERFET (COMINTERFET) directed that detainees were to be conveyed to the Force Detention Centre (FDC) as soon as practically possible, preferably within 24 hours but no later than 36 hours after being apprehended. Within 72 hours of a detainee's arrival at the FDC, the Senior Legal Advisor at the INTERFET Combined Legal Office was to review the detainee's case and, where appropriate, make arrangements for the transfer of the detainee to the appropriate Indonesian authorities. The SOFA with Indonesia provided, *inter alia*, that INTERFET could, in furtherance of its mandate, detain a person who was committing or had attempted to commit offences in relation to persons or property. Furthermore, the SOFA required detainees to be handed over to the appropriate authorities for the purpose of dealing with the alleged offender. However, handing detainees over to Indonesian civilian police proved unsatisfactory because of the collapse of the civil administration (including the judiciary and court system) in East Timor.[106] The detainees were simply released by Indonesian police soon after the transfer of custody.

With the collapse of the Indonesian judicial and detention systems, INTERFET faced the challenge of balancing the rights of detainees to natural justice and due process against the need to maintain detention. On 21 October 1999, INTERFET addressed this balance through the establishment of the Detention Management Unit (DMU) as an interim judicial system pending the reestablishment of a civil judiciary. Once again, the Australians relied on the Fourth Geneva Convention and the law of occupation as the guide for establishing the DMU regime.[107]

---

104. This structure was suggested in a written submission by Maj. O'Kane, SO2 Legal, HQ WESTFOR, in a written submission to the INTERFET Lessons Learnt Conference.

105. For example, it was reported on 22 September 1999, that INTERFET had 'arrested eight East Timorese – including members of the militia – for carrying weapons in the capital Dili', M. Blenkin and J. Martinkus, 'Militia Disarmed: Peacekeepers Arrest Eight', *The Daily Telegraph*, 1st edn. (22 September 1999) p. 3.

106. On 4 October 1999, the Secretary-General reported: 'The Indonesian police ... appear to have withdrawn from the territory [East Timor]. In Dili, there is a token presence of 12 persons, comprising of senior officers, investigators and basic administrative staff ... The Indonesian police have confirmed that the judicial and detention systems are not operating. With regard to detainees, the multinational force has established basic, short-term legal and practical provisions for preventive detention, in consultation with UNAMET and the International Committee of the Red Cross (ICRC). UN Doc. S/1999/1024 (4 October 1999), para. 13.

107. For a full account of the establishment of the DMU and its process, see B. Oswald, 'The INTERFET Detainee Management Unit in East Timor', 3 *YIHL* (2000) p. 347.

3.4 UNTAET and the Peacekeeping Force (PKF)

Following on from INTERFET, the issue of the transition to the United Nations Transitional Administration in East Timor (UNTAET) and the role the PKF would play in maintaining civil order arose. The issue for UNTAET once again became the establishment of a legal framework for the interim administration of justice that would be supportable and ensure the legitimacy of the mission in the perception of the international community and local population. UNTAET sought to establish an independent state and was therefore presented with the issue of transition to a new state polity and succession.[108] UNTAET involved 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. This process involved establishing local administrative capabilities at the same time as actually administering; registering an electorate and political parties/candidates; conducting an election; creating a constitutional assembly which drafted a constitution and then became the national Legislative Assembly; conducting a presidential election, and transferring to independence on 20 May 2002.[109] Given the scope of the task, to date the mission has proven to have been 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. The most pressing initial issue was reconciling the conflicted elements of East Timor, and dealing with the security threat emanating from both the West Timor based militia and the domestic law and order situation. Also to prove problematic was interpreting the UNTAET mandate and the responsibilities of the UNTAET elements in relation to it. This included balancing the roles and interests of the UNTAET civil administration, UN agencies, the Peacekeeping Force; the international Civilian Police (CIVPOL); the Human Rights Office; UNHCR; the UNTAET Justice Department, including the Office of the General Prosecutor and its Serious Crimes Investigation Unit; the emerging East Timorese Police Service; and the emerging East Timorese Defence Force. Critical to establishing the conditions under which UNTAET could terminate the mission were the construction of a sound relationship with the Indonesian government, the West Timorese-based TNI and their Commander in Denpasar, MajGen. Da Costa, and encouraging, assuaging and engaging the East Timorese political actors. Finally it was vital to engage concurrently in managing popular expectations and ameliorating their

---

108. 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.

