

The Rule of Law on Peace Operations

A 'CHALLENGES OF PEACE OPERATIONS' PROJECT CONFERENCE

Edited by Jessica Howard & Bruce Oswald CSC



ASIA-PACIFIC CENTRE FOR MILITARY LAW

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THE UNIVERSITY OF
MELBOURNE



THE RULE OF LAW ON PEACE OPERATIONS
A 'CHALLENGES OF PEACE OPERATIONS' PROJECT
CONFERENCE

Edited by

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and

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University of Melbourne
11–13 November 2002

DEDICATION

This book is dedicated to all who seek to protect the victims of armed conflict through the rule of law

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Foreword

It is with a deep sense of pride and satisfaction that I offer a few thoughts and reflections by way of Foreword to this excellent volume of edited papers from the Conference organised by the Asia-Pacific Centre for Military Law on 'The Rule of Law on Peace Operations' at the University of Melbourne Law School, 11-13 November 2002. Reactions to the Conference were overwhelmingly positive and, consequently, it is important to have captured a written record of much of what was presented and discussed. However, from my own perspective as Foundation Director of the Centre, there are more fundamental reasons for my enthusiasm for this particular publication.

This edited volume represents the inaugural substantive publication of the Asia-Pacific Centre for Military Law – reason alone for celebration on the part of those of us who have been working hard to make a success of the bold initiative to establish the Centre. We have commenced our collective published output with a quality product that establishes a high benchmark. One challenge for us as an institution now is to continue to produce published output while maintaining the standard we have set ourselves. In identifying this objective, however, I am not advocating publications for their own sake or somehow as an end in themselves.

The collaboration between the Australian Defence Force Legal Service and the University of Melbourne Law School, resulting in the recent establishment of the Asia-Pacific Centre for Military Law, is the first of its kind for both parties and for Australia. In the absence of other models, we have had extensive discussions about the potential advantages of our partnership and we continue to regularly question how best to achieve the ambitious objectives articulated in our Charter. One recurring constant through both the planning for and the early history of our collaborative venture is the agreed need to combine practical experience of the application of military law with rigorous theoretical analysis of that law. Our research output must reflect that driving desire. In my view, this volume combines practice with theory admirably and constructively. Many of the presentations delivered at the Conference were by practitioners with extensive field experience on peace operations – whether as military personnel, officials from relevant inter-governmental organisations or as representatives of non-governmental humanitarian aid agencies. Background papers for syndicate discussions included in the volume are, in contrast, almost all written from an academic perspective drawing heavily on the literature in their respective fields. The papers identified crucial questions to be posed to practitioners and made a highly significant contribution to the conference proceedings. Almost all the authors are research higher degree students working under the Centre's

auspices and in my capacity as supervisor of most of them, I am particularly proud of their achievements.

The Centre's participation in the Challenges of Peace Operations Project as the Australian partner is truly a privilege. The Conference was the first in the Project to focus specifically on rule of law issues and provided our Centre with an opportunity to make a significant international contribution to an all too neglected, but fundamentally important, aspect of peace operations. We will always remain grateful to Annika Hilding Norberg and the Project partners for their commitment to incorporate our own expertise within the Challenges Project as well as to our own Australian Defence Organisation for providing the financial and institutional support and encouragement to ensure the success of the Conference.

As one profoundly committed to the belief that the application of the rule of law on military operations of any kind – including in the context of peace operations – will often save lives, invariably improve the lives of those affected by military operations and always benefit those participating in the conduct of operations, I consider myself blessed indeed. I work with a fantastic team of colleagues and students who share my convictions and who are working hard to make their own contributions to an improved world. I have observed two of them work long and hard to see this volume materialise. To Jess and Ossie, I thank you on behalf of your friends in the Asia-Pacific Centre for Military Law and also on behalf of those people who may never know it but whose lives will be better for your efforts in producing and distributing the material contained in this publication.

TIMOTHY L.H. MCCORMACK
MELBOURNE LAW SCHOOL
01 MAY 2003

Acknowledgements

The Asia-Pacific Centre for Military Law (APCML) in association with the Department of Defence and the University of Melbourne Law School presented 'The Rule of Law on Peace Operations': A 'Challenges of Peace Operations Project' Conference. The Conference could not have taken place without the commitment and passion of a great number of individuals and organisations. While it is impossible to thank every one by name it should not be forgotten that many worked very hard to ensure the success of the Conference. We are grateful for their support, encouragement and time.

At the University of Melbourne Law School we gratefully acknowledge the assistance of Ms Dianne Costello, the APCML administrator. Her organisational skills during the Conference were greatly appreciated. We are also indebted to other members of the Melbourne Law School for their professionalism and assistance. They also helped to ensure the success of the Conference by assisting us with many administrative and organisational aspects.

Within the Department of Defence our point of contact was the Strategic & International Policy Division. Group Captain Dunbar, Ms Kerry Bernardin, Ms Jane Burkin and Mr Robert Kidd assisted us with the planning and management of the Conference. Group Captain Dunbar, amongst other things, helped to develop the program for the Conference. Jane and Robert provided us with invaluable support in many areas; not the least being, organising funding, arranging for overseas speakers to attend the Conference, and liaising with other government organisations in Australia and overseas.

Our other Conference sponsors were AusAID (the Australian Government's Agency for International Development) and Kluwer Law International. At AusAID Mr Steve Darvill and Ms Lisa Roberts were our primary contacts. Amongst other things, Lisa and Steve assisted us to get funding and to arrange for overseas participants to attend the Conference. We would like to thank Mr Roger Peacock, Vice Principal (University Development), University of Melbourne and Ms Lindy Melman at Kluwer Law International for their generous support.

Squadron Leader Patrick Forster-Rohal undertook much of the day-to-day Conference organising and management. Patrick's patience, attention to detail

and sense of duty were essential to the success of the Conference. His assistant, Lieutenant Simon Lee, provided much needed support particularly in the area of information technology. Ross Clarke and Sarah Finnin provided us with invaluable assistance to prepare the drafts of the entire manuscript for publication.

The APCML would also like to acknowledge the role that Ms Annika Hilding Norberg played in shaping the Conference. Annika's support and encouragement were essential ingredients to making the Conference a success. Her commitment, passion and contribution to exploring effective and legitimate ways of dealing with 'Challenges of Peace Operations' is admired and respected by all those that know, and work with, her.

THE EDITORS

Preface

The rule of law is a cornerstone of effective peace operations. It is often the primary issue facing the operation and is essential in assisting the promotion of peace, security, political, economic, social and cultural development. The failure to apply and adhere to the rule of law during a conflict is likely to have led to individuals taking the law into their own hands, the economy being left almost solely in the control of criminals, and disarmament, demobilisation and reintegration of warring factions and criminals remaining a distant dream. Security reform, justice and the development of civil society in such circumstances remains elusive and lasting peace becomes difficult to attain.

Over the past six years, civilians, military and police have participated in, and contributed to, a project that has sought to provide an inclusive and informal forum to address challenges facing peace operations. The Project, now known as ‘Challenges of Peace Operations: Into the 21st Century’ (hereafter referred to as the Challenges Project), has sought to explore and contribute to more effective and legitimate ways of dealing with conflict. To that end, the Challenges Project has sought to promote and encourage a culture of cross professional cooperation and partnership between organisations and individuals from a wide variety of nations and cultures.

In keeping with the Challenges Project objective of exploring and contributing to more effective and legitimate ways of dealing with conflict the APCML hosted a Conference in Australia titled ‘The Rule of Law on Peace Operations’. The objectives of the Conference were to (1) inform the deliberations of the United Nations Special Committee on Peacekeeping Operations on key legal issues relevant to the planning, management and conduct of peace operations; and (2) generate valuable and relevant practical information on rule of law issues within peace operations for the Asia-Pacific region.

The rule of law in the context of peace operations incorporates international and municipal legal obligations and standards applicable to all parties involved in the peace process. As a principle it includes the application of the *Charter of the United Nations*, international humanitarian law, human rights law, military law, criminal law and procedure, civil law and procedure, and constitutional law. It also incorporates principles that govern civil and criminal accountability for the actions of international participants engaged in the planning,

management and conduct of peace operations (hereafter referred to as peacekeepers). It also allows for follow up mechanisms to ensure that complaints made against peacekeepers are investigated, and where necessary, appropriate enforcement action is taken. The rule of law includes standards by which national institutions of the host country may be held accountable for their failure to comply with universal legal principles and rules. The rule of law is also the framework that governs the relationship between intervening forces and the local community; and the basis upon which the local population may be held accountable for their actions prior to, and following, the intervention.

Recognising the fundamental importance of the rule of law on peace operations, participants at the Conference were challenged to identify and explore rule of law issues from a strategic, operational and tactical perspective. To that end, there were two themes to the Conference. The first, to explore and examine regional perspectives concerning peace operations; and the second, to examine strategic, operational and tactical legal issues applicable to the planning, management and conduct of peace operations. Those themes were reflected in the structure of the Conference.

The Conference structure permitted participants to hear formal presentations on strategic, regional, and operational challenges facing peace operations. The strategic and operational presentations focused on legal and non-legal matters. Conference participants were also given the opportunity to explore, through syndicate discussions, the role of the rule of law in the framework of peace operations, the cultural context of peace operations, disarmament, demobilisation and reintegration, criminal law, police operations, military operations, human rights, accountability, and transitional administration and assistance.

The collection of papers included in this volume of Conference proceedings includes the formal presentations, additional papers submitted to the APCML by interested parties to assist with discussions during the Conference, and reports of the syndicate discussions. When reading the papers that follow, it should be remembered that the views expressed by Conference participants do not necessarily reflect the official view held by the organisation the participant represents. Editorial changes have been made to the presentations transcribed from the audio recording of the Conference proceedings, as well as to papers provided for publication in this volume. The editors accept full responsibility for any errors in this volume.

This volume does not purport to be an exhaustive account of everything raised during the Conference. For example, the volume does not include a record of the discussions that took place at the end of presentations or during syndicate discussions.

Conference participants recognised that on peace operations, the rule of law must be applied within the multinational and multilateral realities of politics, diplomacy, military doctrine and humanitarian principles. There is a need to ensure that the application of the rule of law is balanced with the political, diplomatic, military and humanitarian space in which peace operations operate so that the victims of conflict are given the best protection possible. The challenge lies in finding that balance.

THE EDITORS

Part I

THE CONFERENCE: INTRODUCTION

Joy Wandin Murphy

TRADITIONAL WELCOME

First of all, as it is in our culture, I would like to pay my respects to the spirits of my ancestors. Where you are meeting is part of the traditional land of my fathers. I am wearing a poppy today, not only because it is Armistice Day and I pay my respects to those who have fought for this country, but also in particular and very personally, for my father who served in World War I.

My father enlisted as an Australian Aborigine, but because he was not recognised as a legal citizen of his own country, he was denied enlistment. He came back from Healesville to Melbourne and re-enlisted because someone said to him, 'If you must fight as a black man for your country and for your people, you have to enlist as an American Negro.' He had no problem with that. He wanted to fight as he was, as a black man, for his own country.

So my father served for his own country as an American Negro. I am very glad to say that my father returned from the war, very ill, but died as a result of war injuries. He passed away in 1957, still not being recognised as a legal citizen of his own country.

So today, I guess, in many ways your Conference and what you are on about – peace – is just the very peace that I need to live with myself, my brothers and my sisters, and for my father who so bravely stood up for who he was. And if that is what peace is about – for the right to be treated as an individual, as you are, for the right to be treated as an equal and for the right to be given your place in society – well then I hope that whatever your mission is, that it is achievable.

The way in which we welcome you to our country follows on from a tradition that is thousands of years old. It is about permission. It is about respect for the land. And this is followed very closely by respect for the people. We say that we are born from the spirit of this land and that when we die, our spirit will return to the land. We say that you can only take from the land what you can give back to the land.

In traditional times we (the Wurundjeri People) would have been on the left-hand side, sitting on boughs of gum trees. On the right-hand side would be boughs of gum trees as well, but the visitors would not be permitted to sit on them until such time as there was agreement between the elders of each tribe, and then permission would be given.

So the two elders would meet first, in the middle, and they would discuss issues. And then, when it was felt by the Wurundjeri People that there would be respect for the land and respect for the people, permission was given. Wurundjeri would sit on their boughs of gum trees and the visitors would sit on their boughs of gum trees. And then, of course, they would have a celebration.

We continue this tradition today. And when we are in buildings we do it in a symbolic way, by using the gum leaves. And it is at this time that I would like to invite Annika to join me on your behalf to share in our custom.

Annika has taken a leaf from this branch and there are many more branches here, and I invite you to share in this custom as well. But with Annika, on your behalf, participating in this custom, it means that she and you are welcome to everything from the tops of the trees to the roots of the earth.

We are known as the Manna Gum People, and of course this branch comes from that very tree. It also means that you are given freedom of the bush. And we say today that freedom is your own space. Times have changed since my people only lived on this land but the space which they gave to other people, as I said before, was the space and the respect for the land.

I would like to thank Annika, and you, for your invitation to be here today. Thank you very much. Because it is only in the last eight years that the Wurundjeri People have been recognised as the traditional people of this land – very recent times.

I am a very proud custodian of this land. I am very proud to be an Aboriginal woman. I am very proud to be the daughter of my father.

Should you join me in this welcome to this country, I would like to thank you, because it means that you have joined with me to honour the spirits of my ancestors who have nurtured this land for many thousands of years.

You are most welcome to the traditional land of the Wurundjeri People.

Professor Timothy McCormack

DIRECTOR'S WELCOME

It is my responsibility, and also my great pleasure, to welcome you to the Conference.

But before I do that, I would like to acknowledge the Wurundjeri People as the traditional owners and custodians of this land. I thank Joy Murphy, as an elder and representative of the people who cared for this land. Thank you on behalf of all of us for sharing your heart with us, and your personal story about your own father. I am sure many Australians, like me, feel ashamed that he could not be recognised as an Australian to take up arms on behalf of his country. The recognition of our indigenous people as full citizens of this country happened in the lifetime of almost everybody in this room, late in 1960.

But what I particularly appreciate is Joy's lack of bitterness and the willingness to be so open in her welcome. I feel emotional about that, and I want to say thank you on behalf of all of us. As I come to welcome you, Joy, to the Conference, it is only to the Conference itself because we have already been welcomed to the land on which this building stands and on which we will walk and talk and enjoy the next few days.

It is with a sense of pride, as Director of the Asia-Pacific Centre for Military Law, that I now extend that welcome to all of you.

I was reflecting on how it was that we came to talk with Annika and with other people associated with the Challenges Project at the National Defence College of Sweden. I think those discussions commenced some time late in 1999 and continued into 2000.

I remember travelling with my Deputy Director, Lieutenant Colonel Kelly to Stockholm to meet with Annika and other colleagues at the National Defence College and representatives from the Ministries of Justice and Foreign Affairs to talk about the possibility of Australia joining the Project.

It was not difficult for us to become a partner of this Project, once the decision was made by the Department of Defence. Australia is the most recent – the 10th

– partner to join the Challenges Project. When the Department of Defence asked the Asia-Pacific Centre for Military Law to be the organisation in Australia that would carry the Australian participation in the Conference, it was obvious that Bruce ‘Ossie’ Oswald was our man. He has attended the last five Challenges Conferences and has worked with all the partner organisations. He therefore took responsibility for the organisation of this particular and most recent Conference in the series.

We are very proud of all the work that he has done and the team that have worked with him, who have laboured very hard and long to make it happen. And it is a great realisation of our dreams as well as all of their hard work that we are here today to kick off and to get into it.

I had the privilege of travelling with Ossie and also with Patrick Forster-Rohal in April to the UN, where the Swedish Foreign Minister handed the report of the first phase of the Project to the UN Secretary-General. It was a great event as all of us who were there had the opportunity to reflect on what had been achieved already and to look forward to the future work of the second phase of the Project.

I can recall quite vividly, and with a great deal of excitement, the number of comments that were made in the context of the meetings that we had that day – 25 April 2002 (coincidentally, Anzac Day for the Aussies of us who were there). Throughout the day there were reiterations from different people about the importance of looking at legal issues on peace operations, and about the timeliness of the Conference, then, of course, still a few months away. There were comments about how much the inter-governmental peacekeeping community was looking forward to the lessons learnt – the recommendations to come out of this Conference – because it is obvious that we need to do some more work on legal issues on peace operations.

So we came away from New York convinced that we were on the right track with both the proposed subject matter as well as the people that we wanted to line up and come and participate with us. As I said before, it is, in many ways for us, a dream come true that we are now about to get into it.

So thanks very much to all of you who have travelled from so far away. Yesterday we heard whines and moans and groans about how long and how tedious and how tiring it all is, and we just want you to know and remember and *never ever* forget, and when you see an Australian in North America or Europe next time, feel some empathy towards them. Because we have to do it three or four or five or more times a year. And for some reason or other, it never seems to get any shorter! Thank you.

Shane Carmody

OPENING ADDRESS

It is an appropriate day to commence a discussion on the challenges of peace operations because today is Remembrance Day – the day Australians around the nation and the world remember those who have died in war. It is a poignant reminder of the continuing relevance of peace operations.

Over the past months the Australian populations' attention has focused on two related security topics: international terrorism and weapons of mass destruction. So, when it comes to the security challenges of the 21st Century, peace operations are not currently at the forefront of the domestic and possibly the international debate. But the way circumstances are developing this is destined to change.

As you all know, discussion since 11 September has been about the threat posed by international terrorism. Tragically, the 12 October bombings in Bali saw this threat brutally realised within our own region. We now find ourselves in a situation long faced by other nations, one of bracing ourselves for senseless, unpredictable but devastatingly effective terrorist attacks.

These threats are underlined by the sinister fear of weapons of mass destruction. The Aum Shinrikyo sarin gas attack in a Tokyo subway in March 1995 was a stark forewarning of the possibilities of international terrorist organisations being armed with weapons of mass destruction. I would not be overstating the point if I said that defeating the threat of international terrorism and weapons of mass destruction is at the top of the Government's agenda.

Over the past month the Security Council debated Iraq's continual disregard of its resolutions. These deliberations were sometimes painful and protracted. But within this context the Security Council should and does remain the pre-eminent forum in which threats to international peace and security are debated and resolutions determined. That said, it is for others to judge whether the complex system of the UN is up to the task – or does it require fundamental change to meet the emerging complexities of peace and security situations? As we all know, it is a large and complex organisation which is difficult to change but which has changed a great deal when one considers its roots.

Of course, the *Charter of the United Nations* was drafted in an era of interstate conflict. Where the UN once dealt with peacekeeping operations aimed at impartially observing the implementation of an agreed peace between formerly warring states, during the 1980s and 1990s the UN was faced with conducting peace operations within ‘failed’ or ‘failing states’ where the breakdown in the rule of law had led to devastating humanitarian disasters. One just needs to look at Australia’s involvement in peace operations from Korea and the Middle East, to the more complex later involvements in places like Cambodia, Rwanda, Somalia and East Timor, to note this trend.

While the potential for conventional military conflict between states remains real in some parts of the world, not least in North Asia, the latter part of the 20th Century brought with it increased ‘intrastate’ and ‘failed state’ conflicts. With this change has come the need for the international community to respond to the tragic events.

Now this new century brings the greater challenges of transnational terrorism and weapons of mass destruction. The concept of ‘asymmetric threats’ – until recently a term used by a few strategists but now widely understood – is just one example of the potential to create a disproportionate effect through one single violent action. And the perpetrators do not observe the same rules as before.

With the threats of this new century one can also detect a significant shift in the policy debate, at least in the US. It now includes, for the first time, a tacit recognition of both the possible need for, and the legitimacy of, military pre-emption as a form of acceptable unilateral action. The legal implications of this are yet to be fully understood.

During the last few years, the UN and troop contributing countries responding to world events have been stretched to near breaking point. While we recognise that many of the recommendations of the *Brahimi Report* have been implemented, there is still much more to do. And as I indicated earlier, instigating reform in such a large and complex organisation is difficult to achieve.

At this point I should point out that as Australians we are quite rightly proud of MAJGEN Tim Ford who is with us today, of his immeasurable contribution to the reform process in the United Nations Department of Peacekeeping Operations during his term as Military Adviser in the UN. Similarly, we welcome MAJGEN Mike Smith, whose contribution to the pre-INTERFET and as Deputy Force Commander during UNTAET was absolutely first rate.

As the world changes so does the nature of peace operations. Never before has the rule of law on peace operations been more necessary. The UN’s Charter and the Chapters relevant to peacekeeping and peace enforcement were (as I said) drafted to respond primarily to an era of interstate conflict. So their

modern relevance must be tested, confirmed and if necessary altered. Multinational efforts to promote peace and stability will continue to be a major challenge for the UN and the international community in the 21st Century.

The way in which we as Member States respond to complex emergencies facing the world today will be our legacy. As such, what we do, or fail to do within our own Member States is important. We can seek to develop and promote strong and stable societies that enjoy the freedoms we enjoy, or we can watch from the sidelines as some states drift towards failure; and suffer the consequences.

You will be aware that the UN just passed the Iraq resolution.¹ Should Saddam Hussein continue to disregard Security Council resolutions, and weapons inspectors not be permitted unfettered access to possible WMD sites, an attack by the US and coalition forces is a very real possibility.

It is now clear that the terrorism emanating from Afghanistan was transnational in nature. Further, terrorist groups could establish in Afghanistan because of its failed state 'environment', which lacked the social, legal, welfare and governance structures that by their very existence seem to make it more difficult for terrorist activities to take root. Australia, along with a number of other nations, joined the US led coalition against terrorism in the pursuit of Al Qaeda under Security Council resolution 1368.² Subsequent to the collapse of the Taliban regime, the ISAF was established, also under a Security Council resolution.³ The situation in Afghanistan provides an example of how the Security Council mandated pursuit of terrorist organisations and the reconstruction of a failed or failing state can be conducted concurrently.

So, returning to Iraq, what would follow an event such as war? Can we separate peace operations from the war on terror? Where exactly is the distinction between conventional war fighting and peace operations? Are the lines becoming blurred? Are the two becoming linked? If so, should we deconstruct this linkage? If we were to do so, how would we hope to bring an end to terrorism that knows no rules and accepts no standards of civilised behaviour? The issues are complex, and no less complex when we consider that terrorism seems to thrive – or at least find sanctuary – where we have failed or failing states. We must act in concert to prevent social collapse and the advent of further violence. And we must prevent the creation of circumstances that sustain terrorism.

Maybe a starting place is in our own respective backyards. By this I mean that we need to look to our own societies. We must be confident that we in no way allow terrorist groups to take root in our countries or in places where we have

¹ SC Res 1441 (2002), 8 November 2002.

² SC Res 1368 (2001), 12 September 2001.

³ SC Res 1444 (2002), 27 November 2002.

influence. In some instances this will take considerable political will to achieve.

For Australia and the ADO, this Challenges of Peace Operations Conference comes at a timely juncture given the changes in our strategic environment over the two years since Australia's Defence White Paper was released. Whilst there is still considerable debate over the depth of change and many of these issues are still to be fully played out, there are implications for peace operations.

In response to these changing circumstances, the Australian Government has made various decisions including the deployment of ADF forces overseas, increases in preparedness and sustainability of forces, increases in ADF capabilities for counter-terrorism, increases in capability to respond to incidents including chemical and radiological threats and the provision of additional resources in the current financial year to fund new operations.

The White Paper also announced the Government's intention to regularly review the Defence Capability Plan, which covers Defence needs over the next decade, and the requirement for Defence to examine strategic developments on an annual basis to ensure that our defence policy settings are up to date. This Annual Strategic Review will cover: strategic developments in the world; their impact on the principles of our defence policy; their implications for our international defence engagement; review the state of key defence capabilities; and consider options for any changes in the priorities. It is virtually complete and makes it clear that in some ways, our circumstances have changed.

It states that:

- The ADF is both more likely to be deployed and more likely to be deployed well beyond Australia;
- We must be capable of responding to a broader spectrum of threats;
- Flexibility will be at a premium – with a capability rather than a threat based approach to planning; and
- The difficulty will be striking the balance between near term preparedness and longer term capability.

In short, whilst it confirms that the defence of Australia will remain the ADF's primary focus, we must prepare for conflicts beyond our region, while recognising that Australia's interests are global interests.

Over the coming days you will have a remarkable opportunity to explore and discuss issues associated with the rule of law on peace operations. In essence, what we are trying to do at this forum is to ensure that we can fully utilise the diversity of thought, experience and enthusiasm to deliver peacekeeping policy outcomes that effectively address changing world circumstances.

It is a challenging task because the issues are necessarily complex. I look forward to an open and constructive exchange of views at this Conference, one

that will leave us all with a better understanding of the issues and provide a sound foundation for our negotiations in the UN on peacekeeping reform.

Annika Hilding Norberg

THE CHALLENGES PROJECT

I INTRODUCTION

Through this presentation, I will seek to give you a general idea of the nature, scope and focus of the Challenges Project, and share some of our preliminary thoughts on the direction in which the Project will develop from here.

Since 1997, a growing number of organisations have come together on a regular basis, to bring to bear, in an informal and collegial setting, the collective knowledge and views of the participants on the challenges of peace operations as the world enters the 21st Century. Participants from some 55 countries and 240 organisations have contributed to the Project effort.

The objectives of the Challenges Project are twofold. The first objective is to explore and convey more effective and legitimate ways of dealing with regional conflict. The second objective is to foster and encourage a culture of cross-professional cooperation and partnership between organisations and individuals from a wide variety of nations and cultures.

In April 2002, we held the 10th Challenges Seminar Meeting at the UN headquarters in New York, where the Minister of Foreign Affairs of Sweden presented the Concluding Report of the first phase (1997–2002) on behalf of the Project Partners to the Secretary-General of the UN and the wider UN membership.

II THE CHALLENGES PROJECT

The objective of the Challenges Project Concluding Report was to make practical recommendations, to inform on current developments on principal issues in contemporary peace operations, and to contribute to maintaining the current momentum for enhancing the effectiveness and legitimacy of international peace operations, as generated by the *Brahimi Report*, and other related initiatives.

The overall methodology of the Project is to combine discussions on the theory and practice of peace operations with tangible issues of training and education. The approach of the Project is fourfold. The first approach is to organise high level seminars and conferences, each meeting with its own particular focus and framework. The reports of the previous seminars can be found at the Project website (www.peacechallenges.net). Second, we seek to involve civilian and military peace operations training organisations. Third, effort is made to increase the pool of peace operations literature in languages other than English; the Project Partners translated the Executive Summary of the Concluding Report into the six official languages of the UN. And finally, we seek to encourage exchanges and practical cooperation to take place within, but also beyond the Challenges Project.

There is a multitude of nations and actors engaged in peace operations around the world, and this diversity is reflected by the partnership of the Project. The Swedish National Defence College hosted the first workshop in 1997, and was the Coordinator of the first phase of the Project. Seminars and conferences have since been hosted by the Russian Public Policy Centre, the Jordan Institute of Diplomacy, the Institute for Security Studies in South Africa, the US Army Peace Keeping Institute, the United Service Institution of India, the Ministry of Foreign Affairs of Japan in cooperation with the United Nations Department for Peace Keeping Operations, the Pearson Peace Keeping Centre in Canada, the Armed Forces Joint Staff in cooperation with the Ministry of Foreign Affairs of Argentina, before the last meeting which was held at the UN headquarters in New York.

And now, we meet here in Australia. It is a great privilege as well as a pleasure, to meet here in Melbourne at the professional and kind hosting of the Asia-Pacific Centre for Military Law, with a view to tackle the challenges of peace operations and the rule of law. Given our host's solid commitment to addressing the challenges of peace operations, their dedication to the subject matter of the rule of law, and the professional manner with which the preparation of this Conference was done, I am indeed looking forward to the days ahead.

There have been a number of spin-offs, such as exchange programs between several of the participating peace operations training centres,¹ and the

¹ Participating training and education organisations: Asia-Pacific Centre for Military Law, Australia; Australian Defence Force Peacekeeping Centre; CAECOPAZ Armed Forces Peacekeeping Training Centre, Argentina; CENCAMEX Gendarmerie Peacekeeping Training Centre, Argentina; Commonwealth of Independent States HQ for Military Cooperation & Coordination; Folke Bernadotte Academy, Sweden; Pearson Peacekeeping Centre, Canada; Royal Police Academy of Jordan; South African Army War College; Swedish International Centre; United Service Institution of India Centre for UN Peacekeeping; United States Army Peacekeeping Institute; UN DPKO Training and Evaluation Service; Vystrel Peacekeeping Academy, Russian Federation; Zarqa Peacekeeping Centre, Jordan.

establishment of an early warning program for Africa. The generation of policy input has become an important part of the Project effort.

Finally, before moving to the future, let me highlight the multinational effort in the pooling of resources, which has been a prerequisite for our joint Project to evolve and develop. The main funders of the seminars have been the hosting Partner Organisations. In addition, the Partner Organisations are particularly indebted to a great number of organisations for their generous contributions, human and financial, to the Project effort.²

III THE FUTURE

Looking to the future, the Challenges Project has developed into a forum for informal and an open exchange of opinions, impressions, practical experiences and conceptual ideas. It has served as a sounding board for views away from the corridors of official meetings and has brought together for reflection a broad cross-section of military, police and civilian expertise. At the Challenges Partners meeting yesterday, we initiated discussions on ways in which to further strengthen and develop our joint effort and commitment to the aims and objectives of the Challenges effort.

The second phase of the Project will be coordinated by the Folke Bernadotte Academy, in cooperation with the Swedish National Defence College, Armed Forces and National Police Board, starting off by hosting a Challenges Partners Meeting and Workshop in Sweden in the spring of 2003.

During the second phase of the Project (2003–5), several Partner Organisations will take the lead in one subject area, coordinating research and activities undertaken by the Partner Organisations over the next three years. Biannual Challenges seminars focused on a particular dimension of peace operations will continue to be hosted by new, incoming Partner Organisations.

The strategic milestone of the second phase of the process is suggested to be the hosting of a major Challenges of Peace Operations Event in 2005. The overall objectives of such a meeting would be to present the findings of the Project Partners and Associate Partners and colleagues dedicated research and seminar work achieved by 2005.

² Foreign Ministries, Defence or Police Forces of: Argentina, Australia, Canada, India, Japan, Jordan, Norway, Russia, Sweden, United States of America.

Other sponsors: AusAID of Australia; Defence Corporate Services & Infrastructure, Australia; Hanns Seidel Foundation; Jordan Radio & Television Corporation; Kluwer Law International; London School of Economics & Political Science; Jordan Ministry of Tourism & Antiquities; NATO Information & Liaison Office; Pearson Peacekeeping Centre; Royal Court of Jordan; Susan & Elihu Rose Foundation; United Nations Department of Peace Keeping Operations; University of Melbourne. Project Coordination: Folke Bernadotte Academy in cooperation with the National Defence College, Armed Forces and National Police Board of Sweden.

The second Concluding Report will:

- Identify the challenges and assess the options;
- Present recommendations for the enhancement of global, regional and national capacities for conducting peace operations and related initiatives;
- Propose a comprehensive implementation strategy;
- Suggest the implications of the implementation strategy for Member States, international organisations and non-governmental organisations, in terms of concept, methods and not least, funding; and
- Seek funding commitments to enable the implementation of the recommendations as finalised during the deliberations of the concluding meeting.

As was observed by the Deputy Secretary speaking earlier, as the 21st Century evolves, the nature of the challenges will change and so we will need to respond, swiftly and appropriately, to these changes as they confront us.

Major General Tim Ford[†]

THE CHALLENGES PROJECT & PEACE OPERATIONS

I INTRODUCTION

As one who has been present at several of the Challenges Project seminars in the first series, and one who has been deeply interested in the recommendations, it gives me great pleasure to be with you here in Melbourne in my home country to participate both as a presenter and a host over the next couple of days.

As many of you know, I am a greater supporter of the Challenges Project, and in my former role as the military adviser in DPKO, I encouraged UN interaction with the Project partners. I consider this Project has already contributed significantly to the debate on peace and security by identifying and documenting the significant challenges of peace operations into the 21st Century.

The findings of the first series of the seminars were clearly outlined in the Concluding Report that was tabled at the UN Headquarters in New York on 25 April 2002. The process so far has also encouraged participation by a very wide range of Member States, peacekeeping institutions and individuals experienced in the conduct of UN and other peace support operations. The Project has been timely and responsive to developing concepts raised in the *Brahimi Report*, United Nations Special Committee on Peace Keeping Operations, and issues concerning peace and security.

I am delighted that the Project will continue so positively, both over the next few days and at future seminars. The continuation of the Project will, with the support of a wider group of partners, institutions and individuals, make a practical impact over the next three years on challenges facing peace operations. We look forward to the second phase of the Project culminating in a successful forum in 2005.

[†] The views expressed in this paper do not necessarily reflect the views held by the author in his official capacity.

II THE CHALLENGES PROJECT

I want to now move on to some comments on the findings of the Project from the first series, which were outlined so eloquently in New York by a fine peacekeeper and supporter, Lieutenant General Satish Nambiar. He summarised, on that day, the findings of phase one under a series of headings that were related to the chapters of the Concluding Report.

It is my contention that the response to those findings has already commenced in a very positive manner. This is demonstrated by the ongoing developments in New York and in the field. There have also been very positive responses by UN Member States, demonstrated by their willingness to support the Project.

Much of the ongoing activity in New York was recently outlined by the Under Secretary-General, DPKO in his very positive address to the Fourth Committee in New York in October 2002. In that address, he outlined developments that have occurred in the last 12 months, many of them directly related to the challenges outlined in the Concluding Report. I expect that the various DPKO representatives who are here will develop those themes further during this seminar.

A Security

One important challenge, where recent international events have influenced the world's response, is the changing concept of security. Shane Carmody has mentioned this already this morning and I am sure that the Chief of the Defence Force (Australia), General Peter Cosgrove, will touch upon this topic during his address tonight at the Conference dinner.

The horrific events of 11 September 2001 in the US, in Bali on 12 October 2002, and elsewhere over the last 15 months have given rise to much discussion on the most effective responses by the world to terrorism activities and their root causes. The topic of security against such activities will have a major impact on the approaches taken to peace and security issues in the 21st Century.

B The United Nations & Regional Organisations

There has also been much progress regarding the Challenges findings that there should be further development of the role of the UN and regional organisations and arrangements. I know that the UN has been active at both the executive and the staff level in developing cooperation and understanding between UN Headquarters and regional organisations.

The relationship between the UN and the African Union, for example, in supporting and responding to the various peace initiatives evolving in the Democratic Republic of the Congo and the Great Lakes region is but one

example. Another is the upcoming hand over of responsibilities in Bosnia-Herzegovina from UNMIBH to the European Union Police Mission.

I am also aware that before I left New York there were a number of developing dialogues with regional organisations and arrangements, covering a range of areas. In that respect, the establishment by NATO of a permanent military representative in the Department of Peace Keeping Operations is also now bearing fruit.

C Doctrine Development

The recommendations of the Concluding Report for doctrine development have also been addressed. A working group has been established in the Military Division to analyse the best approach to formalising UN peacekeeping doctrine. Other developments include: the preparation of the handbook on the United Nations Multi-Dimensional Peace Keeping Operations, soon to be released; the Headquarters Standard Operation Practices for UN Force Headquarters; and the sample Rules of Engagements. These developments are all examples of progress that has been made in initiating and developing peacekeeping doctrine over the last year or so. I encourage all Member States to be fully involved with the DPKO in the process of UN peacekeeping doctrine development over the next few years. I think it is an important area that we need to move forward on.

D Civil/Military Cooperation

The challenges of improving civil/military cooperation and coordination are also being addressed. DPKO has produced a policy document on this subject that has been extensively discussed within the UN organisation and with UN agencies. This will be the basis of further guidance to Member States on this important subject over the next 12 months.

E Legal Implications of Peace Operations

I will not dwell now on the progress made on the legal implications of peace operations. These will be extensively covered in later sessions of this Conference by a range of distinguished practitioners from UN Headquarters, field missions, peacekeeping institutions, legal experts and practitioners from Member States. I am sure there will be very many useful observations on the Conference theme concerning the rule of law and justice on peace operations, particularly in the syndicate discussions.

F Training

The need to significantly improve peacekeeping training and education was seen as highly important by the participants during the first series of the Challenges seminars, and it was marked down for further discussion in future

seminars. Again, I am pleased to note the significant achievements in the last 18 months in this area.

Most of you are aware of the structural development of the Training and Evaluation Service (TES) in the Department of Peace Keeping Operations. Many of you may have visited the revised TES web page¹ that has comprehensive information and links to UN national and regional peacekeeping centres. The web page provides a great deal of information about peacekeeping training and evaluation that is being conducted around the world.

You would also be aware of the standardised generic training modules that have been developed by TES and a number of people in this room have been involved in that project. This project, which has been the subject of consultation and input from Member States, has produced 16 training modules. These have been subsequently discussed at four regional seminars conducted in Finland, Kenya, Thailand and Chile. Representatives from over 75 training institutions attended the regional seminars. These modules are now being revised, based on Member States' input over the last six months.

The modules cover many of the areas raised in the Concluding Report. They include, to name just a few of the modules: safety and security; disarmament, demobilisation and reintegration; human rights; humanitarian assistance; gender and peacekeeping; health in peacekeeping; and media in peacekeeping operations. There are many other elements covered as well and they will be a very useful body of basic information.

In addition, progress has been made in UN training at the practical level. Mission training cells have now been established in most of the larger UN field missions, and a comprehensive policy on induction and in-mission training is being developed. The training cells are designed to assist induction and to support the ongoing mission training requirements identified by the special representatives of the Secretary-General, the heads of mission, by the Force Commanders and the police commissioners. Ongoing mission training is particularly important because the training environment may change as a peacekeeping operation develops through different phases.