109. See 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.

conditions. The challenge was to do all of this in the context of a devastated environment.

As was to be expected all of this was subject to budgetary constraints and funds would never be adequate to tackle all he challenges effectively. At the same time much effort had to go into ensuring that the East Timorese would have a viable and sustainable future with the withdrawal of the 'artificial' UN public sector and its dependent economy.

It is interesting to note the provisions under UNTAET Regulation No. 1999/1 of 27 November 1999 concerning the applicable law in East Timor.[110] Through these provisions, the UNTAET administration drew on the existing body of Indonesian law. Indonesian criminal law is based on its Dutch colonial predecessor, which shared the Napoleonic heritage of the Portuguese Criminal Code. Notwithstanding the fact that only Australia had formally recognized Indonesian sovereignty over East Timor, 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 which had been utilised for repression. This was supplemented by a Regulation on Transitional Rules of Criminal Procedure to ensure fairness in accordance with fundamental international human rights standards.[111] UNTAET was provided with the ability to promulgate laws and the SRSG/Transitional Administrator was empowered to issue Directives.[112]

One problem which emerged was the attitude to the Regulations exhibited by the SRSG. This was illustrated in the deployment of the East Timorese Defence Force (FDTL) in the period leading up to the elections on 30 August 2001. Under

---

110. These state:
'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, 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: Law on Anti-Subversion; Law on Social Organizations; Law on National Security; Law on National Protection and Defence; Law on Mobilization and Demobilization; Law on Defence and Security.
3.3 Capital punishment is abolished.'
See 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; and S/2001/983 of 18 October 2001.

111. UNTAET/REG/2000/30 of 25 September 2000.

112. 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.'

UNTAET/REG/2001/1 of 31 January 2001, as amended by UNTAET/REG/2001/9 of 29 June 2001, the FDTL was prohibited from being mobilized or utilized in matters linked to internal public order, police issues or social conflicts. The SRSG determined that he wanted over 200 FDTL personnel deployed to assist with security for the election and to boost their profile and the confidence of the people. This was strenuously objected to by the PKF as it violated the Regulations, sent the wrong message to the FDTL and the people about their role, could not be logistically sustained and would interrupt the FDTL training. In the end, a different approach was taken, employing 66 personnel on civil assistance tasks, which did not violate the Regulations and achieved the intention of the SRSG. This points, however, to the need for personnel in such key positions to understand the critical concepts upon which such missions must be founded in terms of promotion of the rule of law.

UNTAET was built upon a broad Security Council Resolution mandate fleshed out by UNTAET Regulations based on the authority of that mandate. It was administered through a combination of function based and remedial departments which attempted to transition to indigenous staff and developing institutions through employment policy and consultative mechanisms. This approach was reasonably adequate from the perspective of establishing the perception of legitimacy for UNTAET although one significant weakness was the administration of justice.[113] The approach taken by the UN in East Timor while viable still remains very much an *ad hoc* solution and suffers from the usual problems of delay in marshalling the human and financial resources, although aspects of this are often a matter of international willpower. It 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 certainly is 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 many. Nowhere was the issue of the variable quality of personnel more damaging than in the justice administration and CIVPOL area, which was subject to internal personnel turmoil, allegations of political interference and incompetence.

For the PKF, the UNTAET experience involved a difficult balancing act between the security function of defeating and deterring the known militia threat emanating from across the Tactical Coordination Line (TCL) in West Timor and supporting internal security. This meant establishing modes of operating and procedural arrangements with key stakeholders such as CIVPOL, UNHCR and the Serious Crimes Unit (SCU). There came a stage, dating roughly from July 2001, when the nature of returnees from West Timor changed from straightforward refugees to former functionaries, TNI, POLRI and militia members of the Indonesian regime and their families. A difficult balance had to be struck between the rights of refugees/returnees under the Refugee Convention and the Statute of the

113. 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.

UNHCR[114] and the potential threat posed by these persons both in terms of their need to face justice, the activities they may have become involved in upon return and the reaction of the communities they were returning to in East Timor.

There were particular concerns for the PKF as tension emerged relating to the need to interview returnees for intelligence-gathering purposes. This was not helped by a certain level of mutual suspicion stemming from the different military and NGO/Agency 'sub-cultures' on the part of both UNHCR and PKF personnel, and by actions by some PKF elements that could be perceived as insensitive to prioritising human rights standards as the militia threat diminished and the environment began to normalise.[115] There were also some failures by PKF to facilitate technical requirements in the processing of detainees through to CIVPOL.[116] These matters were resolved through patient negotiation of guidelines and standards and the breaking down of the 'sub-cultural' suspicions. This was formalised in a number of Appendices to Annex L of the PKF Operational Order (OPORD) 8 which covered step by step procedures for returnee processing, interview guidelines, reconciliation meetings, 'go and see' visits and family meetings.[117] These guidelines also involved some compromise to prosecution objectives by the SCU, as the arrangements for reconciliation meetings meant that suspects would not be arrested at the meetings in order to facilitate the larger objective of encouraging large-scale returns and therefore resort to normal process when full return occurred. Compromise on the part of UNHCR occurred in terms of ensuring that no SCU suspects would be part of 'go and see' visits, and the acceptance that many returnees would lose their protected status as SCU suspects. UNHCR also undertook to assist low-level information gathering by PKF during the processing of returnees. In this context, the PKF developed operational coordination with the SCU involving the opening of field offices by the SCU and the dovetailing of intelligence operations and databases. The opening of the SCU field offices enhanced cooperation with the PKF at the tactical level, improved SCU effectiveness in the

114. Convention relating to the Status of Refugees of 28 July 1951 (entered into force on 22 April 1954), Article I of the Protocol relating to the Status of Refugees of 31 January 1967. Statute of UNHCR annexed to General Assembly Resolution 428 (V) of 14 December 1950.

115. These incidents were relatively minor matters involving the access to and questions asked of returnees by PKF intelligence personnel and in one case the temporary detention and questioning of a significant ex militia figure by the PKF in a way that cut across UNHCR objectives. (These matters were observed by and involved the author in his official capacity as Chief Legal Adviser (CLA) to the PKF Force Commander in East Timor from 24 July 2001 to 31 January 2002).

116. There were a number of technical requirements in the processing of detainees which included the time frames for charging and bringing before an investigating judge. There were times when the PKF was not expeditious in handing over detainees to CIVPOL to allow them sufficient time to deal with process requirements or when detainees were held longer than the period allowed to the PKF. (Observations and dealings of the author as CLA).

117. UNTAET PKF Operations Order, 08-0,1 File Number: 3313-1, 8 December 2001, Annex L Appendices 1-6. 'Go and See' visits were arrangements made by UNHCR with refugees to assist in the defeat of misinformation campaigns in West Timor about the state of affairs in East Timor and to reassure them about the local acceptance of their return. They would then be transported back to West Timor. The hope was that participants would influence or lead their families and refugee communities to return. These visits might involve figures who were of a security concern or interest.

gathering of evidence, and reinforced local confidence in the justice process and security environment.[118]

The PKF also executed an Operational Support Arrangement (OSA)[119] with CIVPOL in order to bring some rigor to the provision of support to what were essentially normal policing activities, such as cordon and search operations. PKF support was provided to these missions because the capabilities of CIVPOL and the emerging East Timorese Police Force (TLPS) were still inadequate. The main emphasis of the OSA was to ensure that there was a framework for using the PKF in this role that equated with proper standards relating to the role of a military force in a democracy with proper civil oversight and the priority of authority spelled out. This had the added significance of promoting these values within East Timor with an eye to how the FDTL would relate to the civil political regime as it emerged.