III CONCLUSION

In conclusion, I contend that the Challenges Project has been a most useful forum to date to exchange opinions, discuss issues of importance to peacekeeping, and identify areas where more effort needs to be focused. It has also effectively supported the recommendations of the *Brahimi Report* and of the Special Committee for Peacekeeping Operations.

¹ The TES webpage can be accessed at <<http://www.un.org/Depts/dpko/training/>>.

Many of the findings of the first series of seminars are being addressed by the UN and Member States. I trust that the second phase of the Challenges Project, commencing today, will prove to be just as productive as the first undertaking. It is up to us to make it so, and I therefore encourage all of you to make a positive contribution.

Part II

STRATEGIC VIEWS OF PEACE OPERATIONS

William Durch[†]

CHALLENGES OF PEACE OPERATIONS*

I INTRODUCTION

I want to start by walking through different perspectives on the ‘rule of law’ that occur to me when I, as a non-lawyer, hear that phrase, to set the stage for later discussions. I will then summarise recent work on the underlying and proximate causes of protracted internal conflicts, because what starts a conflict affects how hard it will be for outsiders to help set it right afterward. I will connect that discussion to major structural lessons derived from studies of more than a dozen recent peace operations – studies that also attempt to measure the difficulty of post-conflict situations for peacekeepers. Finally, I apply the lessons from those studies to Afghanistan and its present peacekeeping requirements, arguing in doing so that post-conflict security is the basic prerequisite for establishing or re-instituting the rule of law.

II THE DIFFERENT WAYS IN WHICH WE THINK ABOUT ‘RULE OF LAW’

I would like to begin with a definition of the rule of law from Australian lawyer and peace operations veteran Mark Plunkett:

The rule of law is a notional social contract by people who consent to regulate their behaviour by rules which have the force of law, usually deriving their authority from the State.¹

So by this definition, the rule of law is a behaviour-regulating contract, requiring the consent of the people to be regulated, with regulating power delegated to the state, which issues authoritative rules, drawing on that delegated power. The concept of popular sovereignty drives this definition, and it also underlies most complex peace operations mandates and the peace

[†] The views expressed in this paper do not necessarily reflect the views held by the author in his official capacity.

* Editors’ note: The figures referred to in the text are compiled in an Appendix at the end of the paper.

¹ Mark Plunkett, *Justice Re-Establishment in United Nations Peacekeeping* (2000, unpublished manuscript).

agreements that they implement. As one participant in a recent conference on Transitional Civil Administration noted, 'The UN does not go into a country as a value-free organization. It [represents values such as] freedom from torture, freedom from arbitrary death and imprisonment.' Indeed, it represents the UN Charter's purpose 'in promoting and encouraging respect for human rights and for fundamental freedoms for all.'

There are several dimensions of 'rule of law' consistent with this definition: as societal foundation or framework, as order or predictability, as due process, as justice, as code, as enabling instructions, and as accountability. I would like to discuss each briefly, in turn.

A ROL as Societal Foundation or Framework

In this sense, implementing ROL lays a foundation for citizen-based sovereign authority, for sound administrative practice, and for treatment of citizens by government in accordance with internationally recognised principles and internationally accepted standards.

B ROL as Order or Predictability

ROL as order refers to a society in which agreed rules make life predictable, and there are advantages for everyone in abiding by those rules. In their daily lives, people can focus on things beyond personal survival and how to navigate safely from one place to the next. At a minimum, a complex peace operation should be able to promote such order.

C ROL as Due Process

The order-generating rules within the foundational framework must be implemented according to agreed procedures. The actions of those who wield coercive state power cannot be arbitrary but instead must be governed by the rules of the process, and the exercise of power must be truncated if those rules are violated. That is, beyond assuring orderly law enforcement procedures, due process is a means by which the effective rights of the accused can and have been broadened and protected over time.

D ROL as Justice

Not only must all persons be accountable before the law, they must be equally accountable, whether private citizen, corporate officer, or government official. In other words, ROL must be just, or fair. Giving all citizens 'equal protection of the laws' is the objective of the 14th Amendment to the US Constitution, for example, although making it work in practice has taken more than a century of trials and errors. The difficulty of achieving equal protection for all citizens before local courts in Kosovo after just three years of international supervision is thus unsurprising.

In addition to equal protection, distributive justice in some form is likely to be the objective of one or more parties to a civil war. The values to be redistributed may be quite tangible – for example, control of territory, as in Western Sahara, Kosovo, Palestine, or Bosnia – or it may involve issues of political power, economic power, or political rights – as in Angola, Cambodia, Sierra Leone, Mozambique, or El Salvador.

The mechanisms of post-conflict transitional justice also fit under this dimension of ROL, from war crimes trials to truth and reconciliation commissions and other, less formal mechanisms that aim to produce legal, political, and social closure in war torn societies.

E ROL as Code

Moving from concepts, processes, and objectives of ROL to content: what does the law require or proscribe? How does it reflect the goals of society? Did it reflect the goals of only some segments of society and was that a cause of war? How has the course of the conflict and the means by which it was ended – by negotiation or imposition – affected the acceptability of pre-war legal codes among various fighting factions or segments of society? What elements of local law – even if locally accepted – cannot be enforced by an internationally mandated peace implementation operation because they violate international norms?

1 An Interim Legal Code for Transitional Administration Missions

An early question faced by UN operations in Kosovo and East Timor was one of applicable law: which legal code, or whose code, should these missions with executive authority apply? Both missions appealed to the drafters of the *Brahimi Report* to address this issue and to weigh the possibility of creating an Interim Criminal Code and Code of Procedure that could be used by international missions with executive authority in the crucial early months of their deployment, and to which international contributors could be trained in advance. Such a code could be supplanted by local code and procedure as post-conflict law enforcement infrastructure was rebuilt. Without an interim code in hand, any international mission charged with post-conflict law enforcement will be unable to rise above ‘ad hocery’ in the implementation of its mandate. Legal professions spend many years training their members to be competent in the laws of their own lands; indeed, in bits of the law applicable to bits of their lands. We cannot expect international personnel, however skilled, to absorb local law and procedures in a matter of weeks. In a new mission with executive authority, order must be maintained, miscreants detained and processed, while international legal standards are met.

The *Brahimi Report* requested a feasibility study from the UN, which replied in the negative regarding the criminal code but offered to look at a code of procedure. Responsibility for that effort moved to the office of the United Nations High Commissioner for Human Rights in mid 2001 but the

Peacekeeping Support Account posts requested to support work in this area were not approved; as far as I know, there official matters sit at present.

2 *The Potential Value of an Unofficial 'Interim Code'*

While the Brahimi effort was underway, staff received a concept paper for an unofficial project on an interim legal code drafted by Christopher Lord, then at the Institute for International Relations in Prague, which incorporated extensive comments by Bakhtiyar Tuzhmukhamedov, and which was cited in the *Brahimi Report's* reference list.² Last year, recognising the continuing need for an interim code, the US Institute of Peace launched a project to compile one, working initially with small international working groups to create a basic draft, cognisant of different traditions – for example, common law and civil law – and cognisant as well of the potentially crucial role of customary local law. The Institute plans to vet its draft work widely this year.

An unofficial code that conforms to recognised principles and accepted standards of international law could be considered legitimate; that legitimacy, and the credibility of the effort, could be increased by means of wide vetting of draft materials to promote buy-in from potential users and endorsements from the International Bar Association, International Legal Commission, and national bar associations. If it is widely vetted and available, such a code might be used. If widely accepted as a potential tool of peace operations, it could be incorporated into the mandates of future operations with civil administration responsibilities.

Potential contributors to international missions could use it to train their people to a common expected standard of law and procedure, or to accepted variations thereon, allowing for the differences between legal traditions, including the difference between Western traditions and legal systems with other origins, such as *sharia* – although many Muslim states have ratified international instruments such as the *International Covenant on Civil and Political Rights*, indicating grounds for common effort.

The notion of common legal guidelines, or a framework for peace operations, was also addressed extensively in the 'Legal Dimensions' chapter of the Challenges Project Phase 1 Concluding Report. It offers a good foundation on which to build in this second phase.

F ROL as Enabling Instructions

Peace operations themselves operate under ROL. Their mandates are enabling instructions. Sources of mandates include the Security Council, or regional arrangements. UN Charter art 53 seems increasingly honoured in the breach or

² Christopher Lord, 'Advisory Note for Stimson Center/United Nations Panel on Peace Operations', Prague Project on Emergency Criminal Justice Principles, Institute of International Relations (27 June 2000).

made good after the fact, however, as regional actors or coalitions are sometimes leery of the control that a Security Council resolution gives to its veto wielding permanent members.

At the operational level, implementing instructions include Rules of Engagement (for military forces), Rules on Use of Force and Firearms (for Police), and standard operating procedures for other mission personnel.

G *ROL as Accountability*

Finally, I would like to address ROL as accountability. The *Convention on the Privileges and Immunities of the United Nations* (1946) conferred effective legal immunity upon UN officials and UN experts on mission long before anybody thought that UN personnel might be riding into town with a 9mm Glock strapped to their hip, and with full executive authority over the citizens of a territory. It has also long been the practice that Status of Forces and Status of Mission Agreements give international mission members immunity from local law enforcement. But the expected trade off is that mission members behave in accordance with the same high standards that they seek to leave behind in the mission area when their mandate is finished. UN Secretary-General Annan's Bulletin that charges all UN mission members to adhere to International Humanitarian Law and the laws of armed conflict re-emphasises that deal, and the *Rome Statute of the International Criminal Court* now provides a standing venue in which persons who commit war crimes or crimes against humanity may find themselves hauled before the bar if their own states fail to prosecute them. The lengths to which some governments have gone to ensure immunity from ICC jurisdiction suggests, however, that implementation of the *Rome Statute* will be a long and slow process.

There will always be some tension between foreign personnel based or deployed in a third country (especially military or other armed personnel), and that country's government and inhabitants. In particular, when those troops, police, or international civil servants are providing basic order or standing in for government until local government is rebuilt, it is crucial that the local populace see that their temporary overlords are held to account for what they do. It is therefore ironic that those responsible for seeking to implement democracy in a war torn society may do so essentially by fiat, without effective local counter. Local consultations, yes; but accountability, not so much.

More troubling are the contradictory lessons presented to host country elites when an operation that is intended to implement an agreement to dismantle local impunity operates with *de facto* impunity itself. Indeed, the inability to effectively discipline its own staff is one reason, among many, why the UN Secretariat may be reluctant to contemplate creation of a standing UN police force for use in peace operations, even though everyone agrees that police are in short supply, and few are trained and equipped for work in foreign countries.

I do not see an immediate way around this problem, even if the problems of individual accountability and discipline for UN and other international personnel were solved tomorrow. Every international organisation is an association of states, and the interests of states are predominant; one of those interests is keeping the nation state at the top of the international food chain and guarding against its supersession by some higher governing structure. You do not give substantial standing operational capacity to something that might later evolve too much independence.

So to deal with internal conflicts and war torn societies, the international community will continue to work with an imperfect set of international arrangements. To the extent that the Challenges Project can make them better, then, as the Aussies say, 'Good on ya'.

If we hope to implement ROL in post-conflict settings, it is crucial that we understand the origins of conflicts and what it takes to establish or restore ROL in a war torn society. For the remainder of my time, then, I want to turn to the sources and structures of internal conflicts, address key lessons we have learned about peace implementation in war torn societies, and apply them to post-Taliban Afghanistan, where a relatively massive international experiment in restoring ROL is underway using less direct means than in Kosovo and Timor Leste.

III SOURCES AND SUSTAINERS OF PROTRACTED CONFLICT

Protracted internal conflicts have both underlying and proximate causes. The underlying causes included malformed political structures, poverty, and/or heavily skewed distributions of wealth and privilege. Proximate causes, or the triggers of violent internal conflicts, can come from inside or outside a country, and from elite or mass action. Conflict may also derive from a particular mix of ethnicity, poverty, disposable resources, and predatory leadership. I want to review each briefly, in turn, but start with a review and projection of humanitarian emergencies by the US National Intelligence Council (or NIC).

A Current and Potential Humanitarian Emergencies

The NIC's chart (Figure 1) does not distinguish natural from human-caused disasters. A glance at the map, however, shows that the great majority of ongoing emergencies involve protracted internal conflicts, as do most of the emergencies presently in transition back to normalcy. Colombia is the one ongoing emergency in the Western hemisphere; Asian countries with ongoing emergencies in at least part of their territory include Indonesia, North Korea, Sri Lanka, Afghanistan, Tajikistan, and Iraq. Chechnya is a red dot in Southern Russia.

Sub-Saharan Africa has a chain of humanitarian emergencies from the Sudan south to Angola, which perhaps now should be re-categorised as 'transitioning', since its war appears to have ended, although its humanitarian

situation is as dire as ever. Northern Uganda, Rwanda, Burundi, and the Democratic Republic of Congo – the Great Lakes region of Africa – occupy the centre of the emergency belt. Sierra Leone, which should also be re-designated as transitioning, maintains a fragile peace and an equally fragile new political consensus with the help of UN peacekeepers and British military trainers. The Horn of Africa is considered to be in transition, as are the Balkans.

Areas rated most at risk of becoming new emergencies when this chart was published in August 2001 included Zimbabwe, Ivory Coast, Nigeria, Kenya, and Kashmir. Ivory Coast has since been enveloped in civil war, Nigeria in ethno-religious violence, Zimbabwe in political repression that has worsened food shortages, and violence in Kashmir increased sufficiently to cause India and Pakistan, for a time, to mobilise and deploy their ground forces in anticipation of conflict.

B Political Structures and Societal Conflict

The proposition that democracies do not wage war against one another, known as the ‘democratic peace’ thesis, does not tell us much about the tendencies of democratic states to wage war against non-democracies, and tells us even less about the experiences of states as they become democratic. Figure 2 compares the relative likelihood of ‘major episodes of armed societal conflict’ (Y-axis) over a 45-year period (1955–1999) to a government’s rating on a scale (X-axis) that ranges from ‘fully institutionalized autocracy’ on the left to ‘fully institutionalized democracy’ on the right.³

Look at the top curve in Figure 2, which is the aggregate likelihood of coups, armed conflict, and state collapse. It is relatively low toward the left side of the chart, among fully institutionalised autocracies like Saddam Hussein’s Iraq: these regimes tend to keep a tight lid on their populations and their elites. The likelihood of such events is also low among the fully institutionalised democracies that populate the right side of the chart. It is substantially higher, however, in the middle range, among states neither fully autocratic nor fully democratised. Likelihood climbs sharply as autocracy weakens – as the political lid comes off and old ruling structures begin to lose power – then it declines steadily as democracy is more fully institutionalised.

Note that this chart only depicts the risk of state failure events for a given type of polity. It does not purport to trace the level of conflict over time as a state or group of states evolve toward democratic rule. Still, it shows that the middle ground – the transition zone – can be a dangerous place, and it is largely within that zone that peacebuilders work to build ROL.

³ Monty G Marshall, ‘Regime Authority, Opportunity, and Outbreaks of State Failure Events’, paper presented at the Conference on Conflict Data held at Uppsala University, 8-9 June 2001. Chart reprinted by permission of the author. An ‘event’ is added to the database if it reduces a state’s scale rating by at least six points or involves armed conflict that directly results in at least one thousand deaths.

C Underdevelopment and Societal Conflict

Poorer countries, on balance, have experienced substantially greater societal conflict than have the wealthiest countries. In Figure 3, data from Ted Robert Gurr and company at the University of Maryland indicate that a little development does not substantially reduce – and may increase – the incidence of conflict. The poorest countries have had a hard time extricating themselves from conflict in the 1990s.⁴ The wealthiest developing countries largely resisted the upward trends in societal violence until the latter 1970s but then experienced much greater upheaval for two decades.

D Proximate Causes of Conflict

Countries at risk of violent conflict outnumber those actually wracked by it. Countries with similar underlying political and economic circumstances may follow very different paths. What differentiates them? In the conflict group, something has triggered the violence. Michael Brown offers a helpful typology of external and internal, mass and elite-based triggers.⁵ External causes of conflict include war and unrest nearby ('bad neighbourhoods'): war in the Democratic Republic of Congo was triggered by unresolved conflicts in Uganda, Rwanda, and Burundi that had spilled into its territory. External causes also include 'bad neighbours,' leaders like Charles Taylor of Liberia, who instigated and supported diamond-looting activities of the Revolutionary United Front in Sierra Leone to finance his own insurgency. Bad domestic problems such as a currency collapse or hyperinflation can trigger mass violence, while power-hungry or avaricious leadership ('bad leaders' such as Slobodan Milosevic) can push a country into ethnic or religious violence (Rwanda, Bosnia, Kosovo, or Nigeria).

Paul Collier at the World Bank has emphasised a particular version of the 'bad leaders' model, stressing the extent to which internal wars feature predatory faction leaders who amplify social grievances to generate popular support for violence whose true aim is to generate war booty in the form of disposable black market resources. 'Grievance', Collier argues, 'is to a rebel organization what image is to a business.' Predatory behaviour finances the conflict and 'the feasibility of predation ... determines the risk of conflict.'⁶ Disposable black market resources vary from country to country (diamonds in Sierra Leone and Angola; gold, diamonds, and coltan in the Congo; timber and gems in Cambodia; opium in Afghanistan; cocaine in Colombia).

⁴ Ted Robert Gurr, Monty G Marshall & Deepa Khosla, *Peace and Conflict 2001* (2001) 13, Figure 5b.

⁵ Michael E Brown, 'The Causes and Regional Dimensions of Internal Conflict', in M Brown (ed), *The International Dimensions of Internal Conflict* (1996) 579.

⁶ Paul Collier, 'Economic Causes of Conflict and Their Implications for Policy', in Chester Crocker, Fen Hampson & Pamela Aal (eds), *Turbulent Peace* (2001) 143-62.

Collier is not arguing that all internal conflicts are based on artificially magnified or ‘subjective’ grievances. But predatory faction leaders are common enough that peacemakers and peace implementers should beware that the faction(s) across the negotiating table may represent politicised gangs with little interest in seeing the conflict end, because that will dry up their income stream.

War nonetheless generates real grievances, and these must be addressed in any peace settlement. Long internal conflicts normalise violence as a means of settling disputes. That habit takes time to break and is one reason why the security elements of international peace operations need to be robust. Diaspora populations, which may have helped fund the conflict, can also help to break the cycle of conflict and contribute needed skills to peace building if they can be coopted into the peace process. Collier warns, finally, that the impact of ethnic dominance, which he defines as a single group making up 45 to 90 per cent of the population, on propensity for conflict is the hardest variable to mitigate because population proportions are essentially fixed.

E Lessons from Recent War-to-Peace Transitions

Two studies in the last five years have attempted to take a systematic look at post-conflict peace operations and what it takes to increase the likelihood that a war torn society will transition successfully to a sustainable peace (that is, one maintained by largely local effort once peacekeepers leave). DFI International did a study, in which I participated, for the Pentagon’s then Office of Peacekeeping and Humanitarian Affairs. Stanford’s Center for International Security and Cooperation teamed with the International Peace Academy (IPA). Both studies looked at more than a dozen operations.⁷ Both concluded that the attitudes of local faction leaders and their propensity to act as ‘spoilers’ of the peace process – to defect from that process and return to violence – and the actions of neighbouring states to support the peace process were keys to the success of peace implementation.

Whether local leaders cooperated with the process depended in part on whether they had access to black market resources (‘spoils’) to fund and equip their forces. If those forces were not demobilised, would-be spoilers could use them to take the country back to war, as did Jonas Savimbi in Angola and Foday Sankoh in Sierra Leone. Neighbouring states could derail a transition if they bought or transhipped such commodities, were hostile to peace, or were failing

⁷ Barry M Blechman, William J Durch, Wendy Eaton & Julie Werbel, *Effective Transitions from Peace Operations to Sustainable Peace* (1997), prepared for the Office of the Assistant Secretary of Defense for Strategy and Resources, Office of Peacekeeping and Humanitarian Affairs. For a summary of the CISAC/IPA study, see Stephen John Stedman, *Implementing Peace Agreements in Civil Wars: Lessons and Recommendations for Policy-makers* (1991), available at <<http://www.ipacademy.org/Publications/Publications.htm>>. For the full study, see Stephen John Stedman, Donald Rothchild & Elizabeth M Cousens (eds), *Ending Civil Wars* (2002).

themselves. Finally, great power political and onsite support of the peace process was essential for success, especially in difficult cases.

Both studies attempted to define the relative difficulty of the conflict situations into which peace operations are deployed, the better to gauge the level of effort needed in peace implementation. The DFI effort rated war objectives and factions' motives, state of governance at the end of fighting, the scope and objectives of the peace process, the willingness of faction leaders to compromise in the interests of peace, and the roles of neighbouring states and great powers. These ratings, on a scale of plus to minus five, were intended to reflect the situation in the country at the time peacekeepers deployed. Average scoring on the eight variables became that situation's 'difficulty' rating.

The DFI study separately rated the effectiveness of its cases' transitions from war to peace, measuring whether the old conflict flared up again, whether civil order was maintained, and whether the country held national elections widely recognised to be free and fair, after peacekeeping forces were withdrawn. Figure 4 plots the case scores on difficulty against the scores on effectiveness of transition. Added to the cases contained in the 1997 study are East Timor, Sierra Leone, Kosovo, Democratic Republic of Congo and Afghanistan. I have rated the difficulty of these cases and used those scores to estimate, in rough terms, the likely effectiveness of these cases' transitions from war to peace. I want to track one of those cases – Afghanistan – in greater detail, using both the DFI and the Stanford models.

IV APPLYING LESSONS LEARNED TO AFGHANISTAN

Based on the DFI difficulty measure, prospects for peace were nil when the Taliban and al Qaeda dominated Afghanistan. United Nations Special Representative Lakhdar Brahimi resigned in frustration in 1999 at the intransigence of the various factions, who had pounded much of the country into rubble by way of trying to seize control of it after Soviet forces withdrew – and the fact that they were all trying to seize control rather than break the country into pieces was the only positive element in the situational rating. Otherwise, the ethno-religious motivations of the combatants, the collapse of government, the lack of a viable peace process, the unwillingness of factional leaders to compromise, the destructive meddling of its neighbours, and the relative indifference of the great powers to the country's plight all made Afghanistan one of the most difficult conflicts to settle in the entire world.

Once the Taliban and al Qaeda were ousted from power, Afghanistan's prospects for peace improved. It had great power attention and the neighbours cleaned up their acts a bit. The remaining factions were willing to sit down at the Bonn Conference in late 2001 and work out a plan for an eventual peace settlement, and a process for getting there. The Bonn process has thus far produced an interim government in Kabul, a quasi-elected grand council or Loya Jirga, which appointed a two-year transitional government, and a

timetable for producing a new constitution, judicial system, police force, army, and national elections by mid 2004. All of these changes altered the situation in Afghanistan sufficiently to give the country a chance for peace.

A Effective Transitions: Applying Critical Indicators to Afghanistan

Figure 5 reflects only what a peace operation faces as a ‘going in position’. Figure 6 shows a range of military, political, economic, and social objectives that need to be pursued by an operation if a transition is to succeed. Part of a larger group of 42 variables compiled from the literature on peace building and interviews with practitioners, these 15 correlated most highly with DFI’s measure of sustainable peace in the 13 cases studied.⁸

On most of these measures, Afghanistan rates poorly. Although it has a large demining program, which has been ongoing for some years, coordinated by the UN, and respect for human rights has improved somewhat since the Taliban lost power, on all the other indicators the country has a long way to go.

B Stanford/IPA Study: Measures of Difficulty

The Stanford/IPA emphasised several situational risks in common with the DFI: secession as a goal of one or more parties, governmental collapse, lack of a peace agreement or one forced on the local parties, the existence of likely spoilers among the local parties, and hostile neighbouring states. In addition, the Stanford/IPA study stressed the danger of disposable (black market) resources, situations with more than two fighting factions, and wars involving more than 50,000 soldiers. Of these eight variables, spoilers, hostile neighbours, and spoils showed the greatest relevance to the success or failure of a peace process.

The Stanford/IPA study also found great power commitment to a peace process to be a critical indicator of success, especially in the more difficult cases. Figure 7 depicts difficulty versus great power commitment for the cases that Stanford/IPA studied. Peace operations in relatively less difficult cases with great power commitment tended to succeed (upper left quadrant in Figure 7). Operations in more difficult situations had a chance to succeed with great power support (outcomes were mixed) but were quite likely to fail without it.

Afghanistan is one of the tough cases; it has a chance to make the transition to peace if the US and other great powers remain engaged on its behalf. If they

⁸ They are also highly inter-correlated, meaning that they explain overlapping portions of the dependent variable, sustainable peace. The study used cautious multi-stage multiple regression analysis techniques to sort out the overlaps and settled on a combination of three variables as the best predictors of sustainable peace: willingness of the local faction leaders to compromise; degree to which the fighting factions had been demilitarised; and the state of local governance when a peace operation ended.

pull away, then, based on experience in other cases and from its own history, it is likely to slide back into conflict.

Great power attention remains focused on any given international crisis for some finite period of time before diversion to the next crisis. Afghanistan has had close US attention for a year but first the Middle East and then Iraq, have drawn US attention and resources away. Capacity building programs and legitimate revenue streams for the new government need to be institutionalised before political attention wanes.

C Security in Afghanistan: Why We Should Care

First, war torn Afghanistan destabilises Central and South Asia, and war-weary populations support extreme alternatives if they offer the only prospect for restoring order; in the 1990s, the Taliban were the alternative. Second, countries just past civil war tend to fall back into war and great power engagement tends to reduce the relapse rate. Third, stability and security are prerequisites for reconstruction, both to protect what has been rebuilt and to reassure donors. Fourth, Afghanistan at war became the principal supplier of regional heroin. Warlords can exact 'taxes' from opium distributors or get into the business themselves. Either way, the opium trade helps to finance several regional power centres at the expense of central authority.

Poppies are a drought-tolerant crop and, in a country afflicted by drought whose agricultural infrastructure has been all but destroyed and whose farmers are scrabbling for a living, the high economic returns from planting poppies are unbeatable, and it can be harvested three times a year.

Production of opium poppies and opium gum, the raw material for heroin, peaked in the latter half of the 1990s before the Taliban suppressed it. United Nations Drug Control Program estimate of Afghanistan's fresh opium production in 2000 (depicted in Figure 8) was about 3,300 tons. The total plummeted to 185 tons after opium production was banned in Taliban-controlled areas of the country in 2001. Estimated production for 2002 has increased once again to about 3,700 tons. The UK has taken the lead among international donors for anti-narcotics programming in Afghanistan.

Figure 8 shows the main poppy-growing areas in Afghanistan as of 2000, according to UNDCP; the larger and darker the circle, the larger the area under cultivation.

Security in Afghanistan is reasonably tenuous and there are signs that forces opposed to the peace process are regrouping. Certainly the record of incidents since the convening of the Loya Jirga in June that have made the international press wires suggests that stability is at best fragile. Figure 9 summarises those incidents from early June through the middle of October 2002. It shows separate listings for discoveries and for usage of guns, bombs, and rockets and for incidents of interfactional fighting. Bombs and bombings have focused on

the Kabul area; rocket caches and rocket attacks have been concentrated in the Southeast, along the border with Pakistan, suggesting that these arms are coming across the border, through areas aggressively searched by coalition troops over the past 10 months.

There are two struggles going on in Afghanistan. The first is the war waged by Operation Enduring Freedom (OEF) and the international coalition against al Qaeda and the Taliban leadership. The second is the struggle for control of the country that predated the Taliban and even predated the Soviet intervention.

Coalition intervention has driven the Taliban out of Afghan politics; they are not part of the peace process initiated in Bonn, which is about allocating power among the parties remaining in an effort to divert the unfinished second struggle into more peaceable political channels. Unless this political transition is successful, the goals of OEF will not be met because Afghanistan will likely descend into cycles of violence once again.

Figure 10 relates most of the principal forces working for and against security in Afghanistan over the next two years to the political timeline that runs along the horizontal axis. At the April 2002 Geneva Pledging Conference for Afghan national forces, the Interim Administration proposed a 60,000-strong army, 12,000-strong border security force, 8,000 personnel for the air force, and 70,000 police.⁹ The US has the lead for training the armed services, Germany for training the police, Italy for the justice system, and the UN for demobilisation.

OEF also has roughly 10,000 troops inside Afghanistan plus air support and logistics elements posted outside of it. The International Security Assistance Force (ISAF) patrols Kabul and its environs.¹⁰ The weapons, training, mobility, and communications capacity of OEF and ISAF make these forces, soldier for soldier, much more effective than local fighters, especially when air power (for transport and strike) is taken into account. Figure 11 reflects this difference by illustrating OEF and ISAF with 'capacity bands' rather than lines.

National forces loyal to the central administration may be the best way to secure the two-year transition to a new constitution and government, but at projected rates of training the Afghan Transitional Administration will have, at the end of the two-year transition period, less than a third of the military forces it seeks.¹¹

⁹ US Department of State, Office of International Information Programs, 'Transcript: Afghan security needs discussed by donors in Geneva' (3 April 2002).

¹⁰ Eric Schmitt & Thom Shanker, 'US Sees Hunts for Al Qaeda in Pakistan Lasting into Fall', *New York Times* (New York), 6 May 2002, A1.

¹¹ Situation in Afghanistan, Testimony to the Committee on Foreign Relations, United States Senate, 107th Cong. 2d sess., 26 June 2002, (Deputy Secretary of State Richard Armitage & Deputy Secretary of Defense Paul Wolfowitz).

There may be 70,000 to 200,000 fighters loosely organised in local and regional militias.¹² Although demobilisation of present informal forces is recognized as essential, and failure to demobilise existing fighting forces as new national forces are built has threatened or destroyed other countries' transitions from war to peace, there is little indication of progress toward demobilisation in Afghanistan so far.¹³

D Issues Related to the Afghan National Army and Police Force

Clearly, a self-sustaining Afghan national security capability is needed but how is security to be provided while that capacity is slowly being built? What happens after basic training? How can new forces best demonstrate their utility to the country?

Present plans would deploy the new army first in Kabul. This risks competition with or cooption by Northern Alliance forces based there and led by the current defence minister, Marshall Fahim. OEF and ISAF make better transitional 'balancers' in Kabul.

Instead, send most of the new forces outside Kabul. Put greater emphasis on training border security forces and decide whom they report to (defence or interior ministry). Have new army units patrol main roads to reduce informal 'taxation' and facilitate commerce, working in tandem with an expanded ISAF or one closely advised by US forces, a point to which I will return momentarily.

Germany is the lead nation for reconstructing the Afghan national police. It is rebuilding police infrastructure in Kabul (police headquarters, training academy, and hospital). It is doing field training in the Kabul area with mobile training teams, and seeks partner nations to expand similar programs into the provinces. Unlike the army, there is no established build rate for national police. Total cost of restoring police capability nationwide is estimated at USD 170 million, not including police salaries. The United Nations Law and Order Trust Fund for Afghanistan is supposed to provide salary support. Budgeted at USD 65 million over two years, it had received just USD 4 million as of October 2002, with a total of USD 12 million pledged.

Governors and other local and regional leaders, meanwhile, are building their own forces.

¹² International Crisis Group, US Department of State, 'Afghanistan Briefing: The Afghan Transitional Administration: Prospects and Perils', 30 July 2002, available at <<http://www.crisisweb.org>>.

¹³ Stedman, above n 7; Collier, above n 6; and Mike Collett-White, 'Disarmament in Volatile Afghan North Fails Again', *Reuters*, 18 November 2002.

E Security Options While National Forces Reach Initial Operational Capacity

What are the options for closing Afghanistan's security gap in the near- to mid-term? US forces in the country appear to be doing more now in support of what the Pentagon calls 'stability operations,' as conditions of the 'first war' permit. US forces could, in principle, quickly strike more deals with local parties to provide local security; promote stability in exchange for reconstruction cash; and monitor local forces' behaviour with US advisers. Where those forces belong to governors recognised by the Islamic Transitional Government, US efforts could reinforce the relationship.

An expanded ISAF would be the next interim security option for Afghanistan. With political go-ahead and logistical support from the US, it would take from weeks to months to deploy – weeks if reinforcing Kabul, where the political and logistical groundwork has been laid, and months if deploying elsewhere. Direct, even if token, US participation on the ground, perhaps drawing upon forces already deployed, might be needed to induce other countries to contribute troops.

NATO members with forces committed in the Balkans have been reluctant to volunteer additional forces for Afghanistan, both because of commitments in the Balkans and very likely because of the looming conflict in Iraq. However, the North Atlantic Council recently voted to cut forces in the Balkans by 11,800 troops over coming months.¹⁴ That reduction is just shy of the number of additional troops (13,500) that I have elsewhere recommended be added to the international security assistance effort in Afghanistan (for a total of about 18,000). The added troops could fill a key security gap and serve as models, mentors, and monitors for the new national forces outside Kabul. It could perform tasks that help knit the country together and build its financial base (deterrence of highway banditry and private taxation, and generation of customs revenue for the central government).¹⁵

UN management of a peace operation in Afghanistan should not be ruled out as security conditions in Afghanistan stabilise but Afghanistan would be a quantum leap in size and difficulty by comparison to other military missions that the UN has run.

V THE 'LONG POLES'

Several things have to happen before the international security presence in Afghanistan could be increased. First would be a US decision that something like the outlined force needs to be deployed, with US elements to 'prime the

¹⁴ David Lawsky, 'NATO to Reduce, Re-Organize Balkan Forces', *Reuters*, 10 May 2002, 0746 EST.

¹⁵ For detailed discussion, see W Durch, *Security and Peace Support in Afghanistan*, 31 July 2002, available at <<http://www.stimson.org/fopo/pubs.cfm?ID=58>>.

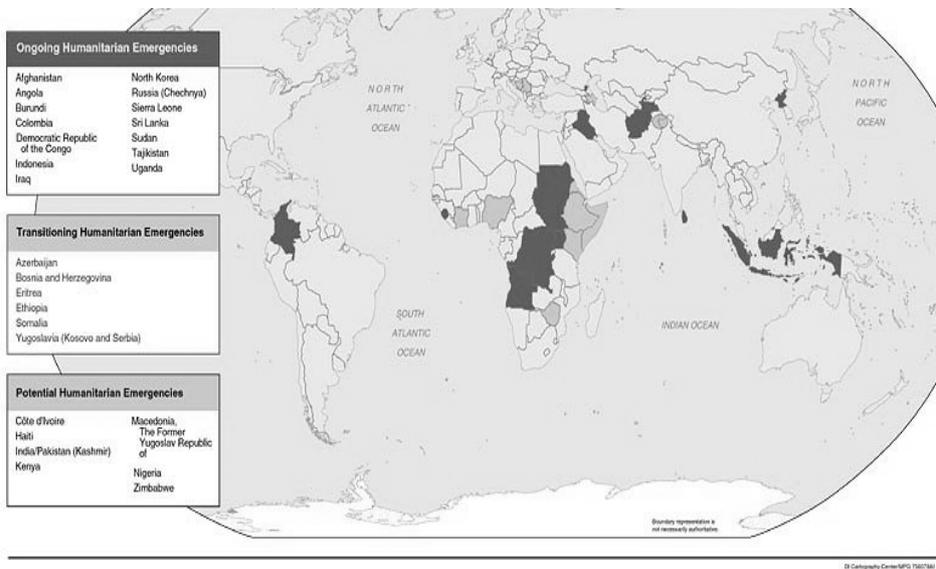
pump.’ US Defence Department leaders seem to have come around, in late summer and early fall, to the notion that additional security for Afghanistan is needed, but do not seem willing to commit US resources to an expanded international force, or to lobby US allies to contribute.

Germany and the Netherlands have agreed to take over command of the current ISAF when Turkey’s lead nation commitment expires on 20 December 2002, but only for six months. Yet it is likely that peacekeepers of whatever stripe will be needed in the country throughout the two-year transition period.

Barring expansion of ISAF, small teams of US special operations forces are likely to substitute, work as advisers with new national army, and be joined by additional civil affairs troops and aid officials. This may keep a lid on factional fighting but will need to be closely coordinated with other reconstruction efforts, road building in particular. The main risk is that, having gathered responsibility for interim security in Afghanistan onto its own shoulders, US attention and resources devoted to that task and to building ROL in Afghanistan will be diverted elsewhere before the country is capable of sustaining peace with its own resources.

Appendix of Figures

Figure 1: Global Humanitarian Emergencies, 2001¹⁶



¹⁶ US National Intelligence Council, *Global Humanitarian Emergencies, 2001* (September 2001).

Figure 2: Likelihood of ‘State Failure Events’

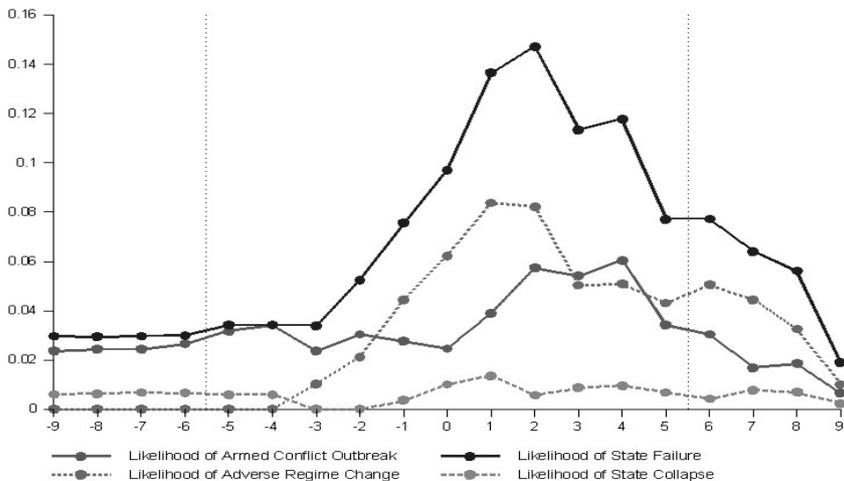


Figure 3: Magnitude of Societal Warfare Compared to Societal Capacity

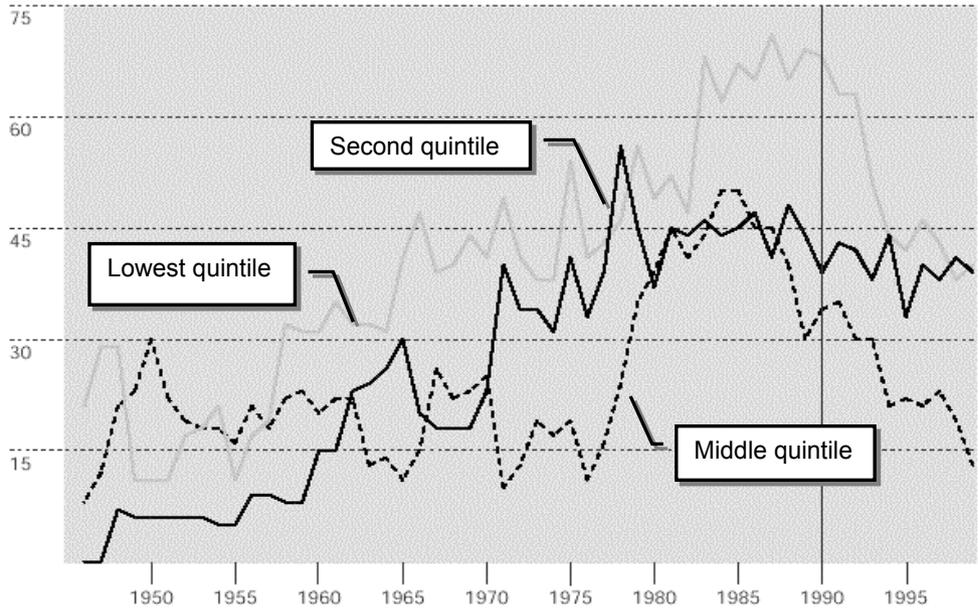


Figure 4: Effective Transitions Study: Situational Difficulty vs Transition Effectiveness

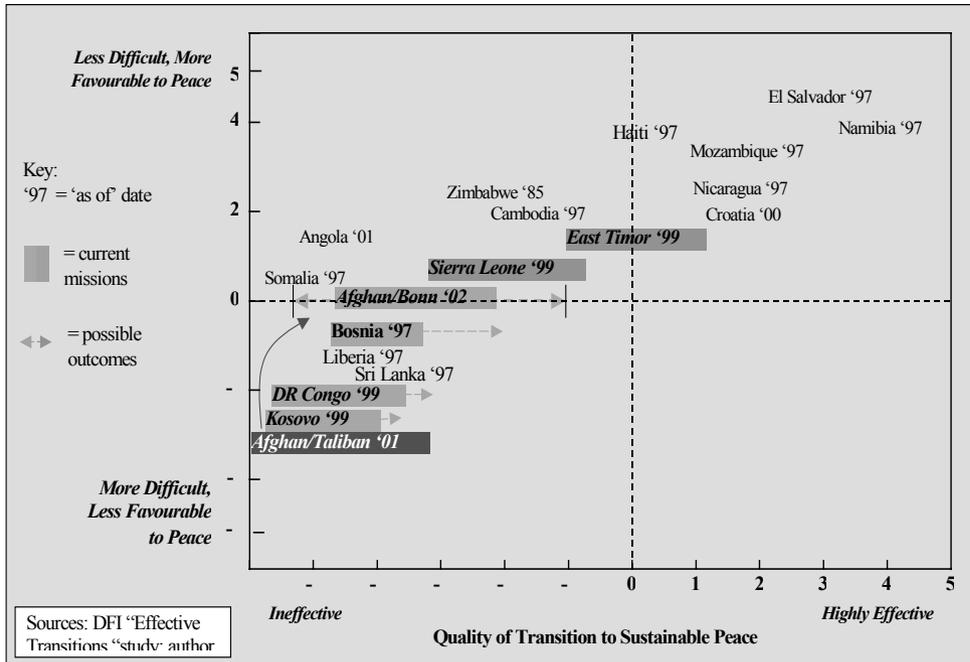


Figure 5: Stanford/IPA Study: Measures of Situational Difficulty Applied to Afghanistan

Situations Are More Difficult If They Involve:	Applied to Afghanistan:
Secession	Regional fiefdoms instead.
Collapsed State	Collapsed, rebuilding centre.
No Agreement, Coerced Agreement	Bonn → Loya Jirga → Transitional Authority.
Likely Spoilers	al Qaeda/Taliban, war/drug lords, ethnic suspicions, local rivalries.
Hostile Neighbours	Hostile elements in Iran, Pakistan, northern tier states.
Disposable Resources	Poppy crop (3 harvests/year).
More Than Two Parties	Many 'parties.'
More than 50,000 Soldiers	More than 50K militia?

Figure 6: Effective Transitions: Applying Critical Indicators to Afghanistan

Demilitarisation	
Factions demobilised	No
Reintegration of former combatants	No
Heavy weapons cantonment	No
Public Security	
Non political/capable police force	Local factional policing outside Kabul; slow training
Police force respectful of citizens' rights	
Governance	
Open elections and viable opposition	Elections in a year and a half
Minimal level of corruption	Substantial corruption
Economy	
Respect for property rights	Unknown
Economic reconstruction programs	Some; security limited
Basic Needs	
Freedom of movement	Self-repatriation; Movement resource and security limited
Refugee repatriation	
Demining	Large demining program
Civil society	
Respect for human rights	Improving from Taliban era
Access to independent mass media	Improving
Freedom of speech	Unknown

Figure 7: Stanford/IPA: Situational Difficulty, Great Power Interest, and Case Outcomes

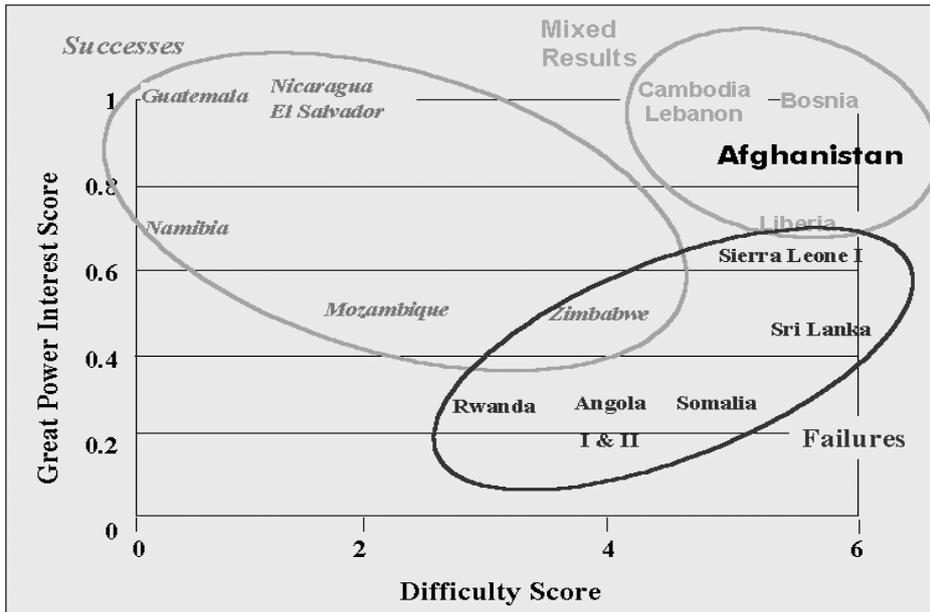


Figure 8: Opium Poppy Growing Districts in Afghanistan, 2000

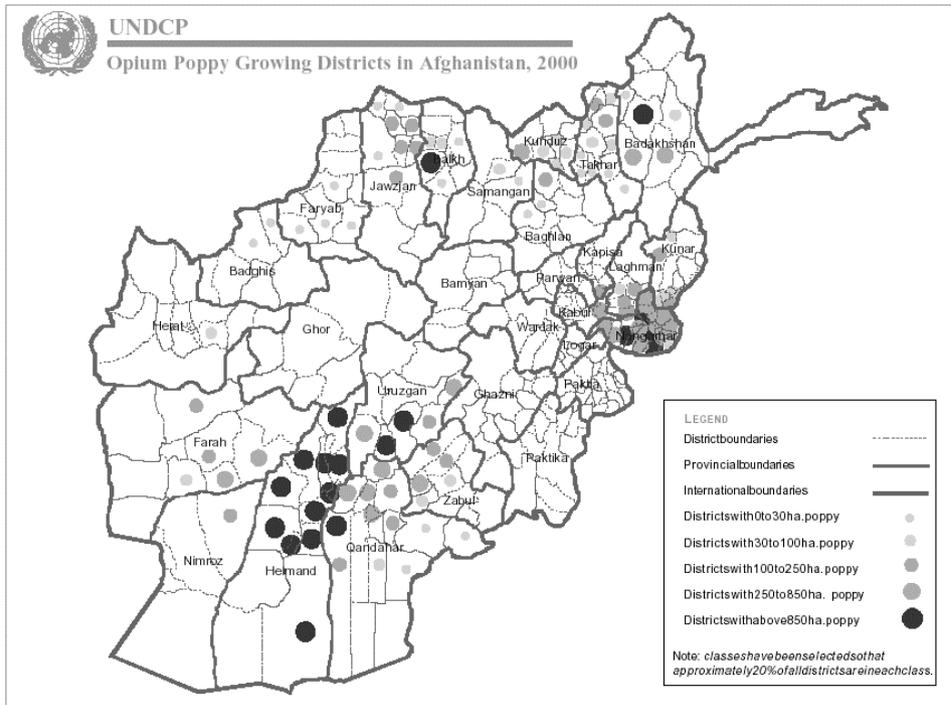


Figure 9: Violent Incidents and Weapon Caches Discovered, June-October 2002

	Centre	East	South East	South	West	North	Central Highland	North East	All regions	Kabul Share
Discoveries										
Oct 1-14			2	2		1	1	1		
Sept 15-30			3							
Sept 1-14	6		1			2				
Aug 15-31	2			3		1				
Aug 1-14	1				1					
July 15-31	1	1				1				
July 1-14		1								
Jun 15-30						1				
Jun 1-14										
	10	2	6	5	1	6	1	1	32	31%
Incidents of Use										
Oct 1-14		2	3	1						
Sept 15-30	2	1	2							2
Sept 1-14	3	2	3	2	2					3
Aug 15-31	3	1		1	1					3
Aug 1-14		2	2	2		1				
July 15-31			1	3	1					
July 1-14	1			1						1
Jun 15-30				1		2				
Jun 1-14										
	9	8	11	11	4	3				9
TOTALS	19	10	17	16	5	9	1	1	78	

Figure 10: Comparing Political and Security Timelines in Afghanistan

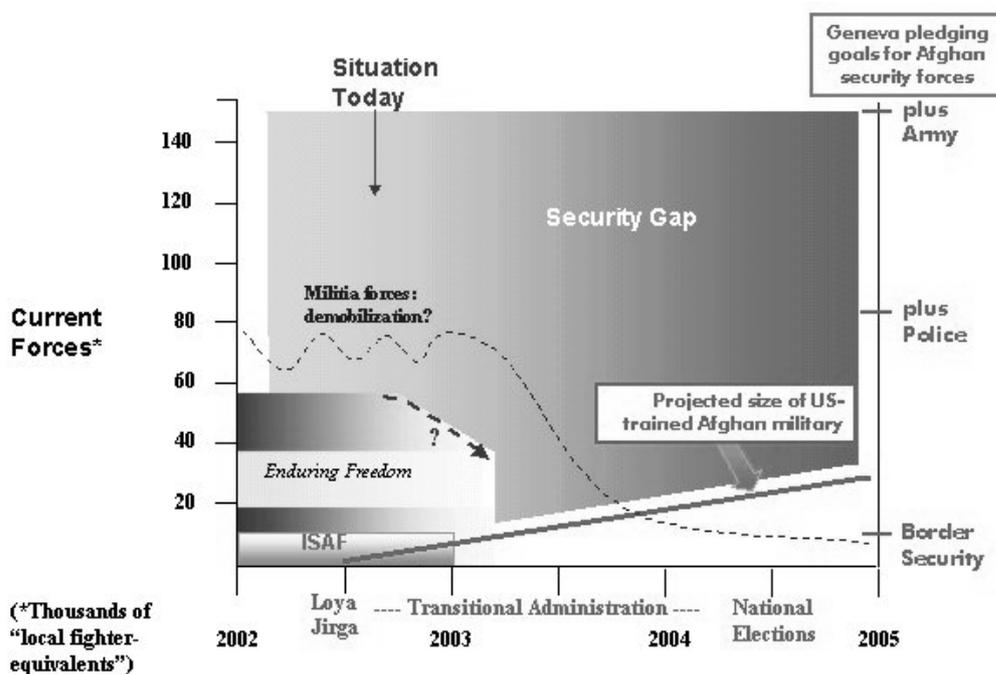


Figure 11: Security Options While National Forces Reach Initial Operational Capacity

Candidate Forces:	Notional Availability (During Transitional Administration)			
	September-December	January '03	Spring '03	Summer '04
US and closely allied international coalition forces, plus ISAF in Kabul AOR	X→			
US-supported, ITGA-recognized regional forces	X→			
Expanded ISAF (coalition of willing) with NATO planning support and US backup		X→		
UN-flagged security force, with US backup?			X→	
Afghan National Army and Afghan national police shoulder increasing operational responsibility				X→

Steve Darvill[†]

THE RULE OF LAW ON PEACE OPERATIONS FROM THE PERSPECTIVE OF AN INSTITUTIONAL DONOR

I INTRODUCTION

With conflict such a visible part of the landscape of international relations, courtesy of global telecommunications networks, reflection on the nature of the rule of law in these contexts is very timely. Armed conflict has affected all regions of the world and it is testament to the global scope of peace operations that this seminar is taking place in the Asia-Pacific region. The Asia-Pacific Centre for Military Law is to be congratulated for its initiative in organising and hosting this 10th seminar in the Challenges Project Conference series. Our region has not only confronted many of the humanitarian challenges being experienced throughout the world but has also developed some unique perspectives on their resolution. Peace support operations in Bougainville, East Timor and the Solomon Islands have provided rich experiences on the application of the rule of law within peace operations.

When peacekeepers intervene in collapsed states to restore public order, monitor ceasefire/peace agreements, and cajole warring parties to the negotiating table, they do so in the full knowledge that those who have committed atrocities must be held accountable for their actions, if peace is to be sustainable and reconciliation is to be achievable. What is far less clear is how the rule of law may be asserted, under what penal code and by whom. Furthermore, deployment within a peace operation does not abrogate the responsibilities of military or civilian participants towards fellow human beings and they must also be held accountable under international human rights law and international humanitarian law. These are difficult issues with few clear-cut answers. I hope that discussions over the next three days will prove fruitful in providing the Challenges Project with fresh ideas and directions to be put to the C34 committee.

[†] The views expressed in this paper do not necessarily reflect the views held by the author in his official capacity.

While military components of peace operations often receive the highest profile in the media, there are, of course, many other contributors to UN-mandated peace operations, and I stand here now representing one of those other players, the humanitarian sector. Publication of the *Brahimi Report* in August 2000 brought the complexity of issues within international peace operations into sharp focus. Security, humanitarian, human rights, development and political actors must be managed to produce a coherent approach to building a functioning society in a collapsed state. This multiplicity of actors reflects the multi-faceted approaches needed to rebuild societies fragmented by violent conflict. Individually, these interventions cannot restore the vital sense of normalcy on which communities can begin the tortuous process of recovery from the effects of war. Jointly they provide a foundation for recovery and a platform for a more stable and prosperous future. But it is a long-term undertaking; and there are no short cuts to peace!

Unfortunately, coherency of approaches across the various components of peace operations has often been a victim of mutual misunderstanding about responsibilities and priorities, with the result that protection and assistance to populations affected by violent conflict may have been sub-optimal. Perhaps the most fractious relationship within a peace operation has been between the military components and the civilian actors – particularly the humanitarian community comprised of UN agencies, Red Cross/Red Crescent organisations, non-governmental organisations and institutional donors, such as the Australian Agency for International Development (AusAID). In a large part, these difficulties may be attributed to a clash of *modus operandi* and misunderstanding of relative priorities rather than outright rejection of respective roles. In particular, it is worth noting at the outset of this paper that the international humanitarian community is not a homogenous entity. Rather, it is comprised of a diverse set of humanitarians driven by a spectrum of ideologies and perspectives. Humanitarian coordination under these circumstances is achieved through consensus rather than the authoritative mechanisms with which military and civilian police may be more familiar. In these terms, I hope that I can reassure the non-humanitarian actors today that we (the humanitarian community) take policy and operational coherence very seriously. AusAID assistance to international humanitarian operations is always delivered within an acceptable coordination framework wherever available.

Fortunately, significant inroads have been made in strengthening civilian-military cooperation, and it is perhaps a small signal of enhanced cooperation within Australia that AusAID is not only a sponsor of several NGO participants at this seminar, but has also been asked to make a presentation to this important international forum. It is my task today, therefore, to outline the perspective of an institutional donor – AusAID – which is responsible for managing the official overseas aid program of the Australian Government. It is a welcome task that will hopefully represent a further foundation to the maturing relationship between AusAID and the Australian Defence Force.

II OVERVIEW

One of the central responsibilities of the state is to provide for the well-being of its citizens. When the state collapses and governments are unable or unwilling to meet this responsibility, the community is exposed to danger and deprivation. This is the classic situation of 'a failed state'. Overnight, vast numbers of the population become vulnerable to indiscriminate violence and the predatory activities of warlords and others seeking to capitalise on the chaos for self-aggrandisement and self-enrichment. It is a situation in which the international community usually feels compelled to intervene to re-establish law and order under a dispersed protection mandate derived, *inter alia*, from the UN Charter, the *Universal Declaration of Human Rights*, the *Refugee Convention* and, of course, the *Geneva Conventions* and their *Additional Protocols*. It is a difficult and dangerous undertaking. Nevertheless those charged with restoring public order, protecting and assisting vulnerable populations, and establishing viable civil administrations must, in turn, be subject to a similar rule of law and be held accountable for their actions.

In order to present AusAID's perspective on the 'rule of law on peace operations', I will first discuss the broader interface between stability (or security) and sustainable development – our core business – drawing on a number of policy and strategic documents endorsed by the Minister for Foreign Affairs, Mr Alexander Downer, in recent months, including: the recent Ministerial Statement to Parliament on Australia's development coordination program; the *Peace, Conflict and Development* policy statement (June 2002) and the *Humanitarian Program Strategy 2001–2003*. I will then attempt to further draw out this linkage as it applies within communities affected by violent conflict and also in terms of accountability of actors within peace operations towards the vulnerable populations that they seek to assist. Wherever possible, I will illustrate these issues with practical examples of international and in-house initiatives to address the issues.

III HUMAN SECURITY

The starting point for this discussion is the critical interface between stability and sustainability of development assistance. This symbiotic relationship is captured by the concept of 'human security', which broadens the definition of security to include not only physical safety but also economic autonomy and basic freedoms. Within the context of peace support operations, the human security concept perhaps provides a useful reference point for a unified approach to assisting conflict-affected populations, as it represents the nexus of the rule of law concerns contained within the mandates of peacekeepers and aid workers.

The recently published UNDP *Human Development Report* (2002) noted that

‘building a functioning state requires a basic level of security’.¹ Apart from maintenance of security, another core responsibility of a functioning state is to stimulate development on which the prosperity of its citizens will be assured.

The Report therefore went on to stress

the importance for human development of personal security and public security, underpinned by state security forces under firm democratic control.²

Without basic assurances of security embedded in respect for the rule of law, private investment – the real cornerstone of development – will not be attracted. ‘Decline’ rather than ‘growth’ will ensue; ‘inequity’ rather than ‘equity’ will be promulgated; the ‘strong’ will prevail over the ‘weak’; ‘authoritarianism’ will override ‘democratic principles’. Individually or collectively, deprivation, inequity, marginalisation and poor governance are powerful portents of impending conflict. That is, underdevelopment (and inequities that this creates within societies) is almost invariably a structural grievance underpinning violent conflict and civil unrest.

A Australian Aid: Investing in Growth, Stability and Prosperity

Necessarily, then, AusAID’s perspective on the rule of law incorporates broader and longer term concerns than the more restricted, peace operations environment under consideration at this Conference.

Throughout this presentation, therefore, it is useful to bear in mind the relationship between AusAID’s core development goals – poverty alleviation and sustainable development – and a security environment, which was reiterated in the title of the 11th Ministerial Statement to Parliament on Australia’s Development Coordination Program in September 2002: *Australian Aid: Investing in Growth, Stability and Prosperity* (emphasis added). Promotion of regional security was identified in the Ministerial Statement as one of the five themes through which AusAID’s overarching poverty reduction framework will be programmed and implemented. The Ministerial Statement proposes that regional security will be promoted within the aid program by ‘enhancing partner government’s capacity to prevent conflict, enhance stability and manage transboundary challenges’.³

B Peace, Conflict and Development

The Ministerial Statement gives substance then to directions laid out in the *Peace, Conflict and Development* policy statement, which was launched by the Minister, in June 2002. The policy represents a framework for improving AusAID’s capacity to address the sources of conflict and stability, with a focus

¹ UN Development Program, *Human Development Report* (2002) 86.

² Ibid.

³ AusAID, *Australian Aid: Investing in Growth, Stability and Prosperity* (2002) 20.

on preventing conflict and building peace. It represents a new direction for the Australian aid program by actively seeking to work with or on conflict. This will be achieved by casting a ‘conflict preventing/peace building lens’ over our activities and seeking opportunities to provide concrete incentives for peace. Of course, these strategic directions will have strong resonance for those familiar with the Secretary-General’s Report, *Prevention of Armed Conflict*, as well as the *Brahimi Report*.

Clearly, preventing conflict and building peace requires an enhanced ability to analyse and understand conflict stressors within societies; an ability to support bilateral partners to design conflict-sensitive programs and activities; and risk management processes that acknowledge the high degree of uncertainty prevalent in societies in conflict. Programming decisions must allow the necessary flexibility and responsiveness to take advantage of brief ‘windows of opportunity’ to promote peace. Work is now beginning within AusAID in all these areas as we move to ‘operationalise’ the policy.

C Poor Performers

In conflict-prone countries the cycle of violence and underdevelopment is self-perpetuating. It is no surprise that the countries most susceptible to armed conflict closely correlate to those countries that we refer to as ‘poor performers’ in the development arena.

There is growing realisation that disengagement with these so-called ‘poor performers’ is not a viable option. By and large, penalising ‘poor performers’ (by withdrawal of aid) not only accelerates decline and allows instability to ferment but also hurts the most vulnerable segments of the population and thereby encourages radicalisation. It does not necessarily encourage reform and will inevitably prove more costly in the longer term. The post-September 11 terrorist discourse has served to further heighten awareness of the dangers of ignoring these trends.

Considerable debate is therefore underway within development cooperation circles about how we, as donors, can effectively engage with these poor performers to promote an enabling environment for development to occur, and arrest the despondency and drift towards extremism created by unmet aspirations. The Ministerial Statement noted that

poor performing States are those with weak policies and institutions ... This may be because the countries are in or emerging from conflict or it may be a lack of political will to tackle poor policy settings and weak institutions, with a resultant lack of transparency and accountability in an environment where corruption can flourish and human rights can be abused.⁴

⁴ Ibid, 54.

A key element of engagement strategies with poor performers will therefore be promotion of the rule of law. But this will be located within a broader agenda of policy reform. By delivering our assistance in a more holistic framework, it is hoped that an enabling environment will be created to attract the private investment, which provides the bulk of funding for national development objectives.

IV SUPPORT OF THE AUSTRALIAN AID PROGRAM FOR RULE OF LAW INITIATIVES

Of course, the notion of rule of law embraces a range of processes and, as a matter of course, AusAID has been working across all areas through our bilateral and regional development programs. Firstly, it is a body of non-discriminatory legislation prescribing acceptable norms of behaviour (eg our support for legal reform programs in Indonesia, Vanuatu, Fiji, Tonga, Cambodia and PNG). There is a widely held understanding of, and respect for, this body of legislation across all elements of society – including government, the security sector and civil society (eg the distinctive Australian approach to the promotion of human rights in Burma and China). It is a fully accountable means to uphold adherence to the law (eg programs to strengthen police services in Solomon Islands, Vanuatu, Samoa and PNG) and it is the means to prosecute those who transgress it, based on accepted rules of documentary evidence, through established facts rather than circumstantial evidence (eg support for the Public Prosecutors offices in Vanuatu and Fiji to effectively manage prosecutions and reduce the backlog in bringing cases to trial). Of course, those who are successfully prosecuted should be punished in accordance with the provisions of applicable human rights instruments; their culpability does not diminish their fundamental rights (eg establishment of separate women's and juvenile correctional facilities in Cambodia). In addition to this assistance, which is directly linked to rule of law outcomes, promotion of democratic governance and broad-based reform, as well as poverty alleviation – common contributors to violent conflict – are key themes for the Australian aid program.

Overall, however, sustainability over the long-term is the key driver for these activities, not 'quick fix' or externally imposed solutions to more immediate problems. The pervasive culture of impunity so prevalent in contemporary armed conflicts has challenged the international community to find more immediate rule of law solutions and new ways to interact with the perpetrators of genocide, ethnic cleansing and other atrocities collectively referred to as 'crimes against humanity'. It has also raised the prospect of some perpetrators being held to account through traditional systems of justice. However, others here today are much better qualified to argue the potential for crossover between traditional and normative legal frameworks in the context of peace operations.

The need for visible progress towards prosecuting those responsible for these

crimes is undeniable. Indeed, progress of reconciliation processes may hinge, *inter alia*, on successful prosecution of perpetrators. However, the message I would like to impart today is that measures to reinstate the rule of law during peace operations should be cognisant of downstream sustainability of systems and processes. A system that does not enjoy broad-based support within the society or depends too heavily on external inputs will inevitably collapse when the fickle attention of the international community turns to other crises. It goes without saying that the resultant vacuum could once again provide opportunities for the forces of destabilisation as grievances go unaddressed and disputes unsettled. For most countries emerging from conflict with massive debts, poor infrastructure and weak human (and social) capital, this may mean striking a fine balance between the imperative to bring those accused of war crimes to account by appropriate means (eg war crimes tribunals, traditional courts, truth commissions etc), and moderating objectives regarding timeframes for overhaul of the law and justice sector.

V THE RULE OF LAW IN COLLAPSED STATES

Unfortunately, as participants in this Conference are well aware, initiatives to manage potential sources of violent conflict are not always successful. Tensions are so enflamed that despite these efforts to cajole communities towards peace and mediation to bring about negotiated solutions to grievances, the situation continues to descend into violent conflict. In these situations the international humanitarian system swings into action, often within the context of mandated peace operations, to protect and assist vulnerable populations. As I have already intimated, under these failed state conditions, resolution of disputes and ultimately reconciliation, will often hinge on processes that hold those responsible for murder, torture, rape and destruction to account. The remainder of the presentation will therefore be devoted to discussion of the rule of law in these contexts.

For peacekeepers inserted into the anarchic conditions prevalent in contemporary armed conflict situations, the primary object is restoration of public order. Of course, the level of coercion necessary to achieve this goal will vary according to the level of peace enforcement mandated by the Security Council but, in effect, this objective (restoration of public order) is concerned with ensuring compliance with the rule of law by would-be perpetrators of crimes. For humanitarian agencies, however, the concept of rule of law during the early stages of an intervention is framed within mandates that call for protection and assistance to vulnerable populations. That is, the focus of humanitarian agencies is on solidarity with potential (or actual) victims of these crimes.

These are two subtly different, but nevertheless mutually reinforcing, angles on the same issue, which must be understood and respected if we are to overcome the perennial hiatus that seems to occur whenever the two groups are thrown together in peace operations. It is acknowledged that this relationship is

significantly complicated by the heterogeneity of humanitarian actors to which I alluded earlier and which also means that agency approaches (to protection and assistance goals) will vary. There is also a vibrant debate within the international humanitarian community about the interface between protection and assistance objectives. However, this is the reality of the international humanitarian system which, as I have mentioned, operates through a consensual process of negotiation, incentives and careful planning.

VI PRINCIPLED HUMANITARIAN ACTION

Delegates to this Conference will be well aware that the popular image of humanitarian action portrayed by global telecommunication networks: of sacks of grain being off-loaded from a convoy of trucks from the World Food Programme; Red Cross doctors and nurses treating victims of forced displacement under makeshift conditions; landscapes strewn with blue plastic tarpaulins distributed by the United Nations High Commissioner for Refugees and queues of displaced people outside NGO distribution centres etc, is underpinned by a set of core principles – neutrality, impartiality and independence. Concerns have been growing within the humanitarian community about perceived challenges to these core principles and, indeed, some have even argued that they may be obsolete. In the words of one experienced relief worker, David Rieff:

since only states could properly stem the carnage, aid workers began to call for and work with state power. The long-standing notion of ‘humanitarianism against politics’ was replaced by a politicized humanitarianism.⁵

In these terms, can such assistance really be regarded as neutral and impartial?

This debate over the continued validity of core humanitarian principles should be regarded as a healthy demonstration of ‘an industry’ prepared to reflect on (and question) its mission while, at the same time, striving to identify a common expression of principled action. In this regard, UN agencies, Red Cross/Red Crescent organisations, institutional donors and major NGOs now generally recognise the harmful impact of random, inconsistent and self-serving assistance.

There is, however, some consensus amongst humanitarian actors (including institutional donors such as AusAID) that these principles must be upheld in some form if traditional ‘humanitarian space’ is to be maintained. If we relinquish this ‘space’, the consequences for humanitarian access to vulnerable populations, for protection mandates of the International Committee of the Red Cross (ICRC), UNHCR, UNICEF – not to mention the safety of humanitarian workers themselves – will be dire. For the sake of those that we seek to assist

⁵ Samantha Power, ‘Book Review: First Do No Harm’, *LA Times*, 6 October 2002; David Reiff, *A Bed For The Night: Humanitarianism* (2002).

therefore, continued insistence on the neutrality, impartiality and independence of humanitarian action is crucial.

However, overt alignment with peacekeeping elements of an operation may become detrimental to this objective. As Hampson has noted

what the peacekeeping force can do and what it is perceived as being able to do (which may well be different) will have a significant impact on the conduct of the belligerent parties. The force may become the target of attack, both directly and by being made ineffective.⁶

That is, the neutrality, impartiality and independence of their actions may be challenged, as will, by association, the motives of those who are attempting to bring humanitarian assistance to affected populations.

And so, if humanitarian workers sometimes seem aloof to military colleagues, mandated with what may be perceived as the more partial role of asserting authority over belligerence in the interests of restoring public order, it should not be misconstrued as a rejection of the security mandate but rather a product of the imperative to preserve precious humanitarian space. Insofar as the role of peacekeepers is concerned, most humanitarian workers would acknowledge that the provision of a secure environment into which humanitarian assistance can be delivered is not only an essential input but also provides the foundation for future stability on which recovery (and eventually development) can occur.

VII CONFLICT-SENSITIVE PROGRAMMING

Central to the concerns of humanitarian workers has been the confronting realisation that assistance could not only ‘fall into the wrong hands’ (diversion of assistance to fighters) but could also be manipulated to sustain crises (‘taxation’ of relief goods by belligerents and methods of control of civilian population by militia etc). Through a process of reflection on these issues, the humanitarian community became sensitised to the prospect of relief assistance becoming an inadvertent part of the political economy of war. The work of Dr Mary Anderson and colleagues at the Collaborative Center for Development Action (Cambridge, Massachusetts) in developing the ‘Do No Harm’ framework for programming in these difficult environments has been crucial for many agencies in coming to terms with this disconcerting reality. But, of course, even in the most adverse situation, doing nothing – ie simply withdrawing assistance – is not a pragmatic option on political, moral or ethical grounds. Instead the humanitarian community increasingly sought to move beyond the rather passive objective of ‘doing no harm’ to approaches that supported local capacities for peace. However, this paradigm shift, which sought options to proactively support conflict transformation through aid

⁶ Francoise J Hampson, ‘International Humanitarian Law in Situations of Acute Crisis’ in DFID & Human Rights Centre, University of Essex, *Report of Conference on the Promotion and Protection of Human Rights in Acute Crisis* (1998) 68.

interventions, also brought humanitarian objectives into closer alignment with political objectives and therefore represents the nexus of concerns of Rieff, which were outlined earlier.

However, there is another dimension to this approach. Externally driven interventions that exclude the participation of local populations in decisions regarding their welfare not only failed to harness indigenous capacities and coping mechanisms, but also risked creating conditions of dependency (and therefore prolonging the deployment of the peace operation). Even our terminology tends to reinforce this structural imbalance in the relationship. Crisis-affected populations are often referred to as ‘victims’ thus reinforcing a sense of helplessness and passivity. On the other hand, if this population is referred to as ‘survivors’, their experience instantly becomes more positive and highlights their capacities. Crisis-affected populations must be given a greater voice in decisions regarding the form of assistance that they receive.

The local capacities for the ‘Peace – Do No Harm’ framework provides one mechanism for understanding our options in these circumstances. As noted previously, however, institutional donors (including AusAID) are increasingly seeking to enhance their capacity to analyse peace-conflict dynamics and design conflict-sensitive programs that support a stable, enabling environment for development. ‘Conflict risk analysis’, ‘peace-conflict impact assessment’, ‘early warning systems’ and ‘preventive action’ are therefore growing in prominence within the lexicon of aid terminology. The significance to this audience is that donor approaches to rule of law issues are increasingly likely to become embedded within broader reform processes aimed at establishing a viable, peaceful society rather than stand-alone (or ‘scatter-gun’) approaches to strengthen judicial systems, police and corrective services etc.

VIII ACCOUNTABILITY AND STANDARDS

The findings of the OECD DAC evaluation of the international response to the Rwanda crisis in 1994⁷ generated an important initiative of direct relevance to this Conference. The evaluation found that the performance of the international humanitarian system had been mixed with many very positive outcomes but also a degree of disarray in mobilising a coherent response to the immense suffering. Under the auspices of the Steering Committee for Humanitarian Response (SCHR), the Sphere Project has developed a set of guidelines, the Minimum Standards in Disaster Response. These are derived from a Humanitarian Charter based on an affirmation of three very familiar principles of humanity – ‘the right to life with dignity’, ‘the distinction between combatants and non-combatants’, and ‘the principle of non-refoulement’. Together the *Humanitarian Charter* and *Minimum Standards* represent a comprehensive mechanism to meet the needs of populations engulfed by

⁷ OECD DAC, *The International Response to Conflict and Genocide: Lessons from the Rwanda Experience; Part Three – Humanitarian Aid and Effects* (1996) 161-2.

violent conflict, ie it contains elements of life-sustaining, material assistance as well as support to protect the capacities of those it seeks to assist. Australia is one of nine donor governments to have supported the Sphere Project since its inception through core grants to the project headquarters; grants to the Australian Council for Overseas Aid (ACFOA) for training programs for Australian NGOs and grants towards local NGO training programs in Indonesia and Sri Lanka. Together, this commitment towards development and dissemination of the Sphere Project Humanitarian Charter and Minimum Standards in Disaster Response ('Sphere Guidelines') exceeds A\$1 million.

IX RULE OF LAW WITHIN PEACE OPERATIONS

Both sides of the peace operations equation (military and civilian personnel) must be acutely aware that their actions must be subject to independent scrutiny. As the *Brahimi Report* noted

the majority of [United Nations personnel] embody the spirit of what it means to be an international civil servant, travelling to war-torn lands and dangerous environments to help improve the lives of the world's most vulnerable communities. They do so with considerable personal sacrifice, and at times with great risk to their own personal safety and mental health. They deserve the world's recognition and appreciation.⁸

Equally, the actions of most non-UN humanitarian workers are driven by a sense of humanity and concern for those unfortunate enough to be caught up in crises and disasters.

Sadly, however, while there have been many cases of exemplary action in the course of peace operations, there have also been a minority of cases where representatives of the international community have taken advantage of the vulnerability of those that they seek to assist, through corruption, criminal activity and nepotism – actions which not only destroy the trust and confidence of affected communities but also undermine central tenets of the mandate of peace operations, as well as core principles of humanitarian assistance. At its core, this reflects a heavily skewed power relationship between the members of the peace operation and those they seek to assist that is structurally imbalanced and therefore susceptible to abuse, if not strictly policed in accordance with the universal norms of the rule of law.

When people have been uprooted from their homes, traumatised by violence, subjected to extreme forms of degradation and seen their means of livelihood swept away overnight, they are extremely vulnerable to further exploitation. Members of peace operations and humanitarian relief agencies are, on the other hand, in an extremely powerful position as the source of protection and

⁸ L Brahimi, et al (2000), *Comprehensive review of the whole question of peacekeeping operations in all their aspects: Report of the UN Panel on Peace Operations (A/55/305 S/2000/809)*, para 271.

assistance. Earlier this year, a series of allegations were made against humanitarian workers in West Africa. These alleged that some aid workers had been trading basic relief commodities for sex with young women refugees. Clearly this is totally unacceptable and these individuals must now be subject to the full force of the law, if the allegations are proven. But which law? Sierra Leonean law or the law applicable in the country where the deploying agency is registered? Or is this even an area that might eventually fall under the jurisdiction of the International Criminal Court. And what is the responsibility of their agencies that, after all, had pledged under the Sphere Guidelines and elsewhere to ‘be held accountable to those who we seek to assist’.

This latter conundrum is the subject of an innovative international project based in Geneva – the Humanitarian Accountability Project (HAP). With the assistance of grants from institutional donors (such as AusAID [A\$250,000], UK and Denmark), the HAP is attempting to define an accountability framework for agencies working in emergency and humanitarian operations around the globe. Reflecting on ‘industry-based’ accountability mechanisms (eg accreditation systems, service standards, codes of conduct, complaints processes), HAP is examining the scope for defining a humanitarian code of conduct (possibly expanding the existing *Code of Conduct for Red Cross Organizations and NGOs in Disaster Relief*, which it describes as lacking specificity or formal mechanisms for redressing grievances). It is also attempting to define an appropriate regulatory mechanism but is unlikely to opt for a full-blown ombud-type mechanism with formalised processes for appeal and sanction.

X PROTECTION AND AUSTRALIAN ASSISTANCE

I want to conclude therefore, by outlining some other practical expressions of support that Australia is currently providing for protection initiatives which may be applicable within the context of peace operations. Not only are these protection activities of the international humanitarian system far less visible than the ‘material inputs’ covered in the Sphere Guidelines (food aid, nutrition, health services, water and sanitation, and shelter) but they also pose significant dilemmas for humanitarian agencies. Aid workers are often the ‘eyes and ears’ of the international system in collapsed (or collapsing) states. As such, they often ‘bear witness’ to abuses of human rights.

At their core, these dilemmas involve weighing up the potential ‘trade-offs’ between maintaining access to affected populations and speaking out against rights abusers – an action that might result in expulsion and therefore expose these populations to even greater dangers. Ultimately, however, decisions must be made by individual agencies in accordance with their interpretation of the ethical parameters on independent action and responsibilities towards the affected population.

The conundrum is underscored by the publication in 1999 by UNHCR, of

Protecting Refugees: A Field Guide for NGOs. The field guide

takes the core, legal concepts that underpin protection of refugees and attempts to make them accessible to the lay reader. It gives practical advice for the on-the-ground interventions that can make the difference between rights abused and rights secured.⁹

Building on this text, a collaborative initiative – the Reachout Project – was launched in 2000 to develop a refugee protection training-learning program as part of the dissemination program for the field staff. I am pleased to advise that Australia, through AusAID, was one of two institutional donors (with US) to support this important initiative from the outset with a grant of A\$360,000 over two years. And in February 2003, the Reachout Project is scheduled to deliver two three-day learning programs in Melbourne on behalf of the Australian Red Cross and ACFOA respectively.

While UNHCR's protection mandate, and therefore the Reachout Project, is primarily focused on refugee protection issues, primary carriage within the UN system for promoting protection of internally displaced people (IDPs) has been vested in the Special Representative of the Secretary-General (SRSG) for Internal Displacement, Dr Francis Deng. In 1999, the United Nations Office for Coordination of Humanitarian Affairs (OCHA) launched the *Guiding Principles on Internal Displacement* on behalf of the SRSG. The *Guiding Principles on Internal Displacement* represent a normative framework for protecting and assisting IDPs based on a set of existing international law provisions. They were endorsed by the Commission for Human Rights at its 54th session. In mid 2000, the Secretary-General established an Internal Displacement Unit within OCHA to, *inter alia*, disseminate the *Guiding Principles on Internal Displacement* and otherwise promote the concerns of the global IDP population, which now outnumbers the global refugee population by nearly two to one. Again Australia, through AusAID, has supported the work of the Internal Displacement Unit, under the leadership of Kofi Asomani, during its first year with a grant of A\$250,000. With the recent extension of the Unit's mandate beyond the end of 2002, we are currently considering our options for further assistance.

More broadly, the Policy Development and Studies Branch of OCHA have been working to support the Under Secretary-General for Humanitarian Affairs, Kenso Oshima, to advocate for the protection of civilians in armed conflict. This involves a series of regional workshops around the globe aimed at raising the awareness of middle and upper level policy-makers within governments about the rights of civilians in armed conflicts and obligations of state and non-state actors towards them. Mr Oshima attended part of a *Protection of Civilians in Armed Conflict* Workshop for North-East Asia

⁹ D McNamara, 'Foreword', in UN Publications Service, *Protecting Refugees: A Field Guide for NGOs* (1999).

participants in Kobe.

Finally, it would be highly remiss of me not to mention the ICRC who, as most delegates would be aware, are the custodians of the *Geneva Conventions* and *Additional Protocols*. The ICRC have a crucial role to play not only in assisting non-combatant populations in times of conflict but also disseminating the *Geneva Conventions* and *Additional Protocols* and encouraging their ratification and incorporation into domestic legislation. An acknowledgment of the importance of this work is contained in the annual level of support to ICRC operations through AusAID's humanitarian program, which this year (2002) looks likely to again be in the order of A\$10-11 million for, *inter alia*, delegations in the Pacific, Indonesia, Myanmar, Philippines, Sri Lanka and Nepal. The forthcoming visit to Australia of President Kellenberger will serve to further cement this vital partnership, while at a strategic and operational level, AusAID will continue to participate in the ICRC Donor Support Group – the elite group of the dozen or so biggest donors to the ICRC.

XI CONCLUSION

All of these initiatives provide practical expression of support for the establishment and maintenance of the rule of law in countries afflicted by violent conflict. The official aid program of the Australian Government compliments the work of others in this area, including the ADF, in promoting sustainable peace in countries emerging from conflict.

Nevertheless I would like to reiterate once more that the success of our mutual efforts in this area will hinge on being able to demonstrate to all stakeholders – combatants and non-combatants alike – that they have more to gain from a stake in peaceful coexistence than settling scores through violent means. Respect for (and adherence to) the rule of law, though an important pillar of this argument, is unlikely to be sufficient to avoid a repetition of violent conflict if it is not backed up by sustainable improvements in the lives of those who see greater gains in achieving their goals through violent conflict. In conclusion, however, I cite Dennis McNamara, the Inspector-General for UNHCR and a veteran of humanitarian interventions around the globe, who recently wrote in the *International Herald Tribune* that

the Achilles' heel of post-conflict peace operations is that of justice/rule of law and civilian policing. There is a global shortage of qualified police available for these operations. Frequently there is also a need to bring in outside judges, prosecutors, defenders and prison managers, at least in the early stages.¹⁰

This seems to suggest the need for a pool of qualified personnel for UN civilian administrations, which was called for in the *Brahimi Report*, is even more

¹⁰ D McNamara, 'The UN has been learning how its done', *International Herald Tribune*, 29 October 2002

urgent than some of us had imagined!

Part III

REGIONAL VIEWS OF PEACE OPERATIONS

Lieutenant General Satish Nambiar (Retd)[†]

REGIONAL APPROACHES TO PEACE OPERATIONS

I INTRODUCTION

The central aim of the UN Charter is to ‘maintain international peace and security, and to that end, take collective measures for the prevention and removal of threats to peace, and for the suppression of acts of aggression’. In pursuance of that aim, Chapter VI of the Charter suggests measures regarding pacific settlement of disputes that oblige parties to a dispute that is likely to endanger international peace and security, to seek a solution by ‘negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice’. UN peacekeeping operations are an evolution from the terms of this Chapter. Chapter VII of the Charter on the other hand, confers powers on the Security Council to authorise the use of armed force, should various other measures fail, in order to maintain or restore international peace and security. Under Chapter VII, Member States are also required to provide armed forces and other assistance and facilities for the purpose. Chapter VIII asks the Security Council to encourage pacific settlement of disputes through regional arrangements or agencies either on the initiative of the states concerned or by reference from the Security Council; it also authorises the Security Council to utilise such regional arrangements or agencies for enforcement actions.

II RECENT PEACEKEEPING EXPERIENCES

The experiences of UN peacekeeping operations in the last decade of the 20th Century have revealed that the UN organisation was not designed to handle commitments of the dimension of the missions launched in Cambodia, Somalia, and the Former Yugoslavia. Even handling one of these operations would have been a stupendous task for the UN as it was then structured. In the event, all three were undertaken more or less simultaneously, in 1992/93. It is therefore a tribute to the dedication and selflessness of the UN Secretariat and

[†] The views expressed in this paper do not necessarily reflect the views held by the author in his official capacity.

the personnel who took part in these operations, that they achieved what they did; which, notwithstanding all the criticism, was certainly not insignificant. The imperative need for building greater institutional capabilities for the maintenance of international peace and security was therefore highlighted. It became amply clear that, in order to develop effective and comprehensive responses to conflict situations around the world, an appropriate division of responsibilities between the UN and other players on the international arena needed to be arrived at.

Such division of labour was obviously expected to take advantage of the different capabilities and interests of regional organisations, national governments, and non-governmental organisations. One view is that the UN would be most effective in the fields of preventive action, traditional peacekeeping, humanitarian missions, mediation, and peace building activities through its various agencies. There is little doubt that regional organisations need to be encouraged to play a greater role in the maintenance of peace and security. At this time it may be more appropriate that they focus on aspects like assistance in economic development, peacemaking, and confidence building at the regional and sub-regional levels. In due course, with more preparation, training, acquisition of appropriate resources of equipment, and experience, regional organisations could no doubt play an effective role in peace operations also. The *Brahimi Report* panel makes this point eloquently in stating that ‘the UN cannot be everywhere’.

Today’s regional crises are probably more dangerous because advanced technologies that can cause immeasurable destruction are more readily available and societies are more vulnerable. Furthermore, in an increasingly interdependent world, most regional crises have global ramifications. For the foreseeable future, it would appear that enforcement actions under Chapter VII would need to be undertaken by coalitions of ‘the willing and the able’. However, to be internationally acceptable, legitimate and credible, these would need to be sanctioned by specific Security Council resolutions. Inevitably, this option will only be viable when the national interests of key countries are sufficiently engaged by a particular development.

On the basis of one’s personal experience of the serious inadequacies with regard to the political commitment of many global powers to the efforts of the UN, I must admit that for quite some time I was of the view that conduct of peace operations should remain a UN activity. In fact when the multinational operation in East Timor under Australian leadership was launched, I was indeed very sceptical. It must be acknowledged that the Australian leadership was forthcoming because that country had a vested interest in resolving the issue to perceived national advantage. Even so, I have revised my views on the subject and am now inclined to believe that regional organisations could well undertake peace operations effectively. In many cases regional organisations may be better equipped to deal with the problems because of the stake they have in the region. This of course has to be balanced against inevitable vested

interests and individual agenda. There can also be some scepticism about the credibility of many regional players in terms of being models for 'restoration of law and order mechanisms' in the peace building phase, given their own domestic track record on democracy and the rule of law.

Most serious and detailed analysis on the subject of regional peace operations in the last few years has taken place under the aegis of countries or groupings of the developed world; particularly in the US or Europe, at which all discussion and lessons are based on the experience of NATO in the Balkans. Without going into any detail, the point must be made that application of the lessons learnt by the US and Europe in the Balkans will have little, if any, relevance to most other regions. This is as much because of the peculiarities of the Balkans, as it is because no other region is likely to receive the commitment and attention of the US and Western Europe. Much is often made in discussions of the degree of cooperation and understanding between NATO and the UN in the operations in the Balkans. Notwithstanding the fact that such a presumption is by itself questionable, the undeniable fact is that since NATO, the EU and the Partnership for Peace that draws in Russia, carry in their ranks four of the five permanent members of the Security Council, there can be little scope for the UN in any of the missions in the Balkans to get into a confrontation or have any disagreement with NATO. This would rarely, if ever, be the situation in any other region.

III THE 'REGIONALISATION' OF PEACE OPERATIONS

An aspect that causes discomfort in this context is the tendency in the developed world to use the term 'regionalisation' of peace operations. This appears to underscore the perception in the developing world that the developed countries are in the process of absolving themselves of responsibility for the maintenance of international peace and security in the more difficult areas where conflict may have erupted; particularly in parts of Africa and Asia where the national interests of the developed world are not affected. NATO, the European Union (EU), and the Organisation for Security and Cooperation in Europe (OSCE) will no doubt attend to their backyard as in the case of the Balkans, evidenced in the substantial military, economic and material investment of all three organisations in Bosnia-Herzegovina, Kosovo, and Macedonia. What is often overlooked is the fact that this regional commitment of resources is in addition to a fairly substantial UN commitment in the very same mission areas. It may be appropriate to place on record the fact that of the 15 UN peacekeeping missions in operation as of date, five are in Europe: three in the Balkans, namely, Bosnia-Herzegovina, Kosovo and Prevlaka; and one each in Cyprus and Georgia. So much for the refrain that UN commitments are focussed on conflicts that are raging in Africa and Asia or South America. If the member countries of NATO are serious about adapting to the realities of multilateral crisis management, they must be prepared to deploy in conflict areas outside Europe under the aegis of the UN together with other countries of the international community. Even so it needs to be stressed that much of the

developing world would look with great suspicion at any attempts at intervention by NATO as an alliance grouping in areas outside Europe.

Regional and sub-regional organisations in Africa, Asia and South America have some capacities but their scope for regional peace operations will invariably be limited by the lack of funds and logistic capability. It is difficult to imagine that these organisations would receive funding from the already cash-strapped members. It is inconceivable that the UN would provide funding for a regional operation; hence, the dependence of such organisations on funding from the developed world. Again it is inconceivable that this would be forthcoming without conditions attached. Such funding is sometimes presented in discussions as a benevolent and somewhat philanthropic gesture by the countries of the developed world. The real truth is that whether it be UN peace operations or regional ones funded by some countries of the developed world, much of the financial outlay is ploughed back into the economies of the developed world. They are the ones who secure contracts for military equipment, logistics supplies, transportation and so on. We can therefore dispense with the patronising approach adopted in this regard. It is vital that for even regional approaches to be credible there must be participation from the developed world, with provision of logistics and state-of-the-art equipment at the very least.

In this context the ASEAN experience is revealing. There was no doubt some reluctance in the initial stages among member countries to be involved in the operations in East Timor. This is justifiably so, because of the convention of consensus and non-interference in internal matters. In my view, it is to the credit of the philosophy of ASEAN that it was possible to secure Indonesia's consent to the insertion of the Australian led force into East Timor, without which it is debatable whether the operation could have succeeded or been launched at all. At the other end of the spectrum is the operation of the International Security Assistance Force (ISAF) in Afghanistan. To term this a 'peace operation' would possibly be incorrect because it is not one. The more appropriate connotation to this operation may well be that of a multinational enforcement action in support of an administration that has the endorsement of the international community.

IV AN ASSESSMENT BY REGIONS

As things stand, it would appear that for some time to come, regional peace initiatives will be contingent on prodding by the US and provision of some political, financial and logistic support. An assessment by regions would possibly lead to the following conclusions:

- Europe: Regional peace operations are feasible. Funding would be readily forthcoming, as would resources.
- Africa: Some regional and sub-regional capability exists for conduct of peace operations and may well be further developed. Sub-regional

organisations like the Economic Community of West African States (ECOWAS) have demonstrated their preparedness to place their troops at risk and even take losses. However funding and resources of equipment and logistics would pose serious problems. This can only be overcome through assistance from powerful international actors.

- South America: It is debatable whether capacity exists for regional or sub-regional peace operations. Even so, nothing is likely to be put in place without the endorsement of the US.
- West Asia: No regional initiative for peace operations is likely in the foreseeable future.
- South Asia: This region probably has the maximum capacity for peace operations with four of the top troop contributors to UN peace operations (namely India, Pakistan, Bangladesh and Nepal) contributing no less than a third of the total troop contributions to UN peace operations at any time. It is therefore a matter of some irony that despite this capacity, as things stand, there is no likelihood of any regional peace operations being initiated. This does not however rule out the use of forces in the sub-region for the restoration of peace and security under bilateral arrangements, as has been undertaken in the past.
- ASEAN: Some considerable capacity for regional peace operations does exist. However, given the reluctance of the member states to consider moves that may be construed as interference in the internal affairs of another state, any such initiatives are unlikely in the foreseeable future. The preference would probably be for the 'ASEAN' way of quiet diplomacy, dialogue, non-confrontation and a behind-the-scenes approach.

There can be little doubt that the primacy of the UN in the conduct of peace operations is gradually being diluted. In considerable measure this is due to the recognition that it cannot go everywhere. It is also a consequence of a deliberate effort by the US and some of its allies to replace the cumbersome UN system with one that is more responsive to their demands, without necessarily having the legitimacy accorded through sanction of their efforts by the international system. Through its own legitimacy the UN can sanction the conduct of regional peace operations. Quite often the Security Council may prefer to do so. But it would then not have control. That could be dangerous under some circumstances. Even so, it can hardly be denied that the provisions of Chapter VIII of the UN Charter are increasingly being looked at and applied. Many of the reservations like that of military alliances not being covered by this Chapter are now purely academic. NATO actions in Bosnia-Herzegovina and Kosovo and the acquiescence of the international community changed all earlier interpretations.

The concept of mixed missions (between regional/sub-regional organisations and the UN) probably needs detailed analysis. Combining the motivation and cultural sensitivity of regional organisations with the capacity of the UN for

objectivity and oversight may be useful in many cases, especially when neighbouring states are part of the problem.

V CONCLUSION

There can be little doubt that lack of resources is an impediment to the successful execution of regional or sub-regional initiatives. But there is also little evidence that abundant resources are an assurance of success. Political will is more important because if that is absent no mission can succeed. The aspect of lack of resources also highlights the role of the regional hegemonic state. The stark reality is that virtually every regional organisation (including NATO) is built around a state that has greater political, economic, military and demographic clout than any of its neighbours. Such dominance need not always be negative. It can often be the catalyst for effective action in a crisis.

Finally the inherent contradiction between the intrastate nature of most contemporary conflict and the understandable reluctance for intervention is the challenge. States are obviously more likely to steer clear of the idea of intervention in principle if they cannot be sure that they themselves will not at some stage be the objects of such intervention.

Andrew Ladley[†]

ENGAGING AND COMMITTING TO PEACE OPERATIONS

I INTRODUCTION

It is just over three years since the Security Council authorised an international force in East Timor to take ‘all necessary measures’. In fact the Security Council authorised the states participating in the International Force for East Timor to take all necessary measures to restore peace and security in East Timor as well as to undertake the other aspects of its mandate.

New Zealand’s initial deployment with INTERFET as part of that regional arrangement led by Australia has changed twice under different Security Council resolutions and is finally ending this week. From what turned out to be the biggest New Zealand overseas deployment in half a century, only a small contingent of trainers now remains. Those remaining are assisting the new state’s defence forces as part of another regional project, and consistent with the situation for much of this deployment, a Status of Forces Agreement between New Zealand and East Timor is yet to be finalised.

The point is not made as a criticism. It reflects the difficulties of getting legal clarity for many issues in peace operations. But the fact that a deployment quietly continues in the meanwhile also reflects a certain pragmatism, a willingness to make do and get on with things, an ability to form good relationships, and I suspect, a capacity to judge when a SOFA is really needed and when the new state can follow on afterwards.

II A NEW ZEALAND APPROACH

The law is important, of course, and a SOFA will, in due course, be signed. But to answer the Maori question as to what is most important in life – it is people, it is people, it is people. The New Zealand Defence Force contribution to the training team in East Timor has become an extremely personal matter. Any Timorese person, especially from the south of East Timor, will tell you that the

[†] The views expressed in this paper do not necessarily reflect the views held by the author in his official capacity.

Kiwi touch in building a relationship between the armed forces and the local population has been distinctive, personal and effective.

I say that, I hope, without sentiment or exaggeration. I particularly do not want to imply that other states, by doing things differently in their own contributions, did something wrong. However, there is something really interesting about the New Zealand approach, and there is plenty of evidence to suggest that it applies wherever the New Zealanders are involved in peace operations. I suspect that virtually everyone at this Conference who has worked with New Zealanders will know what I am talking about.

III ENGAGING AND COMMITTING TO PEACE OPERATIONS

In peace operations, New Zealanders engage. They get close to the people. In East Timor, the only two combat fatalities happened in a New Zealand battalion. So it was not a benign environment. But the New Zealanders realised very early on that the real goal was not some anticipated major invasion from West Timor, but was helping the Timorese to rebuild their lives and to build a sense of confidence, predictability and stability – the rule of law if you like – or at least the beginnings of re-establishing it in East Timor.

That pattern produced operations which were really distinctive for New Zealand. Problematic situations in the south and west of the Pacific region are developing in a number of states – notably Papua New Guinea –including and not limited to Bougainville and the Solomon Islands. Without going into detail here, in these situations, the local governments have a very limited capacity to manage the difficulties without regional and international support.

New Zealand's approach to each of these situations, in my view, has been typical of its developing approach to peace operations. It has offered to help in ways which are low key, hands-on, people-effective, sensitive to culture, interlinked with other countries, insightful of the real goals of the mandate and focused on the rule of law in all respects.

Understanding why countries participate and why people in the region participate in peace operations is quite deeply involved with their own history – this I call 'understanding the story'. I do not think it is possible to even remotely understand the Fijian contribution to international peace operations without a deep look at where it came from – the nature of society and the mix of militarism and other factors which have produced a tradition of serving in the armed forces. Of course, the same sort of argument could apply to countries which do not participate, for example, Germany and previously, Japan.

In terms of New Zealand, that means looking at why New Zealanders engage and commit to peace operations and have a very deep commitment to internationalism. New Zealand is a small country – it relies on the rule of law and has a strong commitment to the replacement of raw power with a reasonably predictable set of rules in the international order. New Zealand

could not hold France accountable for the Rainbow Warrior incident in terms of taking on France in a military operation, but it could take on France through an international legal process which determines accountability. So New Zealand has its own reason, as a founder state of the UN and with its very strong commitment to the international rule of law, for engaging in peace operations.

There is also something very unusual about what is produced – what I think is a distinctive New Zealand touch. It is something understated and low key, which is probably quite deeply cultural and has certainly been strongly influenced by the Maori influence in the New Zealand military. The point being that it is necessary to ‘understand the story’.

IV MISSION LEGALITY

I wanted to say something very briefly about mission legality and charter legality. For New Zealand at least, the critical question is what is the framework of any particular mission internationally? How does this fit into the international rules for the use of force in peacekeeping? How ambiguous or unambiguous is it?

As I said previously, states rely on the rule of law. This is especially the case for small states at the international level. I take the rule of law to be the opposite of arbitrariness; in the sense of arbitrariness meaning something is unpredictable and unprincipled. And so for New Zealand, at least, it is crucial to look very closely at the framework on which any peace operation is launched.

Looking at any mission is, I would argue, looking at the rule of law in operation itself. You start with that generalised international law question: what are the grounds on which any country is going to be asked to commit its forces abroad, whether armed or unarmed? Then you look closely at the mandate; that gives you your text. And then all the way down there is a set of rules which take their authority from those above, just like teaching public law in the university, where you constantly look to the authority under which you are operating.

V MISSION MANDATE

New Zealand tends to look extremely closely at the mission mandate. The founding documents need to allow the job to be done. There is a lot of discussion about interpreting the mandate. Just one example that I think is interesting for our purposes is the East Timor mandates – Security Council resolutions 1264 and 1272.¹ Many of you will know that there was some ambiguity about exactly what was authorised and what was required of both

¹ SC Res 1264 (1999), 15 September 1999; SC Res 1272 (1999), 25 October 1999.

INTERFET and the states, in terms of investigating, documenting and perhaps preparing the ground for the prosecution of international crimes that occurred in East Timor throughout 1999. This gives rise to an interesting question there because once you decide what your mandate is, you then have to decide what your capacity is going to be in the mission.

VI DOMESTIC POLICY

In terms of domestic policy, New Zealand adopted Cabinet Criteria in 1995.² These Cabinet Criteria spell out New Zealand's national considerations when deciding whether to enter peace operations.

The first question is 'does the operation enhance security in a region of strategic or economic interest to New Zealand, support humanitarian objectives, enhance New Zealand's multilateral or bilateral relationships, or offer a distinctive role for New Zealand?' These Cabinet Criteria still apply. Of course you would be surprised if they did not apply, but they have been added to due to the fact that the last three or four New Zealand governments have been coalitions. These coalition governments require a substantial amount of negotiation, and I can tell you very personally that trying to agree on the terms and conditions upon which New Zealand will enter into peace operations is not an easy task.

VII DOMESTIC LEGALITY

New Zealand statutes incorporate quite a lot of international law as part of New Zealand law. Two examples, I think, will be sufficient. The first is the *Defence Act 1990* (NZ), which states that

the Governor General may ... raise and maintain armed forces ... for the following purposes ... the contribution of forces to, or for the any of the purposes of, the United Nations, or in association with other organisations or States, and in accordance with the principles of the Charter of the United Nations.

In other words, the whole UN Charter jurisprudence, the developing legality, the developing practice that has emerged out of peace operations is incorporated into New Zealand law.

Another example is the *Geneva Conventions*, which are incorporated into New Zealand domestic law. Under the *Armed Forces Discipline Act 1971* (NZ) it is an offence for a member of the armed forces to violate any New Zealand statute, which, as stated previously, includes the *Geneva Conventions*. And so wherever they go, New Zealand forces regard themselves as being subject to international humanitarian law.

² See Appendix.

VIII DOMESTIC CONTROL OF CONTRIBUTIONS

What is interesting about looking at the rule of law and the decision to commit is not only the international legality and the domestic legality that I have just spoken about, but of course each contributing nation seeks to retain a measure of control over its national contributions.

That requires a lot of legal haggling and contracting, involving matters that all of you will be familiar with – SOFAs, particular contracts between units and between troops and arrangements with the UN. The coalitions are of course not just agreements to be involved in peace operations together; they are complicated arrangements involving the precise definition of the terms of the relationship. For example, the agreements must determine the particular role of the Senior National Officer, who is going to control what and so on.

With respect to matters like rules of engagement, states retain the authority to maintain their own rules of engagement, which can be different from those of the people that they are serving with. There was a hagggle, many of you will know, in relation to East Timor when New Zealand wanted to change the rules of engagement, believing that they were not quite right. Australia operated slightly different manner – with, I believe, two documents: rules of engagement and orders for opening fire. New Zealand only wanted one. A big discussion ensued over how to get that organised.

On something as basic as rules of engagement there can be considerable discussion and interaction. And again, of course, those matters operate right down to the grass roots level, down through that hierarchy involving individuals finally having to make a decision based upon the orders and rules that they are subject to.

IX INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS LAW

I will just say something very briefly about international humanitarian law and indeed human rights law. The New Zealand position, I am sure many of you know, differs from Australia on the applicability of international humanitarian law. This matter has recently been debated in the *International Review of the Red Cross* by a number of colleagues here. An article written by Ossie and Mick Kelly and a number of others, spells out the fact that New Zealand adopted a different approach to Australia.³ Without going into the debate too much, I think Australia's position involved a bit of reverse reasoning. Australia was reluctant to regard itself as being subject (particularly in East Timor) to international humanitarian law and the laws of armed conflict. I think it comes from saying, 'we don't want to think that we're in an armed conflict, therefore we're not going to regard ourselves as being subject to that law.' On the other

³ Michael Kelly, Tim McCormack, Paul Muggleton, et al, 'Legal Aspects of Australia's Involvement in the International Force in East Timor' (2001) 83 *International Review of the Red Cross* 101-39.

hand, New Zealand says, ‘we’re not particularly fussed whether we’re in an armed conflict or not, they apply – simple as that. We don’t expect anyone else to act contrary to them at any time. It doesn’t matter whether we’re in an armed conflict or not. When you serve, you serve according to these rules.’

X RULE OF LAW WITHIN A MISSION ITSELF

Within a mission itself, I think there are major questions about how the rule of law should operate. Everybody knows the arguments about compensation regimes and trying to make sure that if a mission in some way affects the civilian population, there should be a speedy mechanism for compensation and redress.

I think insufficient thought is given to whether there may well be room for some kind of internal process within a mission itself to try and ensure that the rule of law applies within that mission. In other words, if people breach the basic rules of a mandate and various other things, there should be processes which, if they are working well, will just involve the ordinary hierarchy of authority and command, but if not, may involve an external process.

XI RULE OF LAW WITHIN THE SOCIETY

In relation to a society, any mission that goes in and operates in a society is obliged to take steps in relation to the rule of law, for example establishing a justice system. Further, there are matters that they are authorised to do, in my view, such as trying to ensure that there is no further disintegration of the rule of law. This may require the establishment of detention centres and so on. And this all relates to the capacity which is taken to a mission, such as what kind of people you take, what police force, what forensic teams and so on.

XII CONCLUSION

Peace operations, in my view, represent the rule of law in action. There is a hierarchy that starts from international law generally, and includes state laws, the mission mandate and all of the instructions below. These represent the concepts of the rule of law.

I think that we would want to talk, particularly in New Zealand, about looking closely at the letter and spirit of the mandate – what exactly is authorised, what is required, and how we can ensure that the people operating on the ground get fully involved in the spirit of the mandate. This is particularly the case in a place like East Timor.

I think that engaging and operating in peace operations requires the capacity to make the rule of law work – that is a capacity question. And it means that the countries that send people (civilians or otherwise) – I was heartened to hear the discussion earlier about training and so on – must have the capacity to make that work.

Many of you will know, having served alongside people – this is not meant to be a superior criticism – that there are others who just do not understand these issues. They just do not have the background in it. However, they are required to come to missions and practice it, and find it extremely difficult.

I want to end with one comment. I believe if we were to think that the primary questions of peace operations only arise when states go wrong, we would miss the key point. For me the key point is simple – it is part of human nature for human beings to be involved in the process of self-determination, of building and rebuilding their relationships.

The key for the 21st Century and the key for peace operations is to try and make the self-determination process peaceful and orderly.

Appendix

NZ Cabinet Criteria for Assessment of Proposed Contributions of New Zealand Personnel to Peacekeeping, Peacemaking and Peace Enforcement Operations Pursuant to Security Council Mandates [CAB (95) M 9/6 D(i)]

While each request is to be considered on its own merit, the cumulative impact of growing peacekeeping demands is such that New Zealand must make choices regarding its involvement. Difficult balances will need to be struck regarding the nature and level of contributions based on an assessment of benefits and costs involved. The guidelines set out below will help ensure more fully considered and consistent choices.

1 National Considerations

Does the operation:

- a) enhance security in a region of strategic or economic interest to NZ?
- b) from NZ's perspective, represent a desirable contribution to collective security?
- c) support humanitarian objectives?
- d) enhance NZ's multilateral or bilateral relationships?
- e) offer a distinctive role for NZ?

2 Achievability

- a) does the political framework of the mandate suggest a reasonable chance of success?
- b) does that mandate establish achievable objectives, while allowing an opportunity for any changes required by developing conditions?
- c) is the operation based on a sound plan and does the operational concept offer a reasonable chance of success?

- d) is there effective direction and control of military operations by appropriate authorities including provision for suitable in-place civilian components?
- e) are there adequate provisions for humanitarian assistance?
- f) is there sufficient international support and commitment to both mount and sustain the operation?

3 Acceptability

- a) Would the proposed NZ contribution:
 - i) be nationally identifiable and fulfil a useful role?
 - ii) be acceptable to the protagonists?
 - iii) be able to operate effectively with other elements of the force?
 - iv) be of a nature and size that is consistent with and appropriate for the benefits and costs?
 - v) demonstrate a willingness to accept a fair share of the risk?
 - vi) be likely to result in benefits which are acceptable in the light of the risks to NZDF personnel?
 - vii) be able to be mounted and sustained without serious degradation of NZDF capabilities raised for other Defence tasks?
- b) is there public support and is the support sustainable should NZ suffer or inflict casualties?
- c) is the commitment finite and are there adequate provisions to review and terminate participation if conditions change to the extent that costs and risks outweigh the benefits?
- d) do the resultant limitations to NZ's ability to respond to other situations represent an acceptable risk?
- e) would an early offer provide a better chance of securing agreement to NZ's preferred contribution, and would an early offer permit NZ's objectives to be met with a smaller-sized contribution than otherwise would be the case?

Note: To this list might be added the process requirements inevitably applicable, that any proposals for contributions of NZ personnel to UN peacekeeping operations should incorporate comment on the fiscal impact of NZ.

Takahisa Kawakami[†]

SAFETY OF PERSONNEL SERVING ON PEACE OPERATIONS

I INTRODUCTION

My presentation today has two purposes: to sum up developments subsequent to our discussions at the Tokyo Seminar on the safety and security of peacekeepers and associated personnel, and to identify remaining issues and new elements, with a view to moving to the next stage of our discussions.

There have been both positive and negative developments on the question of safety and security: improvements on the one hand and a new problem on the other. In his remarks at the General Assembly Fourth Committee meeting on 18 October 2002 the USG/DPKO stated that the past year has been a very good year for UN peacekeeping in many ways. There have been positive developments in a number of missions, including the successful completion of UNTAET. While he did not specifically mention the safety and security question, it should be noted that there have been no serious incidents in the conduct of peacekeeping operations (ie in the discharge of their mandates).

The number of casualties caused by hostile action was low; in fact, according to UN statistics, between January and September 2002 there were no fatalities due to hostile actions, while there were 20 fatalities due to accidents, 20 deaths due to illness, and 10 deaths due to other causes. Having said this, I hasten to add that the above statistics do not include the casualties caused by the terrorist bombing in Bali. Two UNMISSET members are missing (and are presumed to have been killed by the blast), while six others were injured. The Bali incident is a vivid example of the suffering caused around the world by terrorism. Later I will come back to the threats posed by terrorism to the safety and security of peacekeepers.

[†] The views expressed in this paper do not necessarily reflect the views held by the author in his official capacity.

In March 2000, at the Tokyo Seminar dedicated exclusively to the safety and security of peacekeepers, we held thorough discussions on a wide range of issues and formulated a set of recommendations. How were these recommendations, which were timely and in line with the *Brahimi Report*, received in New York? They were taken seriously and a number of them were accepted.

II IMPROVEMENTS TO THE SAFETY AND SECURITY OF PEACEKEEPERS

A Appointment of a Fulltime UNSCORD and Reinforcement of the Office

Those of you who attended the Tokyo Seminar remember Mr Sevan's arguments, which he delivered vigorously but with humour. He complained about his dual functions as UNSCORD (United Nations Security Coordinator) and Head of the Office of the Iraq Program, as well as the shortage of human resources in his office. A fulltime UNSCORD took up his post on 1 August 2002 and his office has been reinforced. The PKO support unit, which was literally a one-person office at the time of the Tokyo Seminar, now has four fulltime staff members and a stress consultant.

B Reinforcement of the DPKO

While the creation of a new post – as a focal point of security – was not approved, the head of the Situation Centre was appointed as a focal point. In view of the financial constraints, I consider this to be a reasonable measure. The Centre operates around the clock, with information flowing in from all UN field operations. The Department established an advisory body called the 'Safety Council', whose function it is to promote awareness and a culture of safety and to strengthen safety measures at Headquarters and in the field. According to the DPKO, the Safety Council established several working groups dedicated to specific safety issues. One of the priority issues is road safety as it relates to vehicles and traffic accidents.

C Coordination between UNSCORD and DPKO

It is noteworthy that the UN has made a clear division of labour between the two offices by introducing the concepts concerning safety and security. According to their definition, security is considered as protection from external threat, namely protection from others, while safety is protection from inside, ie preventing and preparing for accidents.

D UNSCORD and DPKO Should Not Act Separately

The above distinction and division of labour does not mean that the two offices should act separately. On the contrary, there is a greater need for coordination between the two offices than ever than before. In July there was a meeting of security officers from all the field missions around the world, with the participation of both UNSCORD and DPKO personnel. They discussed the

need to take a generic approach and considered three options according to whether the mission was small, medium or large in scale. UNSCOP and DPKO are now working on these options with a view to issuing a SOP.

E Training and Equipment

The production of a standard training manual in the form of a CD-Rom is under way. Concerning equipment, a general agreement was reached between the two offices on minimum standards. Despite these efforts, we are of the view that more should be done in these areas. Japan has therefore requested the Secretary-General to include in his next report detailed information on in-mission training and equipment.

F The New Mechanism of Accountability and Responsibility

At the Tokyo Seminar, we also discussed the question of accountability. The issue was also taken up at subsequent sessions of the Special Committee, resulting in the adoption of General Assembly resolution 56/255 on 24 December 2002. The Secretariat issued a follow-up report which introduced the new mechanism. It designates roles and responsibilities at all levels of the security management system and provides for comprehensive monitoring and evaluation functioning.

III TERRORISM IN THE CONTEXT OF PEACEKEEPING

As I mentioned earlier, terrorist activities have resulted in casualties among peacekeepers. How do we cope with this problem? This meeting is not the forum to discuss this issue, nor are we specialists on the matter. But as the Bali incident has made all too clear, we cannot be indifferent to the terrorist threat to peacekeeping. Without touching upon the political sensitivity of the issue, I should like to point out three elements which are relevant in the context of our discussions.

First, is the statement of the obvious: as we devise security measures for peacekeepers, we should now consider terrorist threats to the personal safety of peacekeepers. Second, to eliminate or at least minimise risks in the field, a mission must obtain information and cooperation from local security institutions in a manner that will not impair its mandate or compromise its impartiality. In an operation such as the one in East Timor, where the UN has been involved in capacity building, we may wish to consider building capacity to combat terrorism. Finally, the possible threat of terrorism makes it all the more necessary to keep close and friendly relations with local population, whose cooperation is the best defence against terrorist attacks.

IV CONCLUSION

I should like to emphasise that in considering the protection of peacekeepers, we must take into account ever-changing circumstances and threats to their

safety and security, and I would like to propose that we, as partners, continue to address this issue in forthcoming discussions.

HE Major General Jioji Konrote (Retd)[†]

USE OF FORCE ON PEACE OPERATIONS

I INTRODUCTION

I have been asked to briefly speak to you on the use of force on peace operations. In particular, I was asked to share my views with you on whether there is an Asia-Pacific perspective regarding the use of force on peace operations. I do not think nor believe that our perception in the Asia-Pacific region regarding the use of force on peace operations is any different from that of other countries or regional forces that have participated on peace operations anywhere else in the world.

Within the Asia-Pacific region there have been many successful operations including the UN sponsored peace operation in Cambodia. Again, the success of the 1995 Australian led Operation Lagoon in Bougainville and more recently INTERFET, which became UNTAET and now UNMISSET, in East Timor. I suppose we can consider these peace operations as success stories to date.

The other issue which I was asked to talk about briefly is whether the Asia-Pacific region has a different concept regarding the use of force from that of militaries of other regions. Personally, the very simple answer to this question is I do not think so. I believe the Asia-Pacific countries that have participated in peace operations do not have a different concept regarding the use of force in peace operations. There may be varying degrees in how force is used under different circumstances, but basically I believe that we share the same principles on the use of force with other countries which are involved in peace operations worldwide.

My brief talk on the use of force on peace operations will be restricted to my experience as a peacekeeper with the United Nations Interim Force in Lebanon (UNIFIL). I believe I am going to be remembered as perhaps the only military officer who took part from the inception of a peacekeeping operation, who

[†] The views expressed in this paper do not necessarily reflect the views held by the author in his official capacity.

experienced command at all levels (including the staff at UNIFIL Headquarters) and ended up being appointed 20 years later to command the force. This is why my perception of peacekeeping and the use of force on peace operations may be different to some of my contemporaries.

II THE USE OF FORCE IN UNIFIL

A Establishment of UNIFIL

UNIFIL was constituted and deployed to South Lebanon following the Israeli invasion (Operation LITANI) of March 1978 and the passing of Security Council resolutions 425¹ and 426². It was basically mandated to:

- Prevent the recurrence of hostilities in its area of operations;
- Supervise the withdrawal of the Israeli Defence Forces (IDF) from Lebanese territory; and
- Assist the Lebanese Government in re-asserting its effective control in South Lebanon.

UNIFIL was deployed into a country that had been embroiled in a civil war since 1975. There was no respect for law and order and the whole country was virtually in a state of total anarchy. In fact, UNIFIL was ‘imposed’ by the UN into a part of Lebanon which was controlled by lawless Palestinian armed factions and occupied by the IDF. The rule of law did not exist, so consequently, the problems which were encountered by UNIFIL were many, right from the initial stages of deployment.

The UN failed to secure the consent of all warring factions (including the IDF) before passing Security Council resolutions 425 and 426 and deploying UNIFIL. The Lebanese Government was ineffective in controlling the various armed Palestinian factions which claimed that under the 1970 Cairo Agreement the PLO was granted freedom of operations in South Lebanon. The Israelis, on the other hand, did not trust UNIFIL and became an impediment in UNIFIL’s attempts to implement its mandate.

B Use of Force

How do you apply minimum force and ensure that your actions and those of the troops under your command remain legal? This is very difficult indeed when UNIFIL’s open-ended mandate was not respected by the main parties to the conflict. Without consent there was no cooperation from the belligerents who severely curtailed UNIFIL’s ability to operate effectively.

Without consent and cooperation, an already very volatile and dangerous situation became very confusing and chaotic for the troops at all levels of

¹ SC Res 425 (1978), 19 March 1978.

² SC Res 426 (1978), 19 March 1978.

command. I experienced these problems as a Company Commander when I took over the Line of Control from a French Company which had just lost some soldiers (including the crippling of their Commanding Officer, Colonel Salvan) to hostile fire from a group of Palestinian armed elements which were trying to infiltrate the UN area of operations. At this initial stage of the UNIFIL deployment there were no clear and concise orders from Force Headquarters regarding the use of force, the right of self-defence, protecting individuals and property, and the mandate.

Right throughout its history, UNIFIL was operating between the UN Charter Chapters VI and VII. Regrettably, and with due respect to the UN, it did not have the political will and subsequently the commitment to back the troop contributing countries and other contingents which were asked to keep the peace in an area which I believe had little peace to keep. In order to safeguard the credibility of the UN and UNIFIL, it was necessary at times for troops to resort to peacemaking as opposed to peacekeeping.

When I returned to UNIFIL as a Battalion Commander, I found the operational situation on the ground to be very confusing and chaotic, still because of Israel's second invasion of 1982 (Operation Peace for Galilee), and the resultant hostilities as Israel was slowly 'pressured' to withdraw from all Lebanese territory.

Nina Lahoud (an old friend) who was then UNIFIL's senior Legal Adviser to the Force Commander must have had a difficult time in trying to justify to UN Headquarters New York as to why certain units within UNIFIL were operating the way they did during this very confusing and chaotic period.

III RULES OF ENGAGEMENT

I was asked to address the issue of rules of engagement as well. This needs to be standardised within all units engaged in peace operations if credibility and cohesion is to be maintained at an acceptable level. Unfortunately, this did not occur with UNIFIL. As a Commander at all levels I found that this was one of UNIFIL's biggest problems. There were varying degrees of interpretation of UNIFIL's rules of engagement and, as to be expected, the results were not only disappointing but, more importantly, detrimental to UNIFIL's credibility and that of the UN as a whole.

A lack of commitment (political will) on the part of the UN, coupled with the varying degrees of interpretation of UNIFIL's rules of engagement, had a very profound and negative impact on command and control at all levels. An example of this was in 1986 when the French Battalion was attacked by Lebanese armed groups when troops manning one its checkpoints killed three Amal and Herzollah (Party of God) liaison officers during a confrontation. All UNIFIL contingents are placed under operational control of the UNIFIL Headquarters and not under command for obvious reasons. The Finnish Force

Commander (Major General Gustav Hagglund) could not 'persuade' nor order some of the more heavily armed UNIFIL contingents to 'intervene' and assist the French because of the fear of casualties. As the Fijian Battalion Commander I went to the assistance of the French as a matter of principle in order to preserve the integrity of UNIFIL and protect its credibility. It was most difficult.

IV CONCLUSION

Israel finally pulled out of all Lebanese territory in May 2000. UNIFIL was severely criticised for not doing enough to speed up this withdrawal and fully implement its mandate. I believe that this is unfair because when UNIFIL was deployed to Lebanon in 1978, the whole of the south which was under the control of the Palestinians was virtually deserted following the Israeli invasion. Right throughout its deployment, normalcy returned to this part of this war torn country and UNIFIL was a source of confidence and hope for the inhabitants who had suffered so much throughout the conflict.

Following the Israeli withdrawal, UNIFIL has been downsized with a view to giving it an Observer status. To date about 229 of its members have been killed, half of whom died as a result of hostile action from the various armed factions in the conflict.

Sastrohandoyo Wiryono[†]

PREVENTIVE DIPLOMACY AND CONFLICT RESOLUTION ON PEACE OPERATIONS^{*}

I INTRODUCTION

As a diplomat I have had the privilege of being involved in international endeavours at preventive diplomacy and conflict resolution. I am also pleased and proud to point out that my country, Indonesia, has a long record of being involved in UN peace operations. I therefore have some very positive feelings about that subject. The human tendency to solve difficult problems through violence is nowhere more evident than in studies on the frequency of armed conflicts through the years. Thus, armed conflict has been described, with good reason, as a growth industry. The number of major armed conflicts has remained high in recent years.

II ARMED CONFLICT IN PEACE OPERATIONS

During the 11-year post-Cold War period 1990–2000, there were 56 different major armed conflicts in various places around the world. All but three of them were internal or intrastate. The only three interstate major armed conflicts during that period were Iraq/Kuwait, India/Pakistan and Eritrea/Ethiopia. This could mean that states are learning to resolve disputes among and between themselves through means other than armed conflict, but disputants within states for control of a government or a territory still resort to the use of armed force to settle their disputes. These intrastate armed conflicts, often involving failed or failing states, become an occasion of instability among immediately neighbouring states or even in an entire region.

This can lead to a situation where an intrastate armed conflict is complicated by third party states sending contingents of their regular troops to aid one side of

[†] The views expressed in this paper do not necessarily reflect the views held by the author in his official capacity.

^{*} Editors' note: Mr Wiryono was unable to attend the Conference due to his commitments to support the Aceh peace talks. He very kindly, however, sent us a copy of his paper requesting that it be shared with Conference participants and included in the Conference proceedings.

an intrastate armed conflict such as in the case of the civil war in the Congo. It is also often the case that leaders or elements of a party in an intrastate armed conflict are based, or are operating, in a third country.

One factor that often makes it difficult to resolve an intrastate armed conflict with the help of third countries or international organisations is the time-honoured principle of non-interference in the internal affairs of sovereign states. The government involved in an intrastate armed conflict often invokes this principle whenever it believes that it can resolve the dispute through superior armed force. Very often this is a mistaken perception, and the government fails to defeat its adversary, who usually resorts to a protracted, low-intensity guerrilla war. And in that kind of conflict, the goal of the side using guerrilla warfare is not to score any military victories, it only has to survive. Thus many of the current armed conflicts in the world today have been ongoing for more than a decade.

A The Role of the UN

As the organisation founded to save succeeding generations from the scourge of war, the UN remains the appropriate forum to deal with both traditional and new threats to international peace and security. The entire range of peace operations, peacemaking, peacekeeping, peace building, conflict prevention and conflict resolution may, indeed, be regarded as the main function of the UN. Moreover, the judgment of international public opinion on the effectiveness of the UN is, more often than not, based on its success or failure in carrying out these tasks.

The UN has had some successes. But in general, the verdict is that during the past decade the UN has not lived up to what has been expected of it. The fact is that the UN can only be as successful as its Member States allow it to be. It cannot be expected to do better than it has done in the past unless in every instance where it must undertake peace operations, the UN Secretary-General is provided with a mandate, capability and resources that are commensurate to the magnitude of the task.

Of course, it must in the first place be able to project credible force, because in many conflict situations, force is about the only language that the parties involved understand. Bereft of credible force, it may well be that nobody listens to the UN. This means that the UN contingent must be able to defend itself, its mandate and the environment in which it is doing its work.

But even with credible force, it becomes apparent soon enough that this is not sufficient: force can only create space and opportunities for building peace. If the UN operation does not have the capability and the resources for building peace, that force is wasted, as the operation cannot make the transition from war to peace.

Such a transition entails orienting communities emerging from conflict towards the rule of law and respect for human rights, and promoting national reconciliation. This, too, requires skills and resources that are not always readily available to the UN. In sum, while the UN must make some organisational improvements and develop more efficient procedures and more effective strategies for carrying out its peace operations, the Member States are also called upon to provide UN operations with clear, vigorous and sustained support.

B The Role of Other Actors

This is not to say that only the UN can and should undertake peace operations. There are times that regional organisations and other entities, because of their proximity and other forms of relationship with the parties in dispute, are in a better position to do the work for peace that is usually done by the UN. The fact is that during the international discussions leading to the convening of the San Francisco Conference that eventually established the UN, there was a notion, which many delegates took seriously, that regional organisations should play a major role in the body that would eventually become the Security Council. The notion did not survive the debates at the Dumbarton Oaks (Georgetown, Washington DC) conference, but the role of regional organisations as partners of the world organisation is enshrined in the UN Charter.

In practice, not only regional organisations but also international organisations that are not regional in nature and individual countries with vast influence on the parties in conflict or dispute, have been involved in peace activities.

C Types of Peace Operations

The UN *Agenda for Peace*, which was formulated by then Secretary-General Boutros Boutros-Ghali in the early 1990s, cited a number of peace operations in which the UN may be expected to play a role:

- Preventive diplomacy: which is defined as action to prevent disputes from arising between parties, to prevent existing disputes from escalating into conflicts, and to limit the spread of conflicts when they occur. There is a view that this term is redundant because all diplomacy is geared to preventing conflict or preventing its growth or spread. Coinage of the term is attributed to the late UN Secretary-General Dag Hammarskjöld, with particular reference to conflicts that were outside the sphere of the Cold War.
- Peacemaking: which may be described as the bringing together of hostile parties so that they can resolve their differences through peaceful means.
- Peacekeeping: which is the deployment of efforts and personnel in order to prevent a resurgence of actual fighting between the adversaries.
- Peace building: which is the strengthening of the support structures for lasting peace once hostilities have ceased.

Although it appears that these peace operations take place in a time sequence, one leading to the other, the experience in the field is that they merge with one another. There are no clear boundaries between one and the next operation in actual practice and a number of them may be taking place at the same time. Thus, civilian peace builders may already be at work in a country while a UN military contingent is still doing peacekeeping work.

Often classified as a tool or a technique of preventive diplomacy is confidence building, which is the promotion of a climate of transparency and mutual trust between parties that could or are already engaged in dispute or conflict, so that they are encouraged to solve their differences through peaceful means. Some diplomats (eg Ali Alatas) classify it as basically a peace operation prior to preventive diplomacy, although those who hold this view admit that there are no clear boundaries between the two activities.

III PREVENTATIVE DIPLOMACY

Indonesia has participated in many UN peace operations; particularly peacekeeping operations to which it has contributed troop contingents over the years. This is only in keeping with the constitutional mandate of the Indonesian Government to contribute to the shaping of a better world of peace and social justice. Also in keeping with that mandate is Indonesia's involvement in various preventative diplomacy initiatives, the most notable of which I will discuss briefly.

A The Cambodia Peace Process

Civil war had been raging in Cambodia for almost a decade, with one of four embattled factions being backed by a Vietnamese occupation army, when in October 1987, Indonesia as interlocutor of ASEAN persuaded the four factions, as well as Vietnam, to meet informally in Jakarta for a preliminary exchange of views toward a framework to an eventual settlement of the conflict. The first Jakarta Informal Meeting was held in July 1988, and a second was held in February 1989, during which the participants reached an understanding on the issues to be negotiated on but could not make progress beyond that point. But with the end of the Cold War, global conditions were conducive to peace and all the parties wanted an end to the conflict.

The Jakarta Informal Meetings had also renewed the interest of the major powers in the search for a solution. When Vietnam announced in April 1989 its intention to withdraw its troops from Cambodia, France took the initiative of convening another International Conference on Cambodia at the end of July 1989, with Indonesia, as interlocutor of ASEAN, serving as co-chairman. Also in attendance at this Conference were the Representative of the UN Secretary-General, the Foreign Ministers of the Permanent Members of the Security Council and all the internal and external parties to the Cambodia conflict. The Conference did not succeed largely because the incumbent administration in

Phnom Penh refused to be dismantled in favour of an interim administration and to agree to one of the other factions, the Khmer Rouge, being a party to the settlement. A spate of consultations among the participants followed, with the result that the Conference was reconvened in Paris in October 1991. This time, agreement was finally reached on the basis of a draft prepared by the permanent members of the Security Council, featuring an Australian proposal for an interim UN administration during the transition period leading to general elections, and a provision for the creation of a Supreme National Council led by Prince Norodom Sihanouk where all factions would be represented. The Paris Agreements included a declaration on the rehabilitation and reconstruction of Cambodia.

Elections were held in May 1993, thanks to a UN peacekeeping operation that was described as the most ambitious and most difficult operation of its kind ever undertaken by the UN at that time. National rehabilitation and reconstruction (peace building) was carried out simultaneously with the peacekeeping operation. Ratification of the new constitution in September 1993 effectively brought to a close the UN mandate in Cambodia.

It may be noted that the first significant moves toward a Cambodia peace process were those of a regional organisation, ASEAN, with Indonesia serving as its interlocutor. (No other interlocutor from ASEAN was acceptable to Vietnam.) The Jakarta Informal Meetings that Indonesia convened were highly successful as confidence building measures, and therefore a case of preventive diplomacy. They were undertaken, however, when civil war had been going on for more than a decade, and some authors would therefore classify them as an act of late preventive diplomacy in contrast to early preventive diplomacy which is undertaken before actual armed hostilities take place. The initiative was carried out at such a late stage of the conflict that the term corrective diplomacy may as well be considered applicable.

The Jakarta Informal Meetings did attempt to go beyond confidence building into actual peacemaking, but in this regard, it did not cover much ground because animosity was so high and mutual distrust was already so deep among the warring factions. They could not make any breakthrough towards a peace agreement. Nevertheless, the Jakarta Informal Meetings made essential contributions to the peace process, without which the road to peace would have been so much more difficult or even impossible. The same could be said of the contributions of the UN Secretary-General and of France and the other permanent members of the Security Council, and of Australia, that together successfully found the solution to one of the major problems of the negotiations. A force for peace less than that which gathered to solve the Cambodia problem could not have succeeded.

B Indonesia as Facilitator of Peace Talks on Southern Philippines

Soon after President Ferdinand E Marcos of the Philippines declared martial law in September 1972, a secessionist rebellion broke out in the southernmost part of the Philippines. The Moro National Liberation Front (MNLF), on behalf of minority communities that were almost entirely Muslim, waged the rebellion. President Suharto had suggested to Marcos that the conflict be settled through the mechanism of ASEAN, but Marcos chose instead to bring the matter to the Organisation of the Islamic Conference (OIC), probably because there was an oil crunch at that time, and he wanted to ensure continued Philippine oil supply from the Middle East.

In March 1973, the issue of the Muslim minority in the southern Philippines was put on the agenda of the Fourth Ministerial Meeting of the OIC held in Benghazi, Libya. The OIC then formed a Quadripartite Committee comprising Libya, Saudi Arabia, Senegal and Somalia to help the Philippine Government and the MNLF arrive at a political settlement. This led to negotiations and the signing of the Tripoli Agreement in Libya on 23 December 1976. The Tripoli Agreement, which provides for the establishment of an autonomous Muslim region in the southern Philippines but within the sovereignty of the Republic of the Philippines, could not be implemented right away as many important aspects of it were left for further discussions that did not materialise as hostilities intensified in southern Philippines. Meanwhile, the Marcos Government, believing it could eventually crush the rebellion, implemented the Tripoli Agreement in its own way and without the participation of the MNLF main body.

At its 20th Ministerial Meeting in Istanbul in 1991, the OIC decided to expand the Quadripartite Committee into the Ministerial Committee of the Six in order to include member countries from Asia. The following year – 1992 – with a new Government in charge in the Philippines (Marcos having been ousted and succeeded by Corazon C Aquino), an attempt was made to revive the peace talks: exploratory talks were held in Libya where not much progress was made except that both sides agreed to meet again. This time the OIC Secretariat sought the help of Indonesia to move the peace process forward, and Indonesia agreed. At the 21st Ministerial Meeting in Karachi in April 1993, Bangladesh and Indonesia became members of the Committee, which then elected Indonesia as Chairman. At the request of the parties in dispute, Indonesia hosted a second round of informal exploratory talks in Cipanas, West Java in April 1993. This resulted in a statement of understanding on the holding of formal peace talks with the agenda focused on the modalities for the full implementation of the Tripoli Agreement in letter and in spirit, including:

- Those portions of the agreement left for further or later discussion; and
- The transitional implementing structure and mechanism toward an autonomous Muslim region in the southern Philippines within the sovereignty of the Republic of the Philippines.

The first round of formal peace talks, held in Jakarta in October-November 1993, resulted in the signing of a Memorandum of Agreement and the Interim Cease-Fire Agreement. The Interim Cease-Fire Agreement added momentum to the peace process, immediately replacing armed conflict with political dialogue. An OIC Observer Team manned by Indonesian officers coordinated implementation of the cease-fire.

The first set of issues that the negotiations addressed were the substantive aspects of autonomy. These covered nine areas: national defence; regional security forces; education, economic and financial systems; mines and minerals; administrative systems; representation in national government legislative assembly and executive council, and judiciary; and introduction of *sharia* law.

The second and more crucial set of issues had to do with the establishment of the transitional implementing structure and mechanism for the provisional government in the autonomous region. These issues proved to be much more difficult. They were finally resolved through a formula suggested by President Fidel V Ramos, who had succeeded Mrs Aquino as President of the Philippines. The idea was to create an administrative unit to be called the Southern Philippines Council for Peace and Development (SPCPD), which would serve as the transitional implementing structure. Since this administrative unit would use the delegated powers of the President of the Philippines, it could be established without the constitutional requirement of a plebiscite, on which until then, the Philippine Government side was insisting. MNLF Chairman Nur Misuari accepted the idea and negotiations progressed rapidly to a conclusion.

Seventy meetings at a technical level, seven informal consultations, and eight Mixed Committee Meetings were held in the southern Philippines. Four rounds of formal peace talks and the ninth Mixed Committee Meeting was held in Jakarta. Ministerial consultations of the Committee of the Six were held in New York, Jeddah and Jakarta.

A Peace Agreement, which had provisions for the economic development of the projected Autonomous Region, was signed between the Government of the Philippines and the MNLF in Manila in September 1996. Soon after that, MNLF Chairman Nur Misuari ran unopposed for governorship of the Autonomous Region in Muslim Mindanao. He did not prove to be a good administrator, and a successor was elected in his place as his tenure ran out. Partly because of Misuari's inadequacies as an administrator and partly because of the Asian financial crisis, which devastated the Southeast Asian economies, the expected economic development of the region of autonomy had not gained much momentum. But Indonesia is looking into the possibility of making a case in the OIC for the fulfilment of all the political aspects of the Peace Agreement so that the conflict involving the Muslim communities in the

southern Philippines could finally be declared altogether settled and the Ministerial Committee, now expanded to eight, could also dissolve itself.

This is a case of preventative diplomacy, peacemaking, and peace building in which the UN was not involved at all. Instead, it was an international organisation with a religious orientation, the OIC, which was mediating. Its efforts could make no headway, however, until two countries from the Asian region, one of them a next-door neighbour to the conflicted country, became involved. Although the name of ASEAN was often invoked in relation to the peace talks, and ASEAN was supportive of the process, the regional organisation actually had no part in the process. It greatly helped, of course, that a democratic government, rather than an authoritarian one, was in place when the negotiations were resumed. The timing, too, was just right: after more than two decades of rebellion, the Philippine Government and the affected communities were war-weary. Crucial was the fact that both parties to the conflict trusted Indonesia so completely that, although nominally just a facilitator, Indonesia could actually suggest substantive ideas without provoking resentment or suspicion on the part of the negotiating parties.

IV INDONESIA'S MANAGING OF THE POTENTIAL CONFLICT IN THE SOUTH CHINA SEA

A semi-enclosed sea linking the Indian and Pacific Oceans and located between continental Asia and insular Southeast Asia, the South China Sea is a highly strategic area: it includes vital sea-lanes of communication and holds vast natural resources that, apart from living marine resources, may include oil and gas and minerals. The countries around it have a history of conflict and disputes that have been amplified by conflicting sovereignty and jurisdictional claims over certain island groups in the area and unresolved questions on delimitation of territorial seas, continental shelves and exclusive economic zones.

In 1988, the Indonesian Government was prompted to take a proactive approach to the South China Sea situation by a naval clash between China and Vietnam in the vicinity of the Spratlys islands. Moreover, international observers were citing the South China Sea as the next flashpoint after the Cambodia problem, which was then nearing solution.

As a neutral third party, Indonesia believed it had the credibility to launch an initiative in preventive diplomacy with regard to the South China Sea. Indonesia's first move was to secure the consent of the three ASEAN members that were claimants to the South China Sea – Malaysia, the Philippines and Brunei Darussalam – to an informal workshop on promoting cooperation in the South China Sea as a way of managing potential conflict in the area.

In the first Workshop on Managing Potential Conflict in the South China Sea, which was held in Bali in January 1990, only the ASEAN member countries

were represented. Participants were government officials in their personal capacity, academics and other private observers, who in any case were able to reflect the views and perceptions of their own countries in the Workshop. The Workshop was informal and did not touch on the existing disputes except to call on the parties involved to exercise restraint and to settle their disputes through peaceful means. It proceeded to identify areas of possible mutually beneficial cooperation that the countries of the participants could jointly undertake.

Then Indonesia sought the consent and support of the claimants that were not ASEAN members – China, Vietnam and Taiwan. Participants from these three countries, together with those from landlocked Laos, attended the second Workshop in Bandung in 1991. The principles and approaches having been established at the Bali and Bandung Workshops, the Yogyakarta Workshop of June 1992 proposed concrete programs and projects that the South China Sea countries could cooperate in. For this purpose the Workshop formed two working groups, one on ‘Resource Assessment and Ways of Developing Them’, and the other on ‘Marine Scientific Research’.

As the Workshops became institutionalised as an annual event through the decade of the 1990s, the number of working groups and experts groups increased, and they developed a sizeable body of projects designed to benefit all the countries around the South China Sea. And over the years, the Workshops proceeded in a two-tiered fashion, with the general issues being discussed at the Workshop level, while technical matters related to specific projects were taken up at the working group level. Toward the end of the decade, with a body of concrete projects already developed, refined and awaiting funding and sponsorship, the Workshop process seemed to mark time as the governments of the claimant countries represented in it did not seem to have the political will to translate their broad policy statements of support into concrete action.

In March 2002, however, the Workshop process scored a breakthrough with the launching of a marine scientific research expedition from Batam to Anambas Island in the South China Sea, an undisputed island belonging to Indonesia. The project was the result of a decision of the 10th Workshop in Bogor in 1999 and supported by several governments and institutions of the South China Sea countries, with Indonesia and Indonesian institutions apparently providing most of the needed resources, including the research sea craft. The project was historic because it was the very first time that marine scientific research was carried out in the South China Sea by scientists of various disciplines from all over the South China Sea area.

It would augur well for the Workshop process as an instrument of preventive diplomacy if the Anambas Expedition were followed up with other marine scientific research projects. But the Anambas Expedition did not come easy, and other projects, although a good number of them have been lined up, will

not come easy. This is because there is so much doubt, distrust and political conservatism among the governments of the claimant countries that has to be overcome. As early as the third Workshop, Indonesia proposed to upgrade it into a more formal intergovernmental forum; this was vigorously rejected by the claimant countries. Some of the claimant countries would indeed be more comfortable with the Workshops if they remained just talk shops, instead of becoming the implementers of concrete forms of cooperation that serve as confidence building measures.

And yet even as talk shops, the Workshops have done a great deal of good, if only because of their link-up with the first track diplomacy of ASEAN, particularly in the ASEAN Regional Forum. For instance, the ASEAN *Declaration on the South China Sea* (1992), issued in Manila, was first tried out by a Filipino Workshop participant as a notion in the Workshops. In that sense, the Workshops, because of their informality, have been serving as a risk-free laboratory for diplomatic ideas.

Informal diplomacy has its value and should always be considered as an approach to peace operations, especially when hostilities have not yet taken place, but it has its limits, and those limits should be recognised. Patience and simple persistence may yet win the day for Indonesia's sponsorship of the informal Workshop process as an instrument in preventive diplomacy.

V THE QUEST FOR PEACE IN ACEH

The current secessionist rebellion in Aceh began on 4 December 1976 when Muhammad Hasan di Tiro declared Acehnese independence. Soon the rebel organisation, known as Gerakan Aceh Merdeka (GAM) or Free Aceh Movement, began attacking government troops, only to reel back in the ensuing government counterinsurgency operation. By 1983 di Tiro had fled into exile abroad where he eventually became a Swedish citizen.

But GAM recuperated and again in 1989 challenged the government, which responded with a massive military operation and brutal repression, regaining full control of the situation in 1992. Military oppression and rampant violation of human rights, however, fed public resentment against the government. Human rights violations in Aceh came to public light soon after the Suharto Government was toppled. Pressured by a public outcry at the atrocities and human rights violations in Aceh, the Indonesian military lifted Aceh's status as an area of military operations, promising substantial troop withdrawal from the province. But GAM, taking advantage of the demoralisation of the military, launched an offensive. Armed confrontation resumed.

During the administration of President Abdurrahman Wahid, the Government made overtures for a dialogue with GAM, to which the faction led by di Tiro (GAM had split by that time) responded positively. In May 2000, the Indonesian Government and GAM signed in Geneva a document called Joint

Understanding for Humanitarian Pause for Aceh. The agreement would allow the free flow of humanitarian aid to a population in dire need of it. Reached after a series of confidential talks with the mediation of the Henri Dunant Centre, an international humanitarian NGO, the Joint Understanding was an important confidence building measure that created common ground on which further dialogue could be built. Although the war-weary people of Aceh welcomed this development, it was less than satisfactory to many circles in Jakarta. Parliament had not been consulted nor was there any discussion in the press or anywhere else.

The negotiator of this agreement on the Indonesian side was Dr N Hassan Wirajuda, then Permanent Representative of Indonesia to the UN in Geneva. The Government took care to explain that Dr Wirajuda, while representing the Government, was not negotiating in his capacity as Permanent Representative to the UN in Geneva. This explanation was apparently given to reduce criticism that by negotiating with GAM, the Government had made a blunder and GAM had scored a diplomatic victory, since the act of negotiating with GAM implied recognition, putting GAM, at least theoretically, on an equal footing with the Government. To many Indonesians, the talks in Geneva had internationalised the Aceh problem, evoking memories of the consequences of the internationalisation of the problem of East Timor.

Nevertheless, the administration of President Abdurrahman Wahid persevered with the dialogue and in January 2001 both sides reached a Provisional Understanding that contained a formula for the transformation of GAM from a guerrilla force to a political movement, and for possible future arrangements to check the violence and carry out confidence building measures. By the middle of the year, the Government side put on the table the offer of special autonomy, and both sides agreed on an eventual holding of an all-inclusive informal dialogue of all sectors of Acehnese society, including GAM. But for about seven months after that, from July 2001 to February 2002, dialogue could not proceed mainly because of difficulties on the ground brought about by an increasing frequency of skirmishes. Meanwhile, President Megawati (who has a more nationalistic outlook than Wahid) had taken over the reins of government, and she had appointed Indonesia's negotiator, Dr Hassan Wirajuda, as Indonesia's Foreign Minister.

Internationally, there is strong support for Indonesia's sovereignty and territorial integrity, especially with regard to the question of Aceh. GAM, on the other hand, has no external support for its claim to statehood except perhaps from some NGOs. To some degree, GAM is in control of a force and enjoys some support, which is difficult to estimate, from the people of Aceh. There is widespread concern at the continuing violence resulting in frequent violations of human rights and producing a great number of internally displaced persons, while crippling the socio-economic life of Aceh. This concern translates into domestic and international pressure on both sides to bring the conflict situation

to an end, to establish durable peace and rebuild the socio-economic life of the province.

Very early this year, a new negotiator for the Indonesian Government was appointed to succeed Dr Hassan Wirajuda who had become Foreign Minister. By then the Government had adopted a two-track policy on Aceh, in which dialogue would be pursued while military and police work would also continue.

But there was also a widespread perception in the Government, including Parliament, that the Indonesian armed forces had the upper hand in Aceh. Many of them feel that there is no need to negotiate with a losing and weakening secessionist movement that has no international support. There are more than a few who believe that the only thing to do about a separatist movement is to crush it, period. Hence, dialogue has been difficult to pursue. Nevertheless, dialogue went on with GAM. For this purpose, the two sides formed a Joint Council for Political Dialogue with five internationally eminent individuals acceptable to both sides serving as advisors.

The position of the Government at this time was that the people of Aceh had the right to administer themselves peacefully in freedom and democracy. This would be achieved through three main courses of action. First, the conflict would be ended and peace established over a transitional period, and special autonomy would be accepted as the final solution to the conflict. Second, during the transitional period, there would be cessation of hostilities, an intensive confidence building process would take place, and socio-economic life in Aceh would be normalised with humanitarian aid and economic assistance from the government and the international community. And third, an all-inclusive dialogue among all elements of Acehnese society, including GAM, would serve as the consultative forum for achieving a negotiated peaceful settlement to the Aceh problem on the basis of the Nangroe Aceh Darussalam (NAD) Special Autonomy Law, legislation passed during the tenure of President Wahid granting special autonomy status to the province of Aceh. After conclusion of that all-inclusive dialogue, preparations could then be made for general elections in Aceh, with GAM participating as a provincial political party.

In a February 2002 meeting, the Government's position was presented to the Henri Dunant Centre officials and all the advisors. They generally responded positively to that position, particularly since it allowed dialogue to proceed. The core of the Government's position was the acceptance by GAM of the Government's offer of autonomy spelled out in the NAD Law. Its acceptance by GAM would have implied abandonment of its demand for independence.

In that February meeting, the GAM side was not ready to sign the Joint Statement that would have been the outcome of the meeting, as it sought more time to consider the offer of autonomy. And since the draft Joint Statement could not be jointly issued by the two sides, it was agreed that the facilitator,

the Henri Dunant Centre, would issue it on their behalf. The text of the Joint Statement clearly stated that the two sides agreed 'to use the NAD Law as a starting point for discussions and to a period of confidence building in which they will cease hostilities and then move towards democratic elections in Aceh in 2004.' The document therefore served as a road map for the peace process ahead, stipulating a cessation of hostilities, an all-inclusive dialogue and elections.

The subsequent meeting between the two sides held in early May 2002 resulted in the formalisation of the February Joint Statement issued by the Henri Dunant Centre. On 10 May 2002, they signed a Joint Statement with essentially the same content as the February Joint Statement. But soon the two sides interpreted the text differently. The Government view was that GAM had accepted the NAD Law as a starting point, while GAM understood it only as the first thing to be discussed. As often happened in the past, GAM spokesmen repudiated the agreement, and armed elements claiming to belong to GAM started attacking government facilities, setting back the dialogue process.

Thus, a third meeting, which should have taken place in April 2002, did not materialise. On 19 August 2002, the Indonesian Government announced a new policy on Aceh: it gave GAM until the end of the fasting month of Ramadan, which falls around 5 December 2002, to accept the offer of special autonomy as a prerequisite for future dialogues, or face the full brunt of Indonesia's military power. In fact, the dialogue process was suspended while violence escalated and claimed more lives. Just before the end of August 2002, however, the Government softened its stance and announced that it was still willing to talk with GAM.

The Government of Indonesia has submitted a draft agreement for the cessation of hostilities to the Henri Dunant Centre and the advisors. The Centre and the advisors have made amendments on the draft, which means that they have adopted it so that it could very well serve as basis for further dialogue between the Government and GAM. If, despite complications on the ground, the cessation of hostilities is successfully implemented, this could be followed up with confidence building measures and the all-inclusive Acehese dialogue, and general elections as envisaged in the May Joint Statement.

As progress is made, there will be new problems. For example, since top leaders of GAM have already become Swedish citizens, it would be inconceivable for them to run in the projected general elections in the province. Moreover, Indonesian law today requires that only nationally-recognised political parties can run in any elections, including provincial elections, GAM cannot contest elections in Aceh without affiliating with an existing national party. And any new legislation to accommodate GAM will entail long and emotional debates in Parliament, which will not serve the spirit of reconciliation.

The Indonesian experience in Aceh represents a new approach, as it does not involve the UN nor does it involve another government or a regional or international organisation but an NGO. This is not entirely strange as then UN Secretary-General Boutros Boutros-Ghali once listed NGOs, along with private individuals, as among possible mediators in a peace operation. What is probably unusual about this experience is that the first results of the peace efforts were suddenly revealed without any prior public knowledge that negotiations were going on, and mediated by an entity that is, until today, largely an unknown number to most Indonesians. Great odds are therefore ranged against the success of the peace effort, as there has been no build up of public trust and confidence in an unfamiliar mediator which, as an NGO could easily be perceived as biased against the Government while both the Government side and the side of GAM suffer from an apparent lack of unanimity on the need for negotiations.

VI CONCLUSION

The most obvious conclusion that may be derived from the experience of Indonesia in preventive diplomacy is that there are no hard and fast rules. The techniques and approaches that are to be used in preventive diplomacy will have to depend on the general situation, the disposition and perceptions of the parties in dispute or conflict, the external or international environment of that conflict or dispute, and the capabilities and credibility of the entity carrying out the preventive diplomacy initiative.

The involvement of the UN should always be considered because peace operations are the business of the world organisation, but such involvement should always be carefully weighed. There are indeed situations where preventive diplomacy is much needed but UN involvement would be inappropriate and futile, as in the case of Aceh. When the involvement of the UN is desirable or required, it should be instantly ready for the task. There is certainly great merit to the proposal that experts in preventive diplomacy be attached to the UN Secretariat. Even when the UN is not involved in a preventive diplomacy initiative, these UN experts could be fielded as informal advisers. It should also be useful for regional organisations, international organisations, think tanks, and NGOs to develop personnel with expertise in preventive diplomacy and other kinds of peace operations as the role of mediator in preventive diplomacy might just be thrust upon them by circumstance.

With so many political disputes and armed conflicts taking place in the world today, there is great need for individuals and institutions with considerable knowledge and skills in preventive diplomacy and other kinds of peace operations.

Major General Tim Ford[†]

COMMENTS AND SUMMATION ON REGIONAL VIEWS OF PEACE OPERATIONS

I would like to just reiterate some of the points that have been raised. In the first presentation, Lieutenant General Nambiar raised the issues of the relative capabilities and the importance of UN versus the regional and other coalition-type approaches to peace operations. He suggested that mixed missions involving regional, sub-regional and UN personnel should be analysed as each of those elements contributes to the legitimacy of the UN mission. By getting the involvement of dominant countries in the region you have countries that actually understand the culture of the conflict and the culture of the region, whilst still providing the legitimacy of a full international spread of countries coming to respond to this international concern as recognised by the Security Council.

Lieutenant General Nambiar also, of course, very much stressed the need for the command and control arrangements, which I think is a difficulty beyond which we are going to have to continue to progress. The difficulty lies in the need to reconcile unity of command and unity of forces with the diversity of troop contributing countries.

Takahisa reminded us of the importance of the need to pay continued close attention to the safety and security of UN peacekeepers and their associated personnel. In particular, we must ensure that force protection planning takes into account not only the local threats to safety and security, but also threats now raised by terrorism. He reminded us of the need to take regional security concerns into account, to develop sound information systems and of the need for capacity building as an important subject of that whole security and safety area.

Andrew, of course, has brought a very specific focus to the Conference. He made particularly clear the personal national touch of each nation that has an

[†] The views expressed in this paper do not necessarily reflect the views held by the author in his official capacity.

imprint on the mission, and the importance, of the regional perspective because they bring a national and regional closeness to the community and sensitivity to the local cultures. His presentation highlighted the advantages of using at least some regional contributing countries in every international peacekeeping mission.

Andrew also emphasised the importance of national considerations – and this was again raised in question time – that really need to be taken into account before the national decision is made. He further emphasised some formal processes being undertaken to ensure that there is domestic and international legitimacy.

Major General Konrote talked to us about the use of force in peacekeeping, noting that the UN may often deploy into areas of operations where there is no existing rule of law and that this provides us with a real problem of how we are going to legally apply force. And therefore some of the discussions that came up this morning highlight what we need to look at further.

The need for a clear understanding of the UN rules of engagement has been raised a couple of times. It is one of the reasons why we pushed ahead in the Department of Peace Keeping Operations in issuing sample rules of engagement. Despite people wanting to nit-pick it and come up with a final agreed solution, we got out a sample rules of engagement so that others can now see the sort of rules of engagement that Member States may be asked to be involved in on peacekeeping missions, so they can use it in training, preparation and planning. I certainly saw the lack of understanding between the different Member States of the rules of engagement in Sierra Leone in May 2000. I think it is very important that we follow through on this point.

General Peter Cosgrove[†]

FACING FUTURE CHALLENGES TO FUTURE OPERATIONS: AN ADF PERSPECTIVE*

I BACKGROUND TO THE CHALLENGES PROJECT

Many of you would be aware that the Challenges Project was initiated in Sweden and first conducted in 1997. The ambitious aim of the Project has been to ‘bring to bear, in an informal and collegial setting, the collective knowledge and views of participants on the challenges of peacekeeping and peace support as the world enters the 21st Century.’

To achieve this aim, a series of seminars were held during the past five years in various locations throughout the world. To me, this global involvement emphasises that peacekeeping expertise is truly a global endeavour with no particular State or organisation having a mortgage on all of the answers to what contributes to effective peacekeeping operations.

The Australian Defence Force was well represented during this process, with representatives from the APCML and the ADF Peacekeeping Centre attending a number of the seminars, and participating in editing the Concluding Report that was published earlier this year.

I congratulate the Project Partners on achieving the milestone of publishing the Concluding Report of the first series of seminars, and their vision for the future culminating in a World Forum on the Challenges of Peace Operations and Processes to be held in 2005. I am also delighted that Australia has been able to host this Conference, and that so many highly experienced civilian and military peacekeepers, academics and other experts in this field have been able to attend this Conference in Melbourne.

[†] The views expressed in this paper do not necessarily reflect the views held by the author in his official capacity.

* Editors’ note: General Cosgrove was the guest speaker at the Conference dinner. This is a copy of his address given during that dinner.

II PEACE OPERATIONS IN THE ASIA-PACIFIC REGION

The purpose of my speech tonight, besides congratulating all those involved in the Challenges Project, is to consider some of the factors that influence how peace operations in the Asia-Pacific might be conducted in the future. I will reflect on the peace operation with which I am most familiar, the INTERFET operation in East Timor, to illustrate those matters that seem to be most important to me.

A Australian Involvement in Peace Operations

Before turning to East Timor, I should comment on the general nature of peace operations. It is perhaps an unfortunate hallmark of the latter part of the last century that peacekeeping operations have become increasingly prevalent. Some of those operations have been conducted as UN peacekeeping operations, while others have been conducted as part of a regional response to particular circumstances in a geographic area.

We can expect the trend, evidenced since the end of the Cold War, for peacekeeping operations to continue. Australia has a long and proud record of professional contribution to peace support operations both within our region and abroad. Our peace operations role began in 1947 when the UN asked the Australian Government to provide four military observers to join the UN Commission for Indonesia during Indonesia's struggle for independence from the Netherlands. Our involvement in peace enforcement began in 1950 with the deployment of ADF elements to Korea in response to the UN's call for Member States to help South Korea resist North Korean invasion.

Regional operations involving Australian military forces include INTERFET, the Peace Monitoring Team in Bougainville and operations conducted by the ADF following the violence in the Solomon Islands in 2000.

B Humanitarian Relief

We also have a good record of providing urgent assistance in humanitarian operations.

Increasingly, the ADF has been called on to operate in several arenas at once or within close proximity. For instance, in 1998 the ADF was involved in several regional humanitarian operations: one in Irian Jaya, in conjunction with the Indonesian Government and its armed forces; one in the Papua New Guinea highlands; and one on the north coast of Papua New Guinea. The first two were drought relief operations and the last involved provision of emergency medical support following a tidal wave that destroyed several villages. As mentioned earlier, in the same year the ADF assumed command of an important peace support operation in Bougainville – in what became a longer term operation.

Most recently of course, Australia has provided a range of military forces to support the coalition against terrorism. While necessarily modest in size due to our overall capability and our other current operational commitments, such as East Timor, these contributions have been highly regarded by our allies. Recently, the US Commander of Task Force Mountain in Bagram, Afghanistan – Major General Frank Hagenbeck – formally recognised the achievements of our Special Forces soldiers with a number of awards – some for individual contributions and others as a symbol of the achievements of the whole Australian Special Forces Task Group. Our Navy and Air Force commitments are similarly highly regarded.

It is worth noting that in each of the operations that I have just mentioned, Australia has acted in concert with other countries in the region. Engagement with our allies in the Asia-Pacific region is a cornerstone of Australia's security outlook and we have been ably supported by various countries in the region, and in the case of INTERFET a global response, for various operations.

C Impact of September 11 and October 12

I have little doubt that the shocking events of September 11 were a defining moment for each of us here tonight. Some of you live in New York, and would have witnessed first hand the carnage that occurred on that day. Others may have seen the destruction caused to the Pentagon, and all here would have seen the volumes of news footage that showed in such graphic detail the results of those terrorist acts.

More recently, we have witnessed the bombings in Bali on October 12 – just four weeks ago. These bombings clearly demonstrated for Australians, as well as for the many other nationalities that suffered casualties in the attacks, that the influence of terror has no geographic bounds. It is as much a problem in this region as in any other part of the world.

It is therefore increasingly important, in my view that we continue to pursue opportunities such as this for senior peacekeeping representatives – both military and non-military – to come together. Such events help foster the understanding and communication avenues necessary to address the security environment confronting all of us in the first few years of the 21st Century.

D Regional Initiatives

As the world turns its attention to combating terrorism, the level of cooperation and determination within our region is strong. For instance, Australia has signed Memoranda of Understanding dealing with terrorism with Indonesia and Malaysia and other Memoranda of Understanding have been agreed between ASEAN nations. Such agreements are indicative of a shared resolve to confront and defeat this threat to regional peace and security.

I expect following the Bali bombings, that there will be greater emphasis

placed on such regional initiatives as states in the Asia-Pacific seek to combine intelligence, security and other resources to fight against the threat that terrorism brings to the region.

As governments around the world increasingly focus on protecting their people's security, our diverse engagement experience will become increasingly important. Australia's future requires more than a combat focused, well-equipped, mobile and operationally ready Defence Force. The challenges facing us today mean that defence is but one integral part of the security of Australia and the international community in which we live.

Now more than ever the Defence Force must work closely and effectively with government and non-government agencies. Now more than ever it is imperative that the Defence Force foster better defence and other relationships with countries in our region and around the world, so as to play an effective role in ensuring the security of Australia, our region and the wider international community.

III THE EAST TIMOR EXPERIENCE

A Australia's Role

Australia's experience in East Timor illustrates the value and importance of establishing and maintaining strong, ongoing relations between countries. In August 1999, events began unfolding in East Timor which catapulted the ADF into the largest and most complex peacekeeping operation in our region, in which Australia has been – and remains – engaged. Against the context of a deteriorating security environment, the Prime Minister indicated to the UN Secretary-General Australia's willingness to take a leadership role in a UN-mandated force to restore security to a troubled region.

In September 1999, at the UN's request, and with the agreement of the Indonesian Government, Australia assumed leadership of the international coalition and responsibility for mobilising the international community's response. The response was swift. In a record five days following the Security Council's mandate, Australia had coordinated the arrival of the first coalition forces in Dili. By the end of the first day, approximately 2,300 troops had been deployed to East Timor.

For Australia, the experience of building and leading an international coalition – particularly against such a tight timeframe – was new. While the task was challenging, through intensive efforts at both diplomatic and military levels and with the international community's overwhelming support, military and other necessary contributions to INTERFET were quickly secured. In all, 22 countries from six continents committed troops to INTERFET – a truly international effort.

INTERFET was crucial to the success of the international aid effort providing the protection and stability needed to support humanitarian assistance operations. Through its robust mandate, which included the ability to take all necessary measures to restore peace and security, INTERFET swiftly brought militia activity under control. INTERFET completed its tasks in February 2000, formally transferring military command and control responsibility to the UNTAET PKF. This latter peacekeeping force gave outstanding service over its two years of existence. I have no doubt that UNTAET's successor mission – the United Nations Mission of Support in East Timor (UNMISSET) – will continue in the tradition set by its predecessor.

With the ongoing support of the international community, UNTAET and UNMISSET have built on the security environment created by INTERFET, establishing the foundations for administration of the new country and rehabilitating economic and social infrastructure. East Timor has come a long way in a short time. While its journey is not yet complete, the sense of shock and sadness I felt at the level of destruction that confronted us on our arrival in Dili now seems a lifetime ago.

B Importance of Relationship-Building

The East Timor peacekeeping effort was a remarkable one in a number of respects. While not perfect, for me, INTERFET highlighted the importance of leadership, respect and understanding to a successful coalition relationship. Without the spirit of cooperation and goodwill amongst all nations involved, and a willingness to find rapid and innovative solutions to potential difficulties, the operation would not have delivered the successful outcomes it did. INTERFET worked overall because, despite the differences in backgrounds, we cooperated in a common purpose. We were helped by knowing each other, and having gained respect for each other through past regional military engagement.

The first return on this investment came with the appointment of the Deputy Force Commander, General Songkitti from Thailand. He and I knew each other from the British Army Staff College in the late 1980s. I had met the national commander of the American forces assigned to INTERFET, Brigadier John Castellaw, several times. I knew a number of the other national commanders and in some cases, their superiors back in their home countries. In addition, all of the regional contributors to INTERFET were accompanied by Australian officers who spoke their languages, who knew their cultures and had formed relationships with key officers in their armed forces. A number had trained with Australians in their home countries or had visited Australia for training. Consequently, these regional military leaders could rely on the ADF because they knew us and had worked with us.

My Indonesian counterpart in East Timor, Major General Kiki Syahnakri, worked very hard during the first critical weeks after INTERFET arrived in

Dili to set the necessary groundwork. My relationship with Major General Syahnakri was built quickly through the good offices of our Army attaché from Jakarta – Colonel Ken Brownrigg – who knew Major General Syahnakri well and had developed a relationship based on mutual respect. One of my battalion commanders knew the Indonesian garrison commander in Dili, having exercised in Indonesia with his unit the year before. I met the same man at that training activity in Indonesia. Many Australian officers in INTERFET were able to establish cooperative relations with Indonesian counterparts in East Timor because they had either trained in Indonesia – learned Bahasa – or had hosted Indonesian personnel who had trained in Australia.

Importantly, from the ADF's involvement in East Timor – like its involvement in Bougainville – new relationships were forged for the common purpose of peace and regional stability. The ADF worked closely with diplomats from the Australian Department of Foreign Affairs and Trade and representatives from AusAID – as well as other aid agencies and interested international organisations. We worked closely with officers from the Australian Federal Police and police forces of other nations. INTERFET – like the Peace Monitoring Group (PMG) in Bougainville – had to engage and work with political, community and religious groups as well as former combatants to create a momentum for peace, reconciliation and reconstruction. Most importantly, both the PMG and INTERFET had to win the trust and support of the local people to give them the confidence to rebuild their communities – their infrastructure and their governing institutions. In both Bougainville and East Timor the participating nations in the PMG and INTERFET won a resounding vote of confidence from the local people.

Good will and cooperation are, however, only as strong as the environment in which they operate. I found that understanding and congruence were only achievable where the needs and concerns of each contributing nation were clearly established and acknowledged. It was important to recognise that countries come to coalition operations with unique national interests they want protected or achieved as apart of their multinational force involvement.

Even in the pragmatic halls of a combined headquarters, this generated a responsibility to ensure that individual contributions and concerns were articulated and valued. This principle of 'reciprocal transparency' is an important one in combined operations – commensurate, as appropriate, with sensible regard to detail and operational security. Clear communication and respect for individual contributions and viewpoints paved a way through key differences and enabled a unified mission focus to emerge.

Three key operating principles were crystallised by the East Timor experience: know your coalition partners, cultivate a wide network and foster a cohesive team. For the ADF, the key message from our roles in East Timor and recent humanitarian and peace support operations is that we need to be politically and culturally sophisticated in the conduct of coalition operations.

Good partners learn to speak each other's languages. Good partners learn to respect each other's religious and cultural beliefs. Good partners learn to allow for differences and to be inclusive. Good partners spend time with each other. Good partners understand that contentious issues should be resolved through negotiation so that conditions are not created for young people to take up arms to resolve issues at gunpoint. Good partners understand that at the end of the day it is in everyone's interests to ensure that families, communities, nations and regions are able to prosper free from armed intimidation.

IV CONCLUSION

I stated earlier that Australia's security focus remained primarily on our near region of the Asia-Pacific. The Bali bomb blast of 12 October has clearly demonstrated the necessity for this focus. The ongoing challenges presented by weapons of mass destruction, problems with state governance, the challenges that globalisation poses for some countries and the importance of the relations between the great powers, continue to be important in their relevance to, and impact on, our region. Tragically, the Bali bombings demonstrate all too clearly just how easy it can be to cause great loss of life and destruction in our region.

The future of peace support operations in this region lies in the maintenance of a common understanding of the security challenges that lie ahead. The bombings in Bali clearly demonstrate that the Asia-Pacific is not immune from increasing acts of terrorism, and that those who practice terrorism have no concern for who their victims are. The list of dead, missing and wounded from the Bali bombings contains citizens from all areas of the world. In particular, the long-term effects on the citizens of the region, whether directly affected due to death or injury, or indirectly affected as a result of the downturn in tourist activity, will be a challenge for all states in this region to help address.

Common resolve and purpose will allow us to meet this challenge.

Part IV

STRATEGIC LEGAL VIEWS OF PEACE
OPERATIONS

Ralph Zacklin[†]

UNITED NATIONS MANAGEMENT OF LEGAL ISSUES

I OUTLINE AND SUMMARY OF REMARKS

UN peacekeeping has evolved considerably in recent years towards a concept more aptly described as peace operations. The distinction between peacekeeping and peace enforcement, between Chapters VI and VII of the UN Charter, has been blurred and the tasks have become more complex.

The support-services of the UN Secretariat at Headquarters have sought to draw lessons from failed missions and to build on the practices that have developed in successful missions.

The management of legal issues has been characterised by the endeavour to consolidate existing principles, rules and guidelines while at the same time developing these rules to meet new challenges. The management of legal issues is predicated on the need for clear rules; for only if peace operations are based on a rule of law can they be sustained *vis-à-vis* host countries and contributing countries alike.

Five main public law issues are examined in detail namely: developments in status of force agreements; rules of engagement; the question of the safety and security of UN and associated personnel; the issue of the application of international humanitarian law; and the responsibility of the organisation for the acts of its peacekeepers.

II INTRODUCTION

The *Agenda for Peace* (1992) defined peacekeeping as: a UN presence in the field normally including military and civilian personnel – with the consent of the parties concerned, to implement or monitor the implementation of arrangements relating to the control of conflicts and their resolution and/or to protect the delivery of humanitarian relief. This definition, with its emphasis on

[†] The views expressed in this paper do not necessarily reflect the views held by the author in his official capacity.

consent and the implementation of agreed arrangements, was intended to distinguish peacekeeping from peace enforcement operations carried out under full scale Chapter VII mandates.

Although the distinction between peacekeeping and peace enforcement is still valid and has legal significance for policy-makers and lawyers, the title used for this Conference – peace operations – probably better reflects today's UN operations which have undergone a qualitative transformation in the years since *Agenda for Peace*.

It was fashionable a few years ago to speak of first, second and third generation peacekeeping. This was a way of describing increasingly complex operations (Namibia, Somalia, Cambodia) which required a very high degree of integration of military, civilian and police components as compared to such traditional operations as UNIFIL, UNDOF and UNFICYP.

Today, operations such as those in Kosovo or East Timor which involve cooperation or integration with non-UN military and civilian components and broad governance functions on the part of a multidimensional UN/international civil administration have added new layers of complexity to peace operations.

The contemporary reality is that UN peace operations are most often multi-generational in the sense that not only are missions generally more complex (because they occur in a more complex environment), and require greater degrees of integration within the missions, but also among a wider range of military and political organisations. They are also based on a more sophisticated (realistic) and calibrated legal foundation which has to a great extent blurred the distinction once held sacrosanct between peacekeeping and peace enforcement, and between consensual and non-consensual operations.

Thus, some of the so-called 'traditional' peacekeeping operations that monitor ceasefire and separation of forces agreements have taken on broader and differentiated responsibilities, eg assisting civilian authorities in human rights and demining (UNMIBH and UNMEE).

Yet other missions that perform monitoring and verification functions with the consent of the parties have included in their mandates provisions on use of force under Chapter VII (UNAMSIL or MONUC).¹

If we take stock of current UN operations their mandates in an ascending order of persuasion might be described as:

- Those which permit use of force only in self-defence (strictly defined): UNDOF, UNIFIL, UNTSO, MINURSO, UNMEE, UNFICYP, UNOMIG, UNMOT, UNMOGIP.

¹ See, eg, SC Res 1270 (1999), 22 October 1999.

- Those which allow the use of force beyond self-defence by peacekeepers: MONUC, UNAMSIL, UNMISSET.²
- Pure Chapter VII operations, such as UNIKOM.

To this might be added governance missions with split military and civilian operations such as UNMIK and UNMIBH, which are also adopted under Chapter VII.

Addressing this topic today, it is impossible to overlook the chequered history of UN peacekeeping – particularly the grievous failures in Bosnia, Rwanda and Somalia – and hope that both governments and international officials have learned from these mistakes. By the end of the decade of the 1990s, UN credibility had been seriously compromised.

These failures were largely self-inflicted – the result of political disarray among governments, an international civil service that was overly cautious and deferential, an inherently flawed decision-making mechanism on the international level, and cynical and hypocritical ‘parties’ whose consent was often assumed rather than given.

The fact is that in the 1990s the UN had lost sight of the fundamentals of peacekeeping: the need for clearly defined and attainable mandates; the full political and financial support of all Member States; the genuine consent and cooperation of all the parties; and clear lines of command.

The fundamentals are important because from the perspective of legal strategy the precise character and nature of the operation has a direct bearing on the legal issues which will arise and the modalities of their resolution.

The UN as an organisation is based on the idea of the rule of law. The UN Charter is our constitution, which delineates the competencies of its respective organs whose decisions are made in accordance with the rules and regulations enacted by them.

So it is for peace operations. Although nowhere to be found in the UN Charter, the practice of peacekeeping, as it has developed, is rule based. It is fair to say that there is a substantial body of law and practice of peacekeeping to the extent that, like the common law, in the absence of any statutory provisions or their equivalent, certain UN operations have operated on the basis of the so-called practices and principles of peacekeeping for many years.

The UN management of legal issues is predicated on the existence of clear rules and guidelines, whether primary rules stemming from the UN Charter itself or relevant international agreements, decisions or resolutions of

² See eg SC Res 1410 (2002) 17 May 2002.

competent organs or secondary rules governing the conduct of peace operations such as force regulations and rules of engagement.

For the legal advisers or senior officials whose responsibility it is to ‘manage’ the operations, the clarity of the applicable law and the consistency of its application is an essential pre-requisite to a well-managed operation.

As the senior official at UN Headquarters bearing the most direct day-to-day responsibility for the legal management of peacekeeping, I have always considered that the primary responsibility of the OLC is to ensure the greatest clarity, transparency and ‘legality’ of the fundamental principles underlying each operation, and once launched, that the operation receives timely and consistent advice to enable it to achieve its objectives in an efficient manner.

This is not to say that the legal issues are always comprehensively anticipated or that our well-established practices and principles of peacekeeping are set in stone. Peacekeeping is a continuous process of development and learning, and the lawyers must strive to keep pace with every new development and find an appropriate solution to every legal problem that arises.

For the purposes of the present Conference I propose to give a strategic overview of the legal issues that arise in peace operations grouping my remarks around five main public law issues:

- Status, privileges and immunities (SOMAs, SOFAs);
- Use of force (rules of engagement);
- Safety and security of UN and associated Personnel;
- Application of international humanitarian law (IHL directive); and
- Responsibility of the organisation.

III SOFAS AND SOMAS

SOFAs/SOMAs are the basic operational legal framework for missions as far as their status privileges and immunities are concerned and are usually the first instrument to be negotiated following the adoption of the establishing resolution by the Security Council.

The need for such an instrument is recognised as fundamental by the Security Council, as well as by the General Assembly,³ and is normally a precondition for the start of operations. For example, Security Council resolution 1320 requested that the Governments of Ethiopia and Eritrea conclude, as necessary, SOFAs within 30 days, and pending conclusion recalled that model SOFA of 9

³ GA Res 52/12 B (1998), 9 January 1998.

October 1999 should apply provisionally.⁴ Ethiopia did conclude a SOFA, but Eritrea did not.⁵

The UN Charter and the *Convention on the Privileges and Immunities of the United Nations* (CPI) are applicable *ipso facto* to UN peace operations and provide the basic framework. However, SOFAs are necessary for a variety of reasons: not all states are parties to the CPI; sometimes these operations involve entities other than states (eg RCD-GOMA); and certain issues are specific to peacekeeping operations and are not covered by the CPI (eg contractors and criminal jurisdiction).

Over the years SOFAs have evolved as a result of continuous adjustment on the part of the UN Secretariat. The present basis is a model SOFA contained in a Report of the Secretary-General to the General Assembly of October 1990. It serves as a basis for the drafting and negotiation of individual SOFAs and it applied *mutatis mutandis* to SOMAs.

Among the new provisions that had been incorporated in the model SOFA since 1990 are:

- Applicability of international humanitarian law;
- Facilities for commercial contractors;
- The right of the UN to establish its own radio broadcasting;
- Limitations of liability; and
- Safety and security of UN and associated personnel.

I shall refer to some of these in more detail later in my remarks.

From the point of view of the General Assembly, as the budgetary authority, the most important provisions are those which deal with facilities, taxes, duties and charges (dues, tolls etc). These have very frequently been the subject of intense negotiations.

From the point of view of the troop contributing states, the most important provisions are those dealing with the status, privileges and immunities of the military contingents.

SOFAs distinguish three categories of international personnel: UN officials, experts on mission; and members of formed military contingents.

The first two categories which include UN staff, civilian police and military observers, enjoy the status provided for in Articles V, VI and VII of the CPI. This is official act immunity. Here there is a long-standing practice, and

⁴ SC Res 1320 (2000), 15 September 2000, para 6.

⁵ Similar formulae were used in SC Res 1291 (2000), 24 February 2000, for MONUC. See also SC Res 858 (1993), 24 August 1993, in which UNOMIG calls on the Government of the Republic of Georgia to conclude a SOFA expeditiously; and SC Res 1270 (1999), 22 October 1999 (UNAMSIL).

generally speaking, we do not have very many difficulties in interpreting these provisions.

Military members of the military component are governed by the provisions of the SOFA in relation to the host country, which is to say that like all members of the mission, they enjoy immunity from legal process in respect of official acts (an immunity which is not subject to any temporal restriction) and, in addition, are subject to the exclusive criminal jurisdiction of the contributing state.

This has long been a fundamental principle from which there can be no derogation but it is a highly sensitive issue and nearly always requires explanation and clarification. The counterpart to this principle is that the Secretary-General must obtain assurances from the troop contributing countries that they will be prepared to exercise jurisdiction in such cases.

In practice, this places a two-fold burden on the Secretary-General:

- To ensure that peacekeeping operations adhere to and respect local law – a duty of good discipline and a respect for the rule of law; and
- Should it be necessary for a troop contributing country to exercise its criminal jurisdiction, ensuring that this is carried out in good faith.

IV RULES OF ENGAGEMENT

Rules of engagement are one of the key instruments of any peacekeeping operation. Their purpose is to provide as clearly and as unambiguously as possible the parameters within which armed military personnel (including gendarmerie and armed civilian police personnel) assigned to a peacekeeping operation may use force. Rules of engagement ensure that use of force is undertaken in accordance with the Security Council mandate for the particular operation and in accordance with the provisions of international humanitarian law and the laws of armed conflict. Traditionally – in first generation peacekeeping operations – use of force in self-defence was narrowly defined and essentially was confined to defence of oneself from attack.

The growing complexity of peacekeeping operations in recent years in terms of mandates and the involvement of non-state entities, especially in so-called failed states, has led to a complete re-evaluation of the concept of self-defence. After several years of denial on the part of the Security Council, and some embarrassing failures, the Security Council now is following a practice of providing clearer mandates, including where necessary, authorisation to use force under Chapter VII in specifically designated circumstances. The result is that rules of engagement today may use any one of, or a combination of, a spectrum of use of force rules consistent with the mandate given by the Security Council.

An analysis of current peace operations shows that use of force has been authorised in a number of missions over and above the traditional concept of self-defence and includes the following:

- In UNIFIL⁶ self-defence includes resistance to attempts by forceful means to prevent it from discharging its duties.
- In relation to UNMIBH which is the civilian mission successor to IPTF in Bosnia-Herzegovina, which itself was established after the transfer of authority from UNPROFOR to the multinational implementation force IFOR (now SFOR), authorises members to take all necessary measures in defence of SFOR. Its members are authorised to take ‘all necessary measures’ in defence of SFOR under Chapter VII.
- In both UNAMSIL and MONUC, UN forces have been authorised to use self-defence to protect UN facilities, to protect its installations and equipment, to ensure the security and freedom of movement of its personnel and to protect civilians under imminent threat of physical violence.
- In UNTAET,⁷ acting under Chapter VII, the Security Council authorised the force to take all necessary measures to fulfil its mandate.

This demonstrates that the Security Council has in recent years been less timid in reaching determinations that trigger Chapter VII enforcement powers of UN peace operations and that it has recognised that even in consensual operations such as UNAMSIL and MONUC, some recourse to Chapter VII is necessary in order to give the force broader authority and enhanced powers to defend itself, its installations and the wide range of international personnel now to be found in such mission areas. This includes international organisations, regional organisations and a myriad of NGOs.

The authority to protect civilians under imminent threat is a major expansion of the concept of peacekeeping and a reflection of the recognition that in many of today’s peace operations peacekeepers are inserted into unstable political and security environments. The inevitable blurring of the line between peacekeeping and enforcement, between Chapters VI and VII, has consequences on the legal plane which requires management.

V SAFETY AND SECURITY OF UN AND ASSOCIATED PERSONNEL

Related to the question of rules of engagement and the evolution of SOFAs/SOMAs is the issue of safety and security of UN and associated personnel. The *Convention on the Safety and Security of United Nations and Associated Personnel* (CSS) was adopted on 9 December 1994. It has been in force since January 1999. At the present time there are approximately 40

⁶ SC Res 425 (1978), 19 March 1978.

⁷ SC Res 1272 (1999), 25 October 1999.

parties to the CSS, but importantly, not one of these is a host state to a peace operation.

The CSS was adopted in response to increasing attacks on UN personnel and NGOs in what had become high risk UN or humanitarian operations, such as Bosnia and Somalia. Conceived in haste, the instrument is well-meaning but unnecessarily complicated in its operational clauses: it prohibits attacks, imposes an obligation on the host country to ensure safety and security and establishes the principle of prosecute or extradite, and we should note that many of the acts criminalised in the CSS are now internationalised crimes under the *Rome Statute*.

The problems arise in regard to the scope of application of the CSS – to whom and when does the CSS apply? While the CSS clearly applies to any operation under UN command and control, ie peacekeeping, it is only applicable to other operations (eg political missions, humanitarian assistance, human rights presences, tribunals) while the Security Council or General Assembly has ‘declared’ that it is an operation of exceptional risk.

In practice many operations in high-risk environments (such as Afghanistan, Burundi and East Timor), have taken place since the CSS was adopted, but no declaration has been made by the General Assembly or by the Security Council that these were operations of exceptional risk.

As a result of this experience, steps are now being proposed to remedy the defects of the CSS, including a procedure to initiate a declaration by the General Assembly or the Security Council, making the Secretary-General a risk-certifying authority. Pending these measures, the Secretary-General is now including relevant provisions of the CSS in SOFAs/SOMAs.⁸

VI APPLICATION OF IHL

Recent developments in UN peacekeeping and peace enforcement have brought renewed attention to the question of the applicability of international humanitarian law to peace operations. The more the links between peacekeeping and enforcement have been shaded, the more urgent is the need for clarity on this issue.

Historically, this issue was first raised in connection with an enforcement action (Korea) – the first UN-authorized action that was not a peacekeeping operation. At that time, clarification was provided by the US to the effect that the forces participating in the unified command were under instructions to observe the four *Geneva Conventions* (1949) as well as the applicable portions of the *Hague Convention IV* (1907). This statement established an important

⁸ UNMISSET SOFA pars 50, 51, 52 and 53.

precedent and has been the basis for discussion of the issue in relation to peacekeeping.

The question of the applicability of international humanitarian law was inevitably raised with the first peacekeeping missions. These were not enforcement (use of force) actions and therefore, in principle, the application of IHL did not arise, since force could be used only in self-defence. This necessitated guidelines for Force Commanders, and the early Force Regulations (UNEF, ONUC, UNFICYP) provided that the force shall observe and (subsequently) respect the principles of general international conventions applicable to the conduct of military personnel.

The conclusion to be drawn from the Korean and the early peacekeeping operations was that actions that involve use of force, whether in peacekeeping circumstances (self-defence) or not, cannot take place in a legal vacuum, and that as a matter of principle, IHL is applicable regardless of the characterisation of the action itself.

The 'observe and respect' formula remained as the IHL benchmark for more than 40 years. However, deployment of UNITAF, UNPROFOR, UNOSOM II made clear that the applicability issue could not longer be ignored.

What had been to a large extent a theoretical problem had now become a practical problem:

- What legal limitations under international law apply to the bombing campaign in the Gulf War? What were the respective responsibilities of the coalition states and/or the Security Council which had given its authorisation?
- The same was true of the use of NATO air power in Bosnia under the dual key arrangement.
- Were actions taken by UNISOM against Aideed in Somalia subject to IHL? If so, what were the precise obligations/responsibilities of the UN?
- What status should be accorded to UN peacekeepers arrested and detained by the parties in the Former Yugoslavia?

It was clear that the traditional way of looking at the problem, ie a general commitment without any direct responsibility, was no longer sustainable for the UN. While all of the formal arguments remain (ie to say that the UN is not a party to the *Geneva Conventions* nor can it exercise the functions of a party or be a 'power'), the reality of the new missions has caused a shift away from questions of form and principle to questions of methods and means of ensuring application of IHL by UN forces directly or indirectly.

Through an initiative of the ICRC, and in response to a specific request of the Special Committee for Peacekeeping Operations, this led to the formulation of and the eventual promulgation of a Secretary-General's *Bulletin on Observance*

by *United Nations Forces of IHL* in August 1999 (50th Anniversary of the *Geneva Conventions*).

The ST/SGB is a relatively succinct instrument of nine sections which sets out the principles and rules of IHL applicable to UN forces conducting operations under UN command and control. It is designed to be applicable to UN forces, when in situations of armed conflict they become actively engaged as combatants, to the extent and for the duration of that engagement. Therefore it is applicable both in enforcement actions but also in peacekeeping when force is used in self-defence.

The ST/SGB is not intended to be an exhaustive list of applicable IHL and it is not intended to replace IHL or the national laws governing the conduct of military personnel. The ST/SGB is a core set of such principles and rules as they apply in particular for the protection of the civilian population.

The ST/SGB is a binding legal instrument in the internal law of the organisation but it should also be understood that it does not legislate for troop contributing countries since the rules confirmed in the ST/SGB are already binding upon members of UN operations under their respective national laws.

Overall the ST/SGB has formalised and explicated the undertaking used in SOFAs since 1993 regarding respect for the principles and spirit of IHL (the four *Geneva Conventions* and two *Additional Protocols* of 1997) and the *Hague Convention on Protection of Cultural Property* (1954).

VII RESPONSIBILITY OF THE UNITED NATIONS FOR ITS ACTS ARISING FROM PEACE OPERATIONS

By the late 1990s the question of third-party liability, after a decade that had seen major UN operations in the Former Yugoslavia, Rwanda and Somalia, had become prominent. Further, it had become apparent that the procedures for handling third-party claims and the organisation's policies which had been largely developed in the context of first generation peacekeeping operations, required a review.

In fact the peacekeeping and legal arms of the UN were being submerged by claims that the financial and budgetary organs of the UN were becoming alarmed. The blurring of Chapter VI and Chapter VII operations complicated the picture.

To the types of damage most commonly encountered in peacekeeping (the taking and occupancy of premises, personal injury and property loss or damage) now had to be added injury and damage resulting from combat operations. It became necessary to distinguish between tortious liability caused in the ordinary operation of a force (whether under Chapter VI or Chapter VII) and liability for combat-related damage, whether in Chapter VII or even in Chapter VI, where force is used in self-defence.

The underlying principle that the UN bears international responsibility for the activities of UN forces and is therefore liable to pay compensation was not in doubt. This has been recognised since the inception of peacekeeping and is reflected both in the CPI⁹ and of the model SOFA (standing claims commissions).¹⁰

The purpose of the review of the policies and procedures was to provide for a simple, efficient and prompt settlement of third-party claims, while at the same time protecting the organisation's interests and limiting its liabilities.

Based on two reports of the Secretary-General to the General Assembly,¹¹ the General Assembly enacted far-reaching decisions placing both temporal and financial limitations on third-party liability as well as endorsing the concept of 'operational necessity' as developed by the Secretary-General as a further limitation on liability.¹²

The General Assembly¹³ requested the Secretary-General to implement these new rules in respect of SOFAs and SOMAs. A number of SOFAs and SOMAs concluded in recent years had provided, or do provide, for these temporal and financial limitations.¹⁴

Consequently, as a result of these decisions by the General Assembly:

- No compensation in regard to claims submitted after six months from the time the damage, injury or loss was sustained, or from the time it was discovered by the claimant, and in any event, after one year from the termination of the mandate of the peacekeeping operation, will be paid (with a proviso for exceptional circumstances).
- Compensation under the new rules is limited to economic loss.
- Payments may not exceed US\$50,000, the actual amount to be determined by reference to local compensation standards (with a proviso for exceptional circumstances).
- There are strict criteria for evaluating compensation for non-consensual use of premises and for property damage.
- No liability is engaged in relation to activities arising from 'operational necessity' as defined by the Secretary-General.¹⁵

⁹ See s 29.

¹⁰ See para 51.

¹¹ UN Doc A/51/389 of 20 September 1996 and UN Doc A/51/903 of 21 May 1997.

¹² GA Res 52/247 (1998), 17 July 1998.

¹³ Ibid.

¹⁴ See, eg, MINURCA, MINURSO, UNAMET, MONUC, UNMEE, UNMIK Office in FYROM, UNMISSET.

¹⁵ UN Doc A/51/389 of 20 September 1996, para 14.

VIII CONCLUDING REMARKS

This overview of the principle rule of law issues demonstrates that the law of peace operations has grown and evolved over time; just as peacekeeping is itself evolving, so is the law.

Whether in relation to status, privileges and immunities, the use of force or liability, it is necessary for the law to keep pace with facts and practices on the ground. Recent events have shown the need for clear rules governing such operations and their personnel at all legal levels: UN Charter, conventions, SOFAs, directives, bulletins, etc.

The reform of the UN, which includes reform of peacekeeping, is a laborious process, but it is well underway and the effects can now be seen.

Nina Lahoud[†]

RULE OF LAW STRATEGIES FOR PEACE OPERATIONS

I INTRODUCTION

It is a privilege for me to represent the Department of Peacekeeping Operations (DPKO) in this forum among such distinguished speakers and participants, including many veteran peacekeepers from the military, police and civilian ranks – a number of whom I have had the pleasure to serve with in various peace operations over the years. Speaking on behalf of DPKO, I can say that we are most grateful to have this opportunity to contribute to a better understanding of rule of law issues in peace operations and how they can be more effectively addressed. The theme of this particular Conference reflects the fact that the international community has progressively recognised that a major ingredient for building a durable peace in a war torn society is strengthening the rule of law. While it is uplifting that, at the General Assembly's Millenium Summit, Heads of State and Government stood unified in expressing their resolve, in the Millenium Declaration, '[t]o strengthen respect for the rule of law in international as in national affairs', it is obvious that we still have much to do to meet that lofty objective in the context of our peace operations.

In addressing the topic on which I have been asked to speak today, 'Rule of Law Strategies for Peace Operations', let me first attempt to capture what 'rule of law' entails in a post-conflict setting.

II WHAT 'RULE OF LAW' ENTAILS IN A POST-CONFLICT SETTING

To most laypersons, UN peacekeeping has very little to do with anything other than the act of separating warring armies. Indeed, during the first forty years or so of UN peacekeeping, from 1948 to 1988, this first generation of UN peacekeeping operations was largely restricted (with the notable exception of the Congo in the early 1960s) to the interposition of unarmed military observers and lightly armed military contingents between the armies of warring

[†] The views expressed in this paper do not necessarily reflect the views held by the author in her official capacity.

states to monitor adherence to ceasefire agreements. The mere presence of these ‘traditional’ peacekeeping operations raised the political cost of one or more of those armies violating the agreement and thus helped to prolong a ceasefire to give more time and space for diplomatic efforts to be pursued to address the underlying causes of the conflict.

As you all know, however, the end of the Cold War ushered in a new generation of multidimensional UN peacekeeping operations. The presence of peacekeepers was no longer just largely symbolic or restricted to an ‘eyes and ears’ role on the ground, as they were also asked to assist in and guide the implementation of comprehensive peace agreements that brought protracted civil wars to an end, in such places as Namibia, El Salvador, Cambodia and Mozambique. In those operations, peacekeepers were no longer only military personnel. They were joined by civilian police officers in the thousands, working to monitor, train and restructure local police forces, as well as civilians serving as human rights monitors, election experts helping to supervise and organise elections for new peacetime governments, and humanitarian workers, to name but a few.

The fact that some of these initial multidimensional peacekeeping operations of the late 1980s and early 1990s were relatively successful perhaps gave rise to false expectations that somehow UN peacekeeping could be a panacea for most of the world’s conflicts – and, as a result, peacekeepers were also deployed to places like Somalia and the Former Yugoslavia, where no peace agreements or even durable ceasefire agreements were in place and where there was no real consent for the peacekeepers’ presence. Perhaps those initial multidimensional operations also gave the misleading impression that the UN had found the ‘right model’ for addressing the rule of law aspects of post-conflict transition, by focusing on two main tasks: one, creating a secure environment in which elections can be held; and, two, diminishing the incidence of gross abuses of human rights and/or acts of politically or ethnically motivated violence.

Now, a decade later, with the benefit of experience and hindsight, we realise that the accomplishment of just those two tasks alone requires more than the deployment of international civilian police, human rights monitors and/or electoral experts. We have also learned – in some cases the hard way – that the accomplishment of those tasks is just the ‘tip of the iceberg’ when it comes to addressing the multiplicity of rule of law requirements in a post-conflict setting.

In a post-conflict setting, for even a semblance of rule of law to prevail, there is an obvious need to restore security in a country or region devastated by war, where violent crime, particularly politically or ethnically motivated violence, as well as organised crime, including trafficking in drugs and in human beings, often run rampant. An essential element for the restoration of security and public order – although certainly not the only one – is a functioning criminal justice system. The police, however, are just one part of the criminal justice

system, which also includes the judicial and the penal systems. Each of these constituent parts not only needs to be impartial and free of political control, but also requires, in order to function properly, well-trained personnel, the necessary infrastructure, material and equipment, and, of course, the legal framework from which to be guided. That framework must also be able to deal effectively with the unique needs and special circumstances of vulnerable groups who are often the victims of violent crimes, such as women and children. Likewise, that framework should include adequate mechanisms, as part of a juvenile justice system, to deal with instances in which children themselves are the perpetrators of crimes, including those committed when they have been forcibly recruited by armed groups.

While crimes committed after a 'peace' has been reached present one significant challenge for a peace operation, another daunting challenge is dealing with those committed during the war, including genocide, crimes against humanity and other gross violations of human rights – the prosecution and trial of which will undoubtedly have an effect on the peace and reconciliation process. This brings into the fore dilemmas concerning, on the one hand, amnesty to promote peace, and, on the other, the use of tribunals to ensure that peace does not come at the expense of justice – and, in both instances, the challenge of achieving reconciliation. These competing concerns were recently raised by President Xanana Gusmao, on the occasion of the admission of the Democratic Republic of Timor Leste to the UN on 27 September, as he explained:

We have adopted a policy of reconciliation between all Timorese; reconciliation that will be based on justice. Notwithstanding, to honour justice, our effort is focused on the eradication of all sentiments of hatred and revenge, because a sound reconciliation will only exist when there is a greater social justice in the Timorese society.

The establishment of a functioning criminal justice system, moreover, is only one aspect of the requirements that need to be met for the promotion of rule of law on a broader level. For example, a common feature of post-conflict settings is the need to facilitate the return of traumatised refugees and displaced persons – sometimes in the thousands – to their homes of origin, which is often impeded not only by security concerns but also by disputes over property rights and the destruction of key documentation. There is also the need to reconcile legal concerns of children who have been orphaned and women who have been widowed or whose husbands are missing. And there are issues of citizenship and statelessness as well.

Furthermore, many countries emerging from war often have to rethink and entirely reconstruct the very type of state that they feel will most effectively deliver their national aspirations and reconcile national differences. The challenge of drafting or amending a constitution, determining an electoral system, or re-establishing a process by which critical legislation can be

promulgated, are all rule of law issues that lie at the core of the transition from war to peace.

I have mentioned only a few of the many rule of law-related issues and related competencies that need to be considered in developing comprehensive rule of law strategies for peace operations. These issues, in fact, have been a priority concern for the Under-Secretary-General for Peacekeeping, Mr. Jean-Marie Guéhenno. Indeed, in March of this year, he turned to the Secretary-General's Executive Committee on Peace and Security – comprised of the heads of UN departments and agencies – to propose the establishment of a Task Force for Development of Comprehensive Rule of Law Strategies for Peace Operations. That proposal was warmly adopted, a Task Force quickly constituted, its Final Report fully endorsed by the Executive Committee, and the General Assembly's Fourth Committee was briefed on it by the Under-Secretary-General on 18 October. In that briefing, the Under-Secretary-General identified the development of comprehensive rule of law strategies in the peacekeeping context as one of six outstanding issues related to previous recommendations of the General Assembly's Special Committee on Peacekeeping Operations and the *Brahimi Report* that warranted particular attention – as well as enhanced dialogue – on the part of the Secretariat and Member States in the upcoming year.

Now, before examining what this Task Force specifically addressed and ultimately recommended, it is important to share some background on what prompted this effort to better coordinate and strategise on rule of law issues arising in peace operations. Then I will turn to some of the larger issues raised and some of the major challenges ahead.

III GENESIS, OBJECTIVES AND RECOMMENDATIONS OF THE TASK FORCE

The *Brahimi Report* issued in August 2000 drew heightened attention to the problems faced by our peace operations in the rule of law area. This was by no means surprising given that the Report was issued just a few months after the security situation had deteriorated throughout Sierra Leone, placing the UN mission (UNAMSIL) in crisis, and about one year after the UN had launched transitional administration missions in Kosovo (UNMIK) and in East Timor (UNTAET) with unprecedented responsibilities and often unpredictable challenges. In those two transitional administration missions, we were then struggling not only with helping build the nucleus of a local police service, but also with the even more difficult tasks of helping establish judicial and penal systems virtually from scratch – compounded by the fact that much of the pre-existing physical infrastructure had been destroyed. To even begin to make progress in tackling these enormous tasks, we had to first overcome such basic problems as determining the applicable law and obtaining translated texts; converting dilapidated buildings into facilities needed to begin screening and training police candidates; erecting makeshift courtrooms and detention centres, while reconstructing courthouses and prisons that had been destroyed,

looted or even mined; identifying qualified candidates to serve as local judges and prosecutors and, once selected, trying to convince them to take on sensitive cases despite threats to their security; obtaining basic furniture, equipment and supplies so that judges and lawyers could discharge their much-needed functions, given that court equipment, furniture, registers, records and archives as well as law books and case files had been dislocated or burned; finding sufficient numbers of trained interpreters, translators and court reporters so that judicial proceedings could be conducted in three to four required languages; and, of course, searching for suitable international judges and prosecutors who would be willing to join the ranks of the local judiciary under such circumstances, and would later have to spend enormous time familiarising themselves with the local legal systems.

To illustrate just one of these difficulties, I would recount when, as Chief of Staff to the Special Representative of the Secretary-General (SRSG) in Kosovo (then Mr. Bernard Kouchner), I had been asked on a Thursday in early 2000 to arrange for interpreters and translators for a sensitive trial to be held in Mitrovica the following Monday involving war crimes charges against a Kosovo Serb for the alleged murder of Kosovo Albanians. After being told by the international Chief of the Language Unit that none of his local staff were willing to serve, I chaired an emergency meeting with all of them to convey the urgency of the need. However, in probing each, I heard a litany of reasons that were difficult to dismiss. Some feared having their faces exposed in such a trial; others feared travelling by car across the Ibar River bridge to the courthouse in Serb-dominated northern Mitrovica; still others feared somehow being associated with the defence of a Serb war crimes suspect. Ultimately, I had to turn to the UNHCR Office in Tirana, Albania to urgently loan one of their local staff, a law student, for that trial.

These situations and problems were well understood by the Brahimi Panel, which had witnessed them firsthand during visits to these mission areas. It is against this backdrop that the Panel recommended a shift in the use of civilian police, other rule of law elements and human rights experts in peace operations in order to reflect an increased focus on strengthening rule of law institutions and improving respect for human rights in post-conflict environments. The Panel also stressed the need for an 'adequately-resourced team approach' to upholding the rule of law and respect for human rights, through policing, judicial, penal, and human rights experts working together in a coordinated manner in those operations. In support of this 'team approach', the Panel recommended that arrangements be established for deploying 'rule of law teams', comprised of civilian police, judicial, penal and human rights specialists, and that 'on-call lists' of these specialists be part of the UN Standby Arrangements System. The Panel also recommended that a new unit be established in DPKO, staffed with criminal law experts, specifically for the purpose of providing advice to the Civilian Police Adviser's Office on those rule of law issues that are critical to the effective use of civilian police in peace operations.

In addressing the Panel's recommendations in his implementation report, the Secretary-General emphasised that there was a critical need for civilian police, human rights experts and related specialists to work more closely together in peace operations in order to achieve the Millennium Declaration's objective of strengthening the rule of law. The Secretary-General highlighted that police are but one part of the solution to strengthening local rule of law capacities, which may also be constrained by weaknesses in or the absence of an independent judiciary and penal system – as has been so vividly seen in our operations in Bosnia, Sierra Leone, Kosovo and East Timor (now independent Timor Leste). The Secretary-General also supported the recommendation to establish standby arrangements for the deployment of rule of law teams to peace operations but indicated that, in order to assist Member States in implementing this recommendation, further work needed to be undertaken on the broader issues related to the rule of law in peace operations. He explained that he had therefore requested DPKO to work with the Office of Legal Affairs, the Office of the High Commissioner for Human Rights (OHCHR) and the United Nations Development Programme (UNDP) to draft guidelines covering the principles and practices of the rule of law sector of peace operations which, he emphasised, should build on the considerable amount of work already undertaken within the UN system as well as lessons learned in the field.

As you know, the Secretary-General also endorsed the recommendation for a new unit with criminal law expertise to be established in DPKO. In explaining why such a unit was needed, the Secretary-General stressed that any concept of deployment for UN civilian police should be developed with the full knowledge of the entire criminal law system of the country concerned. In very straightforward terms, he stated:

Every police force in the world has the benefit of legal advice during the conduct of its work. The United Nations should not be any different. When the Civilian Police Adviser is asked to propose a concept of operations for the civilian police component of a new mission, (s)he should have the benefit of counsel on the type of judicial system in place, the interrelation between the police and the judiciary in a particular country and the nature of criminal procedures and laws in effect. If the civilian police component is mandated to restructure a local police force, then it is imperative that such restructuring be done with some cognizance of the entire criminal justice system in the country concerned. Before civilian police deploy to a country, they should be properly trained in the applicable criminal and judicial system, so that they have credibility with their local counterparts.¹

When initially presenting the terms of reference for the establishment of a Criminal Law and Judicial Advisory Unit in October 2000, the Secretary-General proposed that it consist of six staff with judicial and penal expertise,

¹ *Report of the Secretary-General on the Implementation of the Report of the Panel on United Nations Peace Operations*, UN Doc A/55/502, 20 October 2000, para 127.

including a director-level Chief, and report directly to an Assistant Secretary-General. He emphasised that this Unit would primarily be of an operational nature and, to avoid duplication, would rely on UN partners engaged in capacity building programmes to strengthen rule of law institutions, such as OHCHR and UNDP, to provide the necessary advice and support to peace operations. However, the proposed Unit became the subject of rather protracted debate within the General Assembly's Special Committee on Peacekeeping Operations and the legislative budgetary bodies, which raised such fundamental issues as what the precise role of a peacekeeping operation should be in this area and whether the peacekeeping support account budget should finance what some considered to be 'peace building' rather than peacekeeping activities. Taking account of these concerns, the Secretary-General subsequently proposed a smaller, three-person Unit as part of the Civilian Police Division, although the General Assembly ultimately approved, in February 2002, a staff of only one Judicial Officer and one Corrections Officer.

Given the legislative mandate of the new Criminal Law and Judicial Advisory Unit (CLJAU) and its resource limitations as configured, DPKO then faced a major challenge: how would it forge an integrated and coordinated team approach to upholding the rule of law and respect for human rights in peace operations, and how would it mobilise the necessary expert advice and resources to achieve that goal? And, in seeking to do so, how would it apply lessons learned and best practices in this process? To tackle these challenges, the Under-Secretary-General for Peacekeeping presented a proposal to the Executive Committee on Peace and Security – which it endorsed on 1 April – to set up a Task Force, comprised of 11 UN departments and agencies, to address four major issues:

1. What existing expertise and resources among *UN departments and agencies* in the criminal law, judicial and penal areas can be made available to assist the CLJAU in providing advice and support to peace operations on rule of law issues;
2. Whether, in view of the UN expertise available, there is a need to identify *entities outside the UN system* which can provide such expertise to the CLJAU and peace operations, particularly among governmental, intergovernmental and non-governmental organisations;
3. What are the most appropriate arrangements for UN partners (and external partners as required) to assist the CLJAU in providing the necessary support to peace operations on rule of law issues; and
4. What further action is needed to draft any additional guidelines to cover the principles and practices of the rule of law sector of peace operations, taking account of work already undertaken and lessons learned in the field.

After working intensively for three months, the Task Force submitted its Final Report in mid August, which the Executive Committee fully endorsed on 30 September. It is the view of DPKO, one widely shared, that not only do the

recommendations provide a viable framework for making system-wide progress in this critical area, but the Report itself serves as a depository of valuable information on available rule of law capacities both inside and outside of the UN system. So let me now share some of those recommendations and the vision for moving ahead.

A Available Rule of Law Expertise among UN Partners and Gaps

At the outset, the Task Force – of which I was a member – grappled with one major substantive issue: what was the exact scope of the term ‘rule of law’ for purposes of its review? Although the terms of reference required the Task Force to identify expertise and resources among UN partners in the ‘criminal law, judicial and penal areas’ which could be made available to support the CLJAU and peace operations, the members felt that the scope of review should be expanded to a number of *related* areas that can and do affect the rule of law in most post-conflict situations, such as property disputes, citizenship and statelessness, birth registration, amnesty provisions, customary justice mechanisms and reconciliation efforts. The significant impact of such issues on the overall law and order environment can be witnessed in almost any peace operation theatre: the devastating predicament of a returnee family who, after months of living in refugee camps abroad, finds their house occupied but has no papers to prove ownership; the unemployed mother whose husband is missing and has no birth certificates for her children to claim entitlements because they were seized and burned; and the pressures placed on victims of rape and domestic violence to not pursue any formal redress in the courts but to deal with such matters in more ‘traditional’ ways to avoid embarrassing the family.

With this broader perspective, the Task Force members decided to focus primarily on identifying the specific competencies and resources of their respective departments and agencies in the ‘criminal law, judicial and penal’ areas, but also to identify competencies and resources in a second set of ‘related’ areas that often directly affect those three priority areas. They further agreed to identify the prior experience of their departments and agencies in providing rule of law support to peace operations. The result of this extensive ‘stock-taking exercise’ was the compilation of a single document providing an overview of available rule of law expertise and relevant experience within the UN system in both the priority and related areas – yielding a valuable reference source for the CLJAU and all UN partners. To obtain a more complete picture, the Task Force also identified, in a separate document, the ‘gaps’ in UN capacity in key rule of law areas. This process revealed, as the Task Force pointed out, that the available UN expertise in various rule of law areas is not of equal strength: in some areas, there is significant overlap in expertise – so coordination to avoid duplication is essential – while, in others, the expertise is thin or non-existent. To cite but a few of these gaps, the Task Force found that the UN system lacks expertise in undertaking assessments of judicial and penal systems; in providing or developing practical training for judges, prosecutors

and prison officials in various areas; in conducting, or providing training in, forensics investigations and advanced investigative techniques essential to modern police work; and assisting in the development of ombudsperson institutions and in building the capacity of traditional justice systems.

The Task Force therefore concluded that the UN should explore how relevant external entities – particularly among governmental, intergovernmental and non-governmental organisations – might provide the required expertise to help fill these gaps and weaknesses. Its members then canvassed their colleagues to identify reliable, experienced external entities using two criteria: first, that their department/agency had previously worked with that entity on rule of law-related issues and, second, that the entity operated internationally. Based on that information, the Task Force prepared a preliminary compilation of relevant external entities with expertise and resources in the priority and related rule of law areas. However, in recognising that such a preliminary listing of entities reflects only a portion of the substantial rule of law expertise that exists outside the UN system, the Task Force recommended that it be augmented and regularly updated, with the assistance of Member States, so as to extend the outreach to a broader geographical range.

Now let me turn to the Task Force's recommendations on appropriate support arrangements to be established for UN partners as well as external entities to assist the CLJAU, starting with our internal partners.

B Recommended Support Arrangements to be established with Relevant UN Partners

Throughout its deliberations, the Task Force focused on the need to formulate a more *coordinated approach* in tackling rule of law issues in peace operations, as no single department or agency had the required expertise, experience, resources or mandate to identify and handle all such issues. The Task Force stressed, however, that this coordination would not happen spontaneously, and would require not only a team effort by various UN partners but also enhanced planning and a structured approach. The Task Force pointed out that the two-person CLJAU should be the *catalyst of coordination efforts*, but that it alone could not possibly develop comprehensive rule of law strategies for peace operations. After considering various options for establishing support arrangements between the CLJAU and UN partners, the Task Force proposed a three-pronged approach that largely builds on existing institutional arrangements.

- 1st: The Task Force proposed the **designation of 'Rule of Law Focal Points'** by each of the 11 departments and agencies represented, who would ensure that they respond, to the fullest extent possible, to specific requests from the CLJAU and lead department for advice and support on rule of law issues. The CLJAU would also be able to 'mobilise' this

network of focal points, when needed, to address broader rule of law-related issues arising within peace operations.

- 2nd: The Task Force recommended the **implementation of a ‘Coordination Framework for Addressing Rule of Law-Related Issues Linked to the Planning for and Deployment of a Peace Operation’**, which would apply whenever a new operation is being launched or when an existing operation’s mandate is being renewed or modified. This Coordination Framework outlines a process through which the lead department and other relevant UN departments/agencies will systematically address rule of law issues at each critical stage of the planning and deployment of an operation when appropriate in view of its mandate: starting with mission planning within an Integrated Mission Task Force (another outgrowth of the Brahimi Report), to in-theatre assessments, to formulation of a mission’s concept of operations and mandate, to preparation of the mission’s budget, to recruitment of staff and, finally, to support for the operation of rule of law-related offices within a mission once deployed. Under this Framework, a ‘Rule of Law Working Group’ – comprised of representatives of the CLJAU and other UN partners concerned – would be established for individual operations, either as part of an Integrated Mission Task Force or under the lead department if no Task Force is formed, to assist in developing a comprehensive rule of law strategy for each operation. The Framework also recognises that local experts are indispensable to the success of implementing a coherent rule of law strategy, as it calls for the UN to consult such experts early in the mission planning process as well as in all subsequent phases.
- 3rd: The Task Force proposed the **establishment of support arrangements between DPKO’s Personnel Management and Support Service and relevant UN departments and agencies for the recruitment and rapid deployment of rule of law specialists** for peace operations, including for assessment teams. The Task Force presented four possible support arrangements that could be implemented, ranging from the sharing of rosters of rule of law specialists – which DPKO is particularly eager to pursue – to providing vacancy announcements for specific rule of law-related posts in particular operations.

As was apparent in the early days of our deployment in Kosovo and East Timor, the UN lacked a clear strategy on how to approach the panoply of rule of law-related issues that we faced, including on how best to establish functioning judicial and penal systems in parallel – and at a commensurate pace – with building a local police service. The SRSG of UNMIBH, Mr. Jacques Klein, described this predicament in Bosnia, in May of this year, as follows:

The legacy of UNMIBH when it completes its core mandate in December is that police reform will be much more advanced than other rule of law

initiatives. The UNMIBH mandate focuses on the improvement of the local police, while the Office of the High Representative and other international community actors are primarily responsible for judicial reform and related rule of law initiatives. Upon conclusion of the UNMIBH mandate, the mission will have succeeded in establishing local police forces that meet all the basic international standards. However, the local police remain constrained by the weaknesses and inadequacies of the judicial system ...

DPKO is optimistic that the Coordination Framework – under which it has a central coordinating role as a ‘lead department’ – will now provide an effective mechanism for ensuring that such rule of law-related issues in a peace operation are addressed in a systematic, comprehensive and timely way. With this early collaboration with UN and external partners as well as relevant local actors, we will reduce the risk of rule of law issues being dealt with in an ad hoc or fragmented manner – and often too late in the process to make real headway.

We are also hopeful that, with the support arrangements for the recruitment of rule of law specialists, we will be able to show how the UN system can pool its energies to achieve quicker deployment of such high-quality experts. We should never again have to encounter the crises that plagued UNMIK and UNTAET in recruiting sufficient numbers of judicial officers and corrections officers as well as international judges and prosecutors, which further contributed to delays in implementing much-needed judicial and penal programmes and the processing of serious crimes cases. In Kosovo, these recruitment problems were compounded by the fact that the initial operational plan and budget for UNMIK did not include posts for international judges and prosecutors – or for the interpreters, support staff and close protection personnel they would need – which meant that, when the decision was made in January 2000 to utilise them, we then had to seek exceptional funding arrangements pending the General Assembly’s approval of such posts. I can tell you that it was not easy to find a suitable candidate willing to serve as the first international judge to hear sensitive cases in Mitrovica that January. I still remember sitting in my office in Pristina trying, for hours, to convince a judge who was then working in the Department of Judicial Affairs why it was worthwhile to accept the function for a trial scheduled 10 days from then, even though the conditions were certainly not optimal: he would have to live in the French military barracks for security purposes; he would have to be accompanied by close protection officers 24-hours a day; the case files had not yet been translated; we were still trying to identify qualified translators and interpreters for the trial; and he would have to rely on an UNMIK secretary as a court reporter.

C Recommended Support Arrangements to be established with External Entities

As I have mentioned, the Task Force recognised the need to tap into the expertise of experienced external entities in order to supplement the UN’s rule

of law capacities, which are limited or non-existent in certain areas. In assessing the most appropriate arrangements for external entities to provide such rule of law-related support to the Civilian Police Division and peace operations, the Task Force concluded that no single option could be prescribed for all situations. It recommended that at least four options be considered, subject, of course, to legal review to ensure compliance with UN rules and procedures.

- 1st: The Task Force proposed that an **exchange of letters** could be concluded between DPKO and an external entity, setting out the nature of the rule of law-related assistance to be provided in a particular peace operation and the applicable terms and conditions.
- 2nd: The Task Force recommended that the Under-Secretary-General for Peacekeeping consider proposing, after consulting with Member States, the establishment of a '**UN Rule of Law Standby Arrangements Initiative**' and related database, which would include Member States and external entities that are prepared, in principle, to render rule of law-related assistance to the CLJAU and peace operations.
- 3rd: The Task Force proposed the establishment of **support arrangements** between DPKO and relevant external entities **for the recruitment and rapid deployment of rule of law specialists** for peace operations, including for assessment teams. The Task Force considered that four practical options, similar to those proposed for UN partners, could be implemented with such entities.
- 4th: In noting that rule of law initiatives in peace operations are often hampered by the host country's lack of sufficient human and financial resources to strengthen its basic rule of law institutions, the Task Force proposed that DPKO and the Department of Political Affairs (DPA), in consultation with the Controller's Office, spearhead a '**Rule of Law Support Initiative**'. This Initiative would offer two mechanisms – a '**Rule of Law Trust Fund**' and '**Partnership Arrangements**' – for Member States and external entities to provide voluntary funds and resources to 'jumpstart' the development of these critical institutions. Under the proposed Partnership Arrangements, it is envisaged that DPKO or DPA – as the lead department – and the peace operation concerned would consult with the host country on its priority rule of law requirements. Once identified, they would then approach Member States and relevant external entities which might be willing to enter into partnership with that government to provide human or financial resources to strengthen a particular rule of law institution – such as through the refurbishment of courts, the development of police and judicial training programmes, or, for that matter, the provision of such basics as office equipment and legal reference materials for judges and

prosecutors. I will never forget how shocked and rather embarrassed I was during my first visit to the districts in East Timor in August 2001, when nearly every single judge and prosecutor we met, when asked what assistance they most needed, requested such fundamental things as law books and translated copies of the regulations which UNTAET had promulgated.

In proposing these various modalities to reach out to external entities, the Task Force also recognised that many UN departments and agencies – particularly those which are field-based such as UNHCR and UNICEF – have had longstanding relationships with many of these entities. They emphasised that this existing web of relationships should be viewed as a very useful framework to be capitalised on rather than needlessly duplicated. The overriding objective, they indicated, should now be for the UN to approach outside entities in a more focused and manageable manner on rule of law issues, which should lead to better results and a more efficient use of resources for all concerned.

The Department of Peacekeeping Operations fully supports the Task Force's conclusion that it is time to extend our outreach to experienced external entities – from a broad geographical range – which might be able to provide much-needed rule of law expertise to fill some of the UN system's gaps and weaknesses. As the Task Force noted, this outreach offers a compelling example of an area in which we can give flesh to the Secretary-General's reform vision to promote partnerships between civil society and the Organisation to better respond to some of today's complex challenges. To offer just one example of how this type of outreach produced positive results in one of our peace operations, I would recall the assessment mission undertaken to East Timor in December 2001 by a team of lawyers and judges from the International Legal Assistance Consortium (ILAC) – a Sweden-based non-profit organisation comprised of bar associations and councils from over 150 countries. Following intensive discussions over the course of one week with East Timorese and international UNTAET managers sitting together, which regrettably had not frequently happened in the past, the ILAC team reached a consensus with the then Second Transitional Government and UNTAET on potential assistance to be provided in five priority legal and judicial areas. This instance of outreach was truly the product of collaboration with relevant local actors, as every aspect of the assessment team visit was arranged and undertaken in close consultation with both East Timor's Chief Minister and the Justice Minister. In fact, the Justice Minister, Ms. Ana Pessoa, established the criteria for and cleared the selection of the ILAC team members; identified the legal/judicial areas to be examined by the team; led most of the discussions with the team; and agreed on the potential types of assistance needed in each priority area. The outcome of this outreach was not only the submission of the team's written assessment and recommendations, but also ILAC's follow-up assistance to the government – ranging from the submission of candidates to

serve as international judges and prosecutors to the identification of donors to fund the establishment of a legal defence centre.

The Under-Secretary-General for Peacekeeping also looks forward to consulting with Member States on the recommended launching of a Rule of Law Support Initiative. The establishment of Partnership Arrangements and a Rule of Law Trust Fund could serve as practical mechanisms for Member States and external entities to provide – in a hopefully more coordinated and timely manner – voluntary resources to help strengthen critical rule of law institutions of host countries. As can be vividly seen in a number of peace operation theatres, including in Bosnia, East Timor and Sierra Leone, the host country often lacks adequate funding to strengthen core rule of law institutions and, consequently, progress in strengthening local police forces is rarely matched by progress in strengthening judicial and penal institutions. To illustrate the myriad of problems that can be encountered on this front, let me refer to the stark views of the Chairman of the Sierra Leone Bar Association, Mr. J.B. Jenkins-Johnston, when addressing the Conference on ‘Creating an Enabling Environment for the Consolidation of the Rule of Law’ in February 2001:

... [I]t is my view that before we can talk meaningfully about consolidating the rule of law, the machinery and system by which justice is administered must be completely overhauled as it is now in disarray. Thus far I have not addressed the fact that we do not have enough judges and magistrates; that there is no High Court sitting outside Freetown; that several prisoners are forgotten on remand and many die in prison; that the Under Sheriff’s Office which has the responsibility to serve process and to enforce judgments of all the courts is a den of inequity and corruption and needs to be totally reformed and re-orientated. Bailiffs need to receive proper training, uniforms, identification, vehicles, storage space and police protection at all times so that the public will take them seriously. Furthermore, I have not thus far addressed the sad fact that law reports have not been published in Sierra Leone since 1973. All the judgments delivered in all our courts since 1973 are gathering dust somewhere, lost to the development of case law in Sierra Leone forever. Indeed there is a lot to talk about ...

By liaising early with host country authorities on their rule of law-related needs (which, in post-conflict settings, are invariably numerous), peace operations could assist in identifying the priority requirements for rule of law institutions that could most benefit from such partnership support and trust fund financing. Through such Partnership Arrangements, the host country obviously benefits as the recipient, but the donor partner also benefits from assisting the government in a very tangible and identifiable way. As an encouraging precedent, one can look to the positive results achieved by the partnership support offered in UNMIK through the OSCE-sponsored ‘Assembly Support Initiative’, a multi-agency program supporting the Assembly of Kosovo elected in November 2001. This Initiative, the members of which include organisations and institutes from a number of countries, seeks to support and strengthen the Assembly by,

among other things, arranging working visits to parliaments of other countries; holding conferences, seminars and workshops with Assembly members; and providing training for the Assembly's legislative staff and interpreters as well as infrastructure support. And I would also mention the 'sister city' arrangement forged by an UNMIK Regional Administrator between the city in Sweden where he had worked and the war-ravaged town of Prizren. This resulted in funding and assistance on a number of projects, including, within only weeks, the introduction of a modern traffic plan and road signs that not only gave a noticeable 'facelift' to the town but an encouraging sense of a gradual return to a more normal life.

I would now like to briefly discuss the last set of the Task Force's recommendations on rule of law-related guidelines.

D Recommendations on Rule of Law-Related Guidelines Needed for Peace Operations

After canvassing the 11 departments and agencies represented, including their field presences, the Task Force identified a *broad range* of existing rule of law-related guidelines, manuals and training modules that deal with various aspects of rule of law activities in peace operations in the priority criminal law, judicial and penal areas as well as in the other related areas. As reflected by the bibliography compiled, the Task Force found that the rule of law areas in which there are no such guidelines developed or endorsed by the UN largely correspond to the gaps in internal competency areas. The Task Force also noted that DPKO is preparing a 'Handbook on Multi-Dimensional Peacekeeping', which will include guidance on civilian police, judicial and corrections programs in the context of UN peace operations. Given the extent of existing guidelines, as well as DPKO's forthcoming Handbook, the Task Force recommended that no further action be undertaken at this stage for developing *general guidelines* for rule of law activities in peace operations, but suggested that the issue be revisited in the future.

The Task Force recognised, however, that the lead department may sometimes have an operational need for *guidelines to be developed for a particular rule of law area* and recommended that, in such instances, assistance be sought from relevant departments or agencies and, if needed, from external entities. In this connection, I would refer to a recent example where an NGO and experts from a broad range of Member States collectively worked to help fill a gap in the corrections area where no comprehensive UN guidelines had been produced, as we discovered so quickly in our operations in Kosovo and East Timor. The International Corrections and Prisons Association (ICPA) – a Canada-based organisation with 400 members from 65 countries – recently produced 'Practical Guidelines for the Establishment of Correctional Services within United Nations Peace Operations' with the participation of corrections and peacekeeping experts from around the globe, including from the UN.

E Involvement of Local Actors

Finally, let me turn to the one area that the Task Force focused on that transcends any one specific issue set out in its terms of reference – and that is the need to *meaningfully involve* local actors in formulating and carrying out rule of law initiatives in peace operations, rather than imposing a rule of law strategy on them. Let me not try to paraphrase the Task Force’s strong views on this, but instead read a passage from their report:

... [T]he Task Force wishes to emphasize that the UN should make it a high priority to engage local actors (eg government officials, local NGOs and community organizations) in a meaningful way in undertaking rule of law initiatives in peace operations. Local experts on the judiciary, police, corrections system, criminal law – as well as on such issues as property disputes, amnesty provisions and traditional justice – are precious assets and indispensable to the success of implementing a coherent rule of law strategy. The UN should consult with such experts as early as possible in the mission planning process as well as in all subsequent phases. For example, local experts should participate in any review of local laws; local lawyers and police should be trained as trainers for judicial or police training projects and help design the curricula; and civil society leaders should be consulted on what the priority rule of law issues are from their perspective as potential ‘beneficiaries’ of a fair and impartial justice system and a rights-respecting police force. Simply put, the goal of all UN personnel working in the rule of law area should be to reinforce the capacities of, and not replace, local actors whenever possible...

IV THE IMPORTANCE OF WIDE PARTNERSHIP AND NATIONAL OWNERSHIP: CHALLENGES AHEAD

Now, in reflecting on this broad-reaching set of recommendations put forth by the Task Force, I think that one recurring message emerges very clearly: While the nature of a rule of law strategy for a specific peace operation will largely depend on its mandate and the prevailing circumstances, real progress in formulating and implementing that strategy can only be achieved if the lead department is able to rely on the full support of partners within the UN system, Member States, relevant external entities and, perhaps most importantly, the crucial local actors from those war-stricken theatres. At the same time, I should stress that, in undertaking this initiative, the members of the Task Force – and the departments and agencies they represent – fully appreciated that the UN system is not, nor should be, the main actor in developing a *national* rule of law strategy for a country emerging from conflict. Nor should bilateral donors or international NGOs, for that matter.

Simply put, the primary responsibility for developing a comprehensive rule of law strategy for a country emerging from conflict, as well as the responsibility for its long-term implementation, ultimately rests with the men and women of the country concerned. It is they who need to craft and live with the system of

rule of law that will regulate the behaviour of their citizens as well as safeguard their interests and freedoms. It is they who will have to determine what system of law is best suited to their local culture, traditions and norms. It is they who, when a UN operation closes, will continue to steer the rule of law process and operate the police stations, the courts and the prisons, often with limited resources and funding. And it is they who have the most at stake, particularly given that the role played by the rule of law in a society has a tremendously formative influence on shaping a national identity as a whole. The fundamental stake that the people of a country have in the rule of law process is perhaps best captured by the moving words of President Gusmao when closing his address before the General Assembly in September:

The international community, politicians and academics often mention our country 'as a UN success story'.... At the core of this success, were, above all, our People. By rejecting to embark on the path of violence, even when provoked, by exercising their rights in a democratic and civic manner, even if it meant risking their own lives, by looking towards the future hoping for the certainty of freedom, our people proved to the world to be worthy of the respect that we all owe and know, and thus gain the credibility and admiration of all.

While promoting national ownership and capacity building is one of the most important goals of international involvement in undertaking rule of law initiatives in a post-conflict environment, I must admit that our experience shows that it is easier said than done in the peacekeeping context. I need only recall that Sunday in early August 1999 in Kosovo when SRSG Bernard Kouchner held an emergency meeting to address the large group of newly-appointed Kosovo Albanian judges and prosecutors who had submitted a resignation letter that previous Friday because they had not been consulted prior to his signing the first regulation on 25 July 1999, which set out the applicable law. That Regulation² provided, among other things, that the laws that had been applied in the territory prior to the adoption of Security Council resolution 1244 would apply, *mutatis mutandis*, insofar as they conformed with internationally recognised human rights standards and did not conflict with the mission's mandate or any regulations promulgated by the mission. Had it not been for Mr. Kouchner's outright apology for not consulting on such an important issue and his pledge to establish a mechanism for future consultation on all proposed regulations, as well as the eventual issuance on 12 December of Regulation 1999/24 which provided that the law in force in Kosovo on March 22, 1989 (ie before the revocation of its autonomy status within Serbia) would serve as the applicable law for the duration of the UN administration, we would have undoubtedly faced a prolonged standstill on the judicial – and perhaps also the political – front.

² Regulation No 1999/1.

Hopefully, we will get closer to achieving the goal of promoting national ownership and capacity building through implementation of the Task Force's recommendations, including the Coordination Framework – which allows us to address rule of law issues in the peacekeeping context in a more holistic and systematic way, at each critical stage in the planning and deployment of an operation, and in close consultation and partnership with other UN players, national actors and relevant external entities. Even with the implementation of the Task Force recommendations, however, the constraints of time itself will remain a major and perennial challenge. Valuable opportunities can be lost on the ground and confidence in the peace process can start to erode if the international community is unable to act in a timely manner – hence, the importance of forging partnerships and collaborating on an integrated rule of law strategy for a given peace operation early on in the process, and of sequencing and prioritising efforts in light of short and long-term objectives. For example, had we, at the very start in both Kosovo and East Timor, given urgent priority to planning for and obtaining sufficient resources for the provision of the necessary professional training and mentoring programmes and facilities for newly-appointed judges and prosecutors and for the immediate establishment of an adequate prison infrastructure, we would have obviously accelerated the development of operational judicial and correctional systems.

Given these considerations and variables, it is clear that, in planning a rule of law strategy for an operation, a fundamental challenge is to figure out what needs to be done urgently, in what order, and by whom – including during the critical initial days on the ground. The scope of the mandate is a pivotal factor in this regard, as sometimes the peace operation will carry a huge share of the burden, particularly where the Organisation has transitional administration responsibilities, as in the case of Kosovo or East Timor. We must remember, however, that those cases have been the exception and not the norm. In most cases, civilian administrative functions and legislative and executive powers are vested with a national authority, even if with an interim national administration, as in the case of Afghanistan. In most cases, the UN peacekeeping operation does not have executive law enforcement authority. And, in most cases, the UN is not the only major international actor on the ground. Nevertheless, in all cases, there has to be a recognition – by the UN peacekeeping operation and all other players involved – that the promotion of the rule of law must feature prominently throughout all stages of the peace process and that each must do its part. We recently heard this message forcefully conveyed by the SRSG in Bosnia, Mr. Klein, at DPKO's tenth anniversary celebration on 29 October, when he stated:

... We need to ask ourselves why BiH has now received more per capita assistance than Western Europe under the Marshall Plan, but still remains weak and unsustainable requiring several years more of intensive international attention?

One reason is that we have failed to prioritize the priorities, particularly with respect to rule of law. I have no doubt that rule of law must be placed as the centerpiece of practically every peacekeeping mission. Without it, a credible exit strategy is inconceivable – international military forces cannot leave, the economy cannot recover, democracy remains a façade, and corruption and criminalization become entrenched.

V CONCLUDING REMARKS

I have mentioned but a few of the many challenges that lie ahead of us as we move forward with the Task Force's recommendations in seeking to strengthen rule of law in the context of our peace operations. That having been said, it would also seem fair to say that there are a few key ones that we have overcome as well, starting with the basic recognition of the following:

First, rule of law issues have not been given the attention that they deserve in the peacekeeping context.

Second, what is meant by the rule of law in the peacekeeping context, and the related scope of issues which need to be addressed to build a durable peace, is much broader than we had previously thought to be the case.

Third, DPKO must cast its net much wider, and forge its partnerships much deeper, with those both within and outside the UN system, in planning and implementing any rule of law strategy.

Fourth, whatever we do in the rule of law area must be done closely together with local actors, including civil society, so as to maximise national ownership and develop local capacity, in the interests of promoting a durable and self-sustaining peace.

I realise, however, that the path between the recognition of these basic premises and their application on the ground – so that we see real differences and concrete achievements in our field operations – is not necessarily a short or simple one. While the Executive Committee's full endorsement of the Task Force recommendations advances the UN system in a unified direction, we need to think collectively, with Member States, as well as local actors and external partners in forums like this, about how to make progress on all of these fronts. I thus genuinely look forward to taking your questions and getting your thoughts on these issues during the remainder of this session and in our group discussions.

Part V

OPERATIONAL VIEWS FROM THE FIELD

Dennis McNamara[†]

A CIVILIAN OPERATIONAL VIEW FROM THE FIELD

I INTRODUCTION

From my direct work with UN peace operations in Cambodia, Kosovo and East Timor during the past 10 years, as well as several years' involvement with UNHCR in the Great Lakes region of Central Africa, it has become very clear to me that establishing the rule of law is the cement essential to hold post-conflict countries together. The UN and governments have all learnt a lot of lessons in this area in recent years, but unfortunately many of them are still not being applied.

II JUSTICE AND THE RULE OF LAW

The unwillingness to give real priority to justice/rule of law initiatives in UN peace operations reflects a broader reluctance of both the UN and States to focus on human rights issues in what are invariably highly politicised peace agendas. Even the much-lauded *Brahimi Report* on UN peace operations has relatively little emphasis on this area. Despite the rhetoric and often bold language in Security Council resolutions, governments (and consequently the UN) remain extremely wary of an aggressive international human rights agenda, which inevitably collides with more pressing national political imperatives.

This hesitancy is not new but it continues and has meant that human rights and justice issues, including establishment of the rule of law, secure more lip service than tangible support in most peace operations. The most recent ones – East Timor and Afghanistan – are no exception. In East Timor the justice system continues in disarray, despite more than two years of efforts by UNTAET and others, and in Afghanistan, governments have so far contributed only US\$4 million for rule of law activities, while UN human rights activities are minimal.

[†] The views expressed in this paper do not necessarily reflect the views held by the author in his official capacity.

In light of this it is hardly surprising that justice and establishing the rule of law remain the Achilles' heel of UN peace operations. Without priority, they lack adequate resources, expertise and any real strategy. Unless we all give real priority to this area and key governments are prepared to support it properly for longer periods, UN peace operations cannot succeed in promoting transitions to democracy. Cambodia remains the archetypal example of a very expensive peace operation and UN-run election, internationally proclaimed as free and fair, where the losing party got away with not only killing many of its opponents, but also in refusing to recognise the outcome of the vote. Ten years later they remain in power in Phnom Penh, without any legal or constitutional redress.

Conflicts, especially internal ones, are the very epitome of lawlessness. Modern conflicts often include widespread thuggery, with apolitical criminal groups using the chaos to make money and take power. It is only by a serious and sustained movement (back) to a society actively governed by the rule of law that these situations can be moved out of conflict and into recovery.

Without an enforced rule of law regime thugs with guns will continue to dominate. Our much-vaunted 'democracy' has little chance in such environments, and elections, no matter how 'free and fair' we pronounce them to be, are only a token part of this process. Elections do not establish democracy, despite often being seen as its litmus test. Democracy follows the establishment and proper functioning of the rule of law, not the other way around. Cambodia, Haiti, Kosovo, Sierra Leone and East Timor all (negatively) testify to this.

A The Need for Expertise

To establish effective justice systems in post-conflict societies requires that rule of law 'packages', including expert personnel and administrators, should be provided for former conflict areas from the outset with the peacekeepers and the humanitarians. Months later is too late, as we saw in Kosovo, where unredressed revenge attacks on Serbs and Romas by returning Kosovar Albanians led to new killings and 250,000 new refugees.

Most countries coming out of protracted wars lack the essential expertise, experience and support structures to establish the rule of law. They usually lack even the basic laws needed to govern democratically. Despite political sensitivities, the support of outside expertise and resources are often required at the outset, including that provided by returning qualified exiles. In the absence of this, insisting that unqualified locals become judges and prosecutors can be shortsighted and counterproductive, as we painfully learnt again in East Timor. Despite its political incorrectness, there is often a need for direct external support, possibly for some years, in the justice sector of many war torn societies. Of course there must be parallel national institution building and training, but that is a process which cannot address the immediate law and

order problems for some time. And if they are not addressed, they can easily explode.

There is also a great danger that we assume that Host States in peace operations share international justice and rule of law standards and principles. This is not necessarily the case. In East Timor the Minister of Justice wrongly insisted on controlling legal aid and judicial administration, while the Prime Minister wanted direct control over the police. Fundamental principles of separation of powers were, as a result, endlessly debated and the justice system remained semi-functional on independence. Judges were routinely intimidated by the authorities in both Cambodia and Kosovo, to the point that they could not function independently, despite (a weakly applied) UN mandate to manage this area. If rule of law principles are to be properly upheld, including by temporary UN administrations, they must be formally incorporated into any relevant peace agreements or, failing that, at least clearly spelt out in the Security Council resolutions which mandate the UN operation.

To be effective, transitional rule of law packages must be comprehensive: they need to include qualified police, judges, prosecutors, defenders, court administrators and interpreters, as well as prison staff. One missing sector can affect all: in Kosovo arsonists arrested by NATO troops were released for lack of prison space; known killers wanted by the UN in Cambodia could not be tried because of intimidated judges; and the courts in East Timor effectively ceased functioning through a lack of staff and administrators.

These gaps cannot be filled, even temporarily, by unqualified civilians or by the military. Peacekeeping soldiers are not good policemen and most do not want to police. Soldiers are needed to provide a secure environment for police and courts to function, but cannot be a substitute for them. In extreme situations the military may need to protect the police, but as with humanitarian operations, the demarcation lines must be very clearly drawn. Even where martial law may be temporarily needed (as it was in Kosovo in the first months) it must be administered under the supervision of qualified civilians.

B The Importance of a Justice System

Host States often also need to be constantly pressured on justice issues, where local political imperatives may not sit easily with rule of law principles. The lack of political support, coupled with active resistance by the Minister of Justice in East Timor to a host of essential justice issues, was largely responsible for UNTAET being unable to accomplish a great deal in this area.

Nearly 10 years ago, a post-mortem on the UN operations in Haiti, El Salvador and Cambodia sponsored by the Aspen Institute strongly recommended the establishment of a civilian database of available experts to assist failed states in establishing effective justice systems. Today most of these proposals have still not been implemented. The UN remains in urgent need of at least 100

experienced and qualified senior police to be on emergency call for future operations, with support staff. Without more and better-trained police being available at the outset, UN peace operations cannot implement rule of law mandates or undertake the key task of local justice capacity building.

Too often UN civilian police are an unrecognised essential component of peace operations. As the visible frontline interface with the local community they have a critical and difficult role, coming usually from different cultures and with mixed experience. While many police have served with distinction in complex operations, others have been below standard and, in some cases, so unqualified they have had to be repatriated by the UN. Western governments generally do not have extra police available for UN peacekeeping duties (contrary to the military) and there are few senior police readily available with relevant international experience.

Deploying this expertise, including police, requires the active political support of concerned states. This support is also required more broadly to establish functioning justice systems after conflict. Security Council resolutions are not enough, particularly where key neighbouring states (such as Yugoslavia in Kosovo and Indonesia in East Timor) fail to cooperate with, or even resist, this aspect of the UN mandate.

Setting up the framework for the rule of law post-conflict is a long-term, difficult and unspectacular task. Building (or rebuilding) the essential infrastructure and resources takes years, not months. But it is absolutely essential.

The process may also require a change in the local culture to be effective, insofar as the population needs to be persuaded that the courts and police are not part of their oppression (as previously in Kosovo and East Timor), but rather, are essential for their protection. Experience over the past decade has also clearly shown that new justice systems cannot be soundly built on the basis of serious unaddressed injustices of the past. Previous atrocities including crimes against humanity and war crimes must be addressed, at least where the main perpetrators are known. Not only is this owed to the victims (and invariably demanded by them) and the community at large, but it is also a necessary catharsis for future stability. A system which has granted broad impunity for past atrocities faces a major dilemma in prosecuting new crimes, as we saw in Cambodia. Some see these human rights imperatives as conflicting with more pressing political priorities, usually of healing and reconciliation, both internal and external. But the justice versus reconciliation debate is a phoney one insofar as reconciliation and truth processes for less serious crimes are an integral part of any effective justice package which includes accountability for gross past abuses.

In East Timor, the lukewarm support by the political leadership for the prosecution of serious crimes committed there during 1999, despite being

mandated by the Security Council and internationally staffed, was a serious handicap to this process, as was Jakarta's unwillingness to seriously pursue the major and well-known Indonesian military organisers of the violence. Despite this predictable reluctance, the prosecution of past violations must be part of any peace package if the establishment of justice is an objective of the operation. This requires a carefully balanced approach between internationally led, and national, prosecutions, and between civil and criminal priorities. However, local politicians should not be allowed to deny victims the justice they demand and are entitled to, in the interests of political imperatives of reconciliation. The balance is not easy, but it can be achieved.

By definition, war and conflict are essentially lawless. Only the aggressive establishment of the rule of law, difficult as it may be, can act as a counterbalance to continued or even renewed conflict. Justice is the key underpinning of democracy and positive governance, of which elections are the most visible starting point. In grappling with these major challenges, an overly legalistic approach is not the best way to ensure the transition from lawless environments. Legal experts are needed, but they also need to be managed. The response must of course be rights-based, but it also needs to be prompt and pragmatic.

The justice component of peace operations also requires that the peacekeepers responsible for this are themselves properly monitored. While most are beyond reproach, some peacekeeping police and military provided to the UN have themselves been guilty of abuses, in East Timor and elsewhere. The UN has to make (and is making) strenuous efforts to ensure that these violators are held accountable, which requires better cooperation by police and military contributing states. Without this, the credibility of the entire peace operation can be seriously damaged, as it was to some extent in both Cambodia and East Timor. For this, there is a need for an independent ombudsman-type role in peace operations to ensure proper monitoring and accountability of those who violate the very laws they have been sent to establish.

III CONCLUSION

In all of these endeavours, I believe that the phrase 'peace operations' is the most appropriate description of what we are attempting to undertake. The popular but controversial phrase 'nation building' is both misleading and incorrect: nations are 'built' by nationals, not internationals, over decades, if not longer. The international community can support and help this process but cannot do it. Peace operations of the UN do not – and should not – pretend to build nations.

Over the past decade we have learnt many times the basic lessons relating to justice/rule of law issues in peace operations. The challenge remains to translate this valuable experience into both political and practical reality: more focused, longer term support by the Security Council and real priority to this

crucial area on the ground from day one. It is a challenge which regrettably, we seem likely to face again in the not too distant future. Any serious international attempt to support the transition of countries from conflict to civilian democracy must start with this.

Major General Songkitti Jaggabatarat[†]

PAST EXPERIENCES & FUTURE CHALLENGES: A MILITARY PERSPECTIVE

I INTRODUCTION

Multinational forces conducting peace operations usually have little time to prepare for the emergency situations they are likely to face. It is therefore important to understand the capabilities of a peacekeeping force. Peace operations are very different from fighting in a conventional war. For instance, the emergency situation leading to Thailand's involvement in East Timor included violence, human rights abuses, terrorism and massacre. These caused casualties and resulted in human lives being lost. In addition, UN officials and humanitarian organisations had restricted access to victims.

II THE PEACE OPERATION IN EAST TIMOR

The Security Council adopted resolution 1264¹ and authorised a multinational force (INTERFET) under a unified command structure headed by Australia, to carry out the following tasks:

- To restore peace and security to East Timor;
- To protect and support UNAMET in carrying out its tasks; and
- Within force capabilities, to facilitate humanitarian assistance operations.

A Background to Thai Involvement

Air Marshall Douglas Ridding, Deputy Chief of the ADF at that time, visited the ASEAN countries of Philippines, Malaysia, Singapore and Thailand to request contributions for a peacekeeping force to join the multinational force.

In the early morning of 16 September 1999, he arrived in Thailand and met with the Chief of Joint Staff and then with the Commander in Chief, Royal

[†] The views expressed in this paper do not necessarily reflect the views held by the author in his official capacity.

¹ SC Res 1264 (1999), 15 September 1999.

Thai Army. Prior to lunch, he also met with the Prime Minister. The Government of Thailand agreed to contribute a Task Force, which consisted of an infantry battalion, C-130, HMS Surin and a General as Deputy Commander of INTERFET. The Task Force was named 972 Joint Task Forces/Thai-East Timor.

At 1400hrs, I received an order from the Supreme Commander appointing me Deputy Commander INTERFET and Commander 972 Joint Task Forces/Thai-East Timor. On 17 September 1999, at 0300hrs, I flew on a C-130 with 30 staff from Bangkok to Darwin to plan and coordinate with the Commander of INTERFET.

Major General Peter Cosgrove and I went to Dili, East Timor, to meet with Major General Kiki Syahnakri, who was responsible for East Timor. We coordinated the deployment of the multinational force and requested the use of a helipad, airport, seaport and the provision of officials for aircraft guidance.

B Deployment of INTERFET

INTERFET deployed in the area of operations (AO). It is obvious that the multinational force had insufficient time for preparation and planning. We rushed to halt the violence and minimise any loss and casualties. The lead nation must have capabilities of C⁴I – Command, Control, Communication, Computer and Intelligence – in order to be able to communicate, give orders and supervise. It must understand the nature of peacekeeping operations and be ready to give logistical support to a Troop Contributing Country (TCC).

TCCs must be able to sustain themselves for an initial period of up to 30 days and understand the role of a peacekeeping force, because soldiers are trained for war fighting following the principles of war. Doctrine, Standing Operation Procedures (SOP) and Rules of Engagement (ROE) developed for war fighting need adjustment and need to be studied by the forces that take on a new role in a new mission.

The lead nation and TCCs must sign a Memorandum of Understanding (MOU) because each TCC has its own command, control and communication system as well as its own constitution. Due to different tactics, ROE, doctrine and chains of command, the best way to accomplish the UN mandate is by dividing the AO (grouping troops by regions) and mission assignment.

As a result of the difference of strategies, equipment and combat vehicles, TCCs must plan appropriately to sustain themselves. The lead nation will sometimes provide food, fuel and basic need items. The TCCs must be responsible for their own expenses, except if there is another agreement; for example the Trust Fund which needs supervision and reimbursement based on expense and wear and tear costs. The procedure of reimbursement is in accordance with UN guidelines to contributing governments. TCCs will enter and leave the country pursuant to their own government policy. If a TCC has

insufficient weapons and equipment, the lead nation may support the TCC by signing a bilateral agreement.

From the initial entry into the AO until the accomplishment of the mission, an experience which lasted five months, I found there were several important factors for me to consider while serving both as the Commander of a TCC and as Deputy Commander of INTERFET:

- History, races, nationality, tribes and lineage of the country to which forces will be deployed;
- Custom and culture of the local people – each soldier must be familiar with the ‘do’s’ and ‘don’ts’ when dealing with the local people. Religion should be left intact;
- The history of the conflict including the casualties, destruction and human rights abuses leading to the deployment of the multinational force;
- The relation of countries in the region concerning the conflict and the consent of the host nation to accept TCC involvement in the UN mission;
- Terrain and weather of the AO, information required of all belligerents such as the capability to use force, types of weapons, combatants’ disposition and strength, communication, local language as well as the habits of the local people; and
- Languages and capabilities of each country in the multinational force.

C The Operational Environment

Upon arriving in the AO, on 20 September 1999, fires were still burning. Traces of human rights abuses were everywhere. Buildings were burnt down. Bullets and cartridges were scattered throughout Dili and Bacau airports. There were rarely any people in the towns. Some people were waiting to be evacuated by sea at Dili port. Some had fled to West Timor (Atambua) and others had escaped into the mountains and forests. Dwellings, government offices, business compounds as well as markets were burnt down. There were no schools, hospitals or any public health service, doctors, nurses, police or administrative officials. However, some Indonesian officials did remain in East Timor. In general, however, there was a vacuum in administration and services.

Generally, the people remaining in East Timor were very poor. There seemed to be very few ‘professionals’ left in East Timor. Information gathered from human intelligence was vital due to restraints on communication. Signal intelligence partly enhanced human intelligence. Therefore, when information is needed, locals must support, cooperate with, trust and have confidence in the multinational force.

The multinational force had to operate with administrative officials, UN special representatives, NGOs, humanitarian assistance organisations (eg UNHCR,

World Food Programme), local leaders, and religious leaders.

The spread of diseases (eg malaria), the scarcity of health services and the lack of infrastructure significantly affected the performance of military personnel and the health of locals. Humanitarian assistance organisations and private development organisations took time to organise and develop in East Timor.

As the security situation improved and the environment became safe, the refugees incrementally returned to East Timor. This raised problems of poverty, lack of education, infrastructure, transportation and health services. These factors caused unemployment and rivalries for basic resources. In the meantime, there was a vacuum in the administration with no existing law or administration. The representatives or administrative officials of the UN were beginning to function. The civilian police started enforcing law and order. Language differences among TCCs and local dialects were an obstacle to coordination.

D Tasks Performed by INTERFET

In order to accomplish the mission of the UN mandate, INTERFET conducted many important tasks. We created a safe environment in East Timor by intelligence gathering, reconnaissance, searching, establishing checkpoints, securing important infrastructure such as power plants, water supply, communities, airport and seaport.

As mentioned above, the units and organisations which were responsible for administration, internal management and procurement, needed time for preparation. These support units have doctors, nurses, engineers, humanitarian assistance units and public relations officers. Immediate action needs to be taken when the people are sick or in need food and shelter. Multinational forces can initially secure and provide human security to them and then provide medical services, construction, food and guidance on living in hardship. By treating them justly, locals were willing to trust INTERFET. So they gave us useful information. In addition, we also coordinated our deployment with humanitarian assistance organisations and private development organisations that gave us medicine, plastic cloth, soap and a budget for the procurement of medicine and basic need items.

Local leaders, community leaders and religious leaders played a significant role in peace operations. We coordinated, cooperated and understood them so that all operations achieved the objective swiftly.

Impartiality is very important. All parties which were Pro-Independent, Pro-Integration, Falentil and Mitilia had to be disarmed. Only INTERFET could be armed. Furthermore, instructions on only using their weapons in self-defence were made clear to every soldier. Humanitarian assistance was provided evenly to all parties throughout.

III INTEROPERABILITY

A *Combined Operations within Multinational Forces*

The following factors are important to a successful mission:

- All units must understand the UN mandate clearly;
- All units must respect the national honour and prestige of other troops regardless of how big or small the contributing troops are, or how great the budget supporting the mission is because each troop represents his country;
- All unit leaders or National Contingent Commanders (NCCs) must respect each other. Exchanging ideas by meeting twice a week updated us on the progress and problems of the operations. We then planned to find an appropriate approach to solve the problem together;
- Official and unofficial commander visits to other national contingents created mutual understanding and cooperation. Furthermore, the visit of officials (Prime Minister, Defence Minister, Minister and Ambassador) to the national contingent enhanced and facilitated the mutual understanding of the combined operation;
- The efficiency of using English within the contingents was still a barrier and needed to be improved. For the Thai contingent, commanders and staff were selected who had past education and experience in the US, UK, Australia, Indonesia and Malaysia. They were capable of coordinating with other contingents effectively.
- NGOs also needed to coordinate with other contingents. NGOs were chosen from among those who were from the southern part of Thailand and were capable of using local Malayu (similar to the local Indonesian language); and
- Establishing harmony with National Command Elements, units and local people by initiating and participating in social activities. These activities improved the close relationship and culture of cooperation. In addition, sport activities helped create a secure environment and gained support from the people.

B *Combined Operations with Other Organisations*

There was coordination and cooperation among the UN SRSG, administrative officers, CIVPOL and UN humanitarian assistance agencies to accomplish the ultimate goal, which was to build 'human security' in the AO. Our coordination was both formal and informal which brought good understanding in combined operations.

The group of private development organisations played a significant role in the operations. Mutual support was crucial for all organisations. The group of private development organisations sometimes played a role as representative of a nation state. The coordination and cooperation between local leaders and private development organisations can enhance the operations effectively and

reduce the gap between them. Private development organisations and humanitarian assistance organisations were useful for providing information to the multinational force which can be evaluated, interpreted and analysed for multinational organisations.

Not only can the local leaders and religious leaders enhance mutual understanding between the multinational force and locals, but they can also assist the force to communicate with the local people.

If we believe that a multinational force is part of a government agency, then the UN, administrative organisations and humanitarian assistance organisations are also elements. Furthermore, they work together with CIVPOL, the private sector, the business sector, the public sector (local people, local leaders, religious leaders, independent intellectuals) within the framework of good governance, systematically and transparently to fulfil the needs of the local people justly. The newborn state will then have good governance principles to run the country.

IV CONCLUSION AND FUTURE CHALLENGES

In my view, many countries are now facing problems such as terrorism and fighting for resources. These problems lead to competition for administrative power. Problems of differences in race and religion can lead to ideological conflicts. When violence takes place, there are refugees. The causes of conflict in the Asia-Pacific region – South Asia, East Asia and Southeast Asia – have obviously come from the issues mentioned above.

Waiting until conflicts evolve into large-scale violence and then bringing in the UN Peacekeeping force to solve them will be too late. There will be great losses and human rights abuses which deprive local people of human security. If the international community can use appropriate measures to solve the problems in a peaceful way by means of negotiation, natural resource allocation and reducing the pressure of political competition, national reconciliation will take place rather than peace operations.

Finally, in my opinion, present and future peace operations should benefit the local people. Peace operations also mean the operations of the peacekeeping forces, administration processes and humanitarian assistance. If the operation is based on good governance, the local people and the newborn state will be secured in terms of ‘human security’. Then the operation will achieve the purpose of the international force that joined the mission in order to truly assist and benefit the local people.

Part VI

OPERATIONAL LEGAL VIEWS FROM THE FIELD

Mandira Sharma[†]

PAST EXPERIENCES & FUTURE CHALLENGES: A CIVILIAN PERSPECTIVE

I BACKGROUND

Since 1990, Nepal has had a constitutional monarchical system with a multi-party democracy. The prevailing Constitution has been in force since 1990. Respect for the rule of law and human rights are enshrined in the preamble of the Constitution. In addition, it guarantees fundamental human rights and abolished the death penalty.

Nepal has ratified and signed 18 different multilateral human rights treaties. It has also ratified the *Geneva Conventions*. The *Treaty Act of Nepal* provides that treaties ratified by Nepal prevail as national laws in Nepal and even supersede national laws if they contradict each other. In that way, theoretically, Nepal seems to have broad protection of human rights and the rule of law. However, the situation in the field is different. Some examples of human rights violations by security personnel are illustrated by the following case studies. These case studies are based on fact-finding missions, on-the-spot visits, and interviews with eyewitnesses, victims and their family members.

A further reason for presenting these case studies is to bring to light the real picture of human rights and the rule of law in Nepalese villages and to make it easier for participants to understand what is actually happening in the field where the security forces are fighting against the Maoists.¹

[†] The views expressed in this paper do not necessarily reflect the views held by the author in her official capacity.

¹ The Maoists, an extreme-left Communist Party of Nepal, declared a 'peoples' war' in Nepal in February 1996 with the stated aim of overthrowing the monarchy and the multi-party system and establishing a Peoples' Republic.

II CASE STUDIES INVOLVING NEPALESE SECURITY FORCES

A *Case Study One*

At about 7:30pm, approximately 20 army personnel, in uniform, arrived in Jamuna Village.² The villagers were asked to close their doors and shops. The army personnel arrested five villagers – Surya Adhikary, Jeeban Adhikary, Subas Adhikary, Mahesh Kharel and Rohan Baniya – suspecting them as Maoists. They tied their hands back, blind-folded them with black cloth and took them away. Family members repeatedly went to nearby army barracks, but the army officers denied that they had been detained and also threatened them not to visit the army barracks again to ask after the whereabouts of these arrested persons.

Three days later, the government-owned media³ broadcast news stating that an armed Maoist named Surya Adhikary had been shot dead in Jamuna Village during an encounter with the security forces.

This news anguished the villagers who had witnessed the arrest of Mr Surya Adhikary and had known the other detainees as simple peasants. Adhikary was also a candidate from the Nepali Congress Party, (which was in government) in the village local election. The story of his death frightened the villagers further. The villagers and the family members of the remaining four men arrested by the army at the same time initially feared they had been killed too. They were too frightened to seek further information. The four men were subsequently released and were found to have been severely tortured at the army barracks.

B *Case Study Two*

It was early in the morning. About 100 personnel from the security force came to a village and asked all male members from every family to come out of their houses. All of these male members were lined up and randomly beaten, with accusations of supporting the Maoists by providing them with shelter and food.

After the mass beatings, four villagers were arrested, their hands were tied behind their backs, and they were put into a vehicle and taken away. Several months have now passed since their arrest but their whereabouts remain unknown. Family members have gone to different police stations and army barracks but all of them deny the arrest and detention. Wives of those arrested persons are illiterate. They do not understand how the state system, including the justice system, functions. They do not know what they should do and where they should go to search for their husbands. The entire village remains terrorised and has lost faith in the security forces and in the justice system.

² The names of places and people mentioned in this paper have been changed for reasons of security and confidentiality.

³ Nepal Television and Radio Nepal.

C Case Study Three

Two young ladies aged 16 and 18 were arrested at their home by a group of army personnel. Their arrest followed their father/uncle's arrest and detention in an army barracks a few months earlier, for his alleged involvement in drug trafficking. He was released on the condition that he would pay a fine of about two million Nepalese Rupees (approximately US\$2,000). His wife sold all her jewellery and managed to collect some 600,000 Nepalese Rupees and gave it to one of the army officers. The detained father promised to pay the remaining amount after his release. However, he was unable to pay the promised amount, and he escaped to India. When the army personnel could not find him, they arrested his daughter and niece.

After their arrest, the two young ladies were taken to the army barracks, where army officers raped both of them. One of the girls was repeatedly raped on the night of the arrest. The next day, one of the girls was sick with heavy bleeding. The same army officer who had arrested the girls and raped one of them, released them on the condition that they would not disclose anything about the rape to anyone and that the army officers would come to visit them once every week. Terrified, the whole family fled to India.

III MOBILISATION OF THE SECURITY FORCES TO COMBAT THE MAOIST INSURGENCY

There are a number of incidents like these in the Nepalese villages where the security forces have launched their operations against the Maoists. The Maoists, which declared a 'peoples' war' in 1996 and started their activities from three districts of Nepal, have increased their activities in about 70 districts (out of 75) across the country. They hold many villages of Nepal and have declared their own government called the 'peoples' governments' in those villages. They are also committing heinous crimes. They have attacked civilians, police posts, army barracks, government offices, educational institutions. This conflict has claimed the lives of more than 5,000 Nepalese.

The Government of Nepal decided to declare a state of emergency and mobilise the Royal Nepal Army (RNA) to fight the insurgents when the three rounds of talks between the Government and the Maoists broke down in November 2001, with the Maoist group blaming the Government for not being serious.

Thus, the RNA had to take the challenge to combat the Maoists who operate in very difficult, mountainous terrain. The Nepalese public, press and the political parties have acknowledged the difficulties facing the under-resourced RNA forces in fighting the Maoists. They have been generally sympathetic to the RNA, recognising that the RNA took up the dirty job of fighting the insurgency when the Maoists, in most parts of rural Nepal, had paralysed most other state and political institutions. However, increasingly, the RNA has started losing public confidence because of its lack of commitment to human rights and the

rule of law in the course of fighting the insurgency. A number of human rights organisations, including Amnesty International, and journalists have reported extra-judicial killings, torture, rape, illegal detention, disappearances, and mass terrorisation by the security forces. They have reported these incidents based on interviews with eyewitnesses and field visits. This is unfortunate, since it is capitalised by the insurgents to garner support. And, of course, human rights abuses are unacceptable in their own right.

IV REPEATING THE SAME MISTAKES IN NEPAL

A number of studies have been done on the causes of the recent conflict in Nepal. In conclusion, almost all of the reports, including the then Government's report and the report of the main opposition party, have highlighted that the violation of the rule of law, human rights, and the denial of justice to victims are major causes of the Maoist conflict in Nepal. All these reports have identified the police operation that was carried out in the early 1990s (Operation Romeo and Kilo Serra 2) as one of the motivating factors for many villagers to support the Maoist movement. During these operations, simple peasants of the villages and political opponents were arrested in pre-planned fake cases, detained, tortured by the authorities and denied access to justice. Many young people had to flee to the nearby jungle to escape from the atrocities committed by the police. It has been also said that these are the people who are now holding the guns.

Unfortunately, the same incidents are now being repeated. Since November 2001, thousands of people have been arrested and detained in custody, including at army barracks/camps, for their alleged involvement in terrorist activities. Those who are kept in custody on these charges are hardly allowed to visit their family members and lawyers. It is unclear under which law they are detained. The recent anti-terrorist legislation allows the 'security forces' – meaning the army, armed and civil police – to arrest suspects without warrant. It has practically been interpreted as if the security forces can detain arrested persons for as long as they want. But the Constitution guarantees that every arrested person has the right to be produced before the court or a competent judicial authority within 24 hours of arrest and have access to lawyers. These rights cannot be derogated from, even during a state of emergency. Also, the criminal justice rights guaranteed by the Constitution imply that the civilian police, not the army, are responsible for initiating criminal proceedings against civilians. If the army arrests suspected terrorists or their supporters, they should be handed over to the civilian police for investigation as soon as possible. Such constitutionally guaranteed rights have not been respected. As at July 2002, only seven out of the hundreds of people arrested and detained so far have been produced before the special court (which has jurisdiction to consider these cases). This glaringly demonstrates that the constitutionally guaranteed human rights and the rule of law are being violated with impunity by the army.

An increasing number of cases like these generate negative attitudes towards the security forces and indirectly support the insurgents, who have been cashing in on the frustrations of the people towards the state and its institutions. It is undeniable that the insurgents have not respected human rights and humanitarian laws. But two wrongs never make a right. Institutions that are responsible for maintaining law and order should follow the rule of law in the first place. The state and its apparatus cannot be excused for not fulfilling their obligation in maintaining the rule of law and human rights. Human rights violations cannot be legitimised at any cost. So, a transparent system of accountability should be in place to investigate and prosecute incidents of human rights violations and violations of the rule of law. This will inspire hope among the people that the system is functioning and wrongdoers are being punished.

V RECOMMENDATIONS AND CONCLUSION

It is just one year since the army was mobilised to fight insurgency within Nepal. It is fighting an uphill battle that was in the first place fuelled by (power-holding) politicians of the last few decades who misgoverned the country and created many social problems. But, that in no way justifies human rights violations by the army at the present time. Human rights violations are intrinsically unacceptable, but they are also instrumentally counterproductive. They can sully the image of the security forces, especially the army, and further erode the faith of the people in state institutions; boosting instead, support for the insurgents. It is not too late for the security forces, especially the army, to correct the wrongs. The first step to do that is to acknowledge that the problem exists. The second step is to then devise practical and genuine structures and processes to address the problems.

After increasing pressure from the donor community and the human rights organisations of Nepal, the ad hoc human rights cell that has been recently formed within the RNA should be strengthened and institutionalised. Independent persons and institutions should be provided access to detention centres for human rights monitoring. It should be encouraged that allegations of human rights violations are independently investigated, and those found to be guilty should be brought to justice.

At present, human rights activists and journalists are discouraged from reporting any incidents of human rights violations and activities of the security forces, especially the army. Human rights activists, lawyers and journalists have been threatened, intimidated, arrested and detained for voicing opinions against such atrocities. It is often said that any reporting related to the army will reduce the morale of the army. However, suppressing reports about incidents of human rights violations and extra-legal activities does not boost the morale of the army. So, the army should accept positive, constructive feedback and information from civil society organisations, human rights activists and journalists.

Michael Jorsback[†]

POLICE IN PEACE OPERATIONS

I INTRODUCTION

Police in peace operations have become increasingly important during the last decade. The main reason for this is primarily the increase in intrastate conflicts where internal security aspects dominate after the collapse of functioning security forces and judicial systems (including prosecution, courts and correctional services). Another important reason is the increase in criminal activities in post-conflict environments.

The international community faces new challenges in relation to cross-border criminality, organised crime, and trafficking in drugs and human beings that need to be addressed in order to facilitate stability and democratic developments in the host country of a mission. It is also important to note that all UN police activities, regardless of whether they are executive or non-executive by nature, include capacity building activities. This institution building aspect includes the establishment of entirely new police forces or re-shaping already existing police structures. It includes a chain of reform activities, from recruitment/training to the development of modern democratic policing concepts.

All UN police activities must be seen in a broader context. Police are only one part of the legal chain; this chain also includes prosecution functions, courts and penal management activities. In order to achieve an effective local law enforcement capacity, support activities have to be undertaken throughout the whole rule of law area in all modern peace operations.

This presentation gives a short overview of the challenges faced by UN police in peace operations. It does not cover all past and ongoing operations but gives a picture of the complexity of police operations.

[†] The views expressed in this paper do not necessarily reflect the views held by the author in his official capacity.

II THE PAST

UN police involvement in peace operations is not new. Police components have been part of such operations since the early 1960s. These operations have been relatively stable in the sense of operational concepts until the 1990s. The vast majority of all past police operations have been monitoring missions with or without capacity building elements.

These classical monitoring missions have been focused on monitoring the performance of local law enforcement activities. What does it mean to monitor and what are the criteria for measuring the performance of local law enforcement activities? If such a question had been asked 10 years ago, the individual police monitor would have answered 'the professional performance of the local police'. Considering that a UN police component comprises police officers from a variety of UN Member States with different educational and training backgrounds, different cultural and religious backgrounds as well as coming from different legal systems, this answer becomes even more complex. Is it the policing standards of country X that apply or those of country Y? Of course, the answer is compliance with international human rights standards for law enforcement. However, in the past, this fact was not always clear for the individual police officer in the field. Since the early 1990s, it has gradually become clear that all monitoring activities are based on international human rights standards, which cover all operational activities of law enforcement.

It was also relatively rare that Member States trained their personnel for service in peace operations. The common perception was, and this is unfortunately still relevant, that the officers were well trained as police officers and did not need any additional training. This perception led to ineffective, and sometimes incompetent, performance by individual officers in the field. On the other hand, the lack of developed operational concepts and guidance from the UN Headquarters also led to this situation. Not until the mid 1990s was a police unit established within the UN Headquarters to address police activities in peace operations.

The past monitoring types of UN police activities were relatively passive in nature, including reporting human rights violations committed by local law enforcement personnel and forces in the mission area and informing the local police commanders on different levels of their violations in order to correct their behaviour and procedures. The monitoring concept in the early days did not include an effective mechanism to address non-compliance. Non-compliance was addressed through the political mechanisms such as negotiations with central political leaders in order to change the behaviour, but no mechanism was in place to remove those individuals or commanders who constantly violated human rights standards.

The experiences from the past, and particularly the experiences from the United Nations Protection Force (UNPROFOR) in the Former Yugoslavia, led to

serious discussions on how to improve the UN policing concept. In the preparation of the Dayton Peace Accord in 1995 for Bosnia and Herzegovina, it became clear that the police were an important component in addressing the internal security aspects of peace. Annex 11 of the Dayton Peace Accord provided a much better tool with which UN police could go into the monitoring process; and the police component received a more distinct role (including advisory and supervisory roles), and access to any local law enforcement facility or activity. However, these 'new' defined tasks were still a development based upon the classical monitoring concept of operations. During the UNMIBH-IPTF mission, several developments were undertaken to improve the effectiveness of the operational concept. This includes the certification of new police cadets as well as a mechanism for de-certification of individual police officers, including senior commanders.

III THE PRESENT

With the establishment of the peace operations in Kosovo and East Timor in 1999, the UN was challenged to create full executive law enforcement missions. It is fair to say that the UN was not prepared in any way to start such undertakings. On the contrary, the UN Headquarters in 1999 based all initial guidelines and instructions on prior monitoring concepts. Tasking a UN police component with full executive powers and responsibilities not only for maintaining law and order but also, at the same time, to establish entirely new police structures and forces is an enormous undertaking which would normally have serious planning considerations. Instead, the planning