Tensions between CIVPOL and the PKF surfaced from time to time, due to the difficult working environment in which the security mandate of the PKF and the role of CIVPOL had a degree of overlap. These tensions were exacerbated by the lack of capability of CIVPOL.[120]

The efforts of the second DSRSG, Mr Dennis McNamara, to remedy many of the UNTAET justice administration deficiencies demonstrates 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 the criticisms of UNTAET are those of detail in a broadly successful mission.[121]

3.5 Conclusion

The INTERFET/UNTAET missions in East Timor posed an array of challenges across all aspects of the operations – particularly in the legal field. The challenges faced by INTERFET/UNTAET reflected many of the common experiences and issues that have recurred in the course of recent complex peace operations. From the perspective of the promotion of the rule of law and defining the international humanitarian and human rights legal norms that should apply in such situations, the operation was a successful evolution in the approach that has been adopted by Australia since the deployment to Somalia described above. It is not suggested here

118. Observations of the author. The author was involved in the arrangements described as well as the execution of the guidelines with UNHCR.

119. Operational Support Arrangement between the UNTAET Civil Police Commissioner and the PKF Commander executed on 22 March 2002. Drafted by the author and the legal adviser to the CIVPOL Commissioner, Mr Wayne Hayde.

120. This lack of capability arose from insufficient numbers, resources and variable level of training and standards in the various CIVPOL contingents.

121. These are observations by the author. 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; the conduct of reconciliation meetings; cooperation between CIVPOL and PKF; the management of the operational deployment of the East Timorese Defence Force; and the establishment of the indigenous government.

that the operations ran perfectly or that they represent models for doctrinaire replication. However, the Australian approach to the issue of the interim administration of justice confirmed the existence of some fundamental general principles and issues that must be planned for and considered before any future military deployment into complex emergency situations.

In Somalia a reluctance to be proactive on this issue was the cancer at the heart of the mission that eventually killed it. While there is always a reluctance in the military to avoid 'mission creep' Somalia demonstrated that there are key points of intervention that it is in the interests of the military to address to facilitate an earlier withdrawal. It took much subsequent soul searching and added experiences to confirm the need to tackle rule of law matters right from the commencement of an operation. One of the key problems in Somalia was not only the lack of capability but the lack of legal analysis and preparation to enable remedial action to occur and to sustain the perception of legitimacy. UNTAET showed the benefit of this lesson but also highlighted that faith in the rule of law must be painstakingly built with the disrupted community and this will depend not only on the sense of security generated by the mission but by the behaviour of the security elements of the mission and the manner of maintaining order. UNTAET also illustrated the need to take positive action to avoid a dependence on the military for law and order support which will retard the development of indigenous law and order. It is essential that the military not be used to mask or delay the effort that should exerted on the standing up of the local capability.

One thing is certain, any deployment into the collapsed state environment will involve the military in a situation of the interim administration of justice to some degree and this must always be prepared and planned for. This includes everything from the legal framework to the logistics of looking after detainees. The UNTAET experience also confirms the need identified in Somalia and in subsequent operations for the international community to concentrate on developing an ability to deploy a capable police response and for the peacekeeping forces to be adequately trained in basic human rights principles and non-lethal force techniques. The peacekeeping forces also need to be adequately equipped and structured for their inevitable role in the interim administration of justice and the transition to civil authority. The Brahimi Report on Peace Operations has posed many suggestions which go directly to the heart of the international response to the interim administration of justice and the professionalisation issue.[122] If implemented effectively, or at least if the issues raised are adequately addressed, an operation will be more likely to succeed and in a way that leads to continuing viability with less need for international oversight or intervention. The rule of law is a key element to creating the 'virtuous circle' of mutually supporting factors rather than the 'viscous circle' that often begins with the insecurity and corruption generated by an inadequate or dysfunctional administration of justice.

122. *Report of the Panel on United Nations Peace Operations*, L. Brahimi, Chairman, of 21 August 2000, A/55/305-S2000/809 (available at http://www.un.org/peace/reports/peace_operations/) See in particular paras. 39-47, 76-83, 86-91, 118-125 and 219-225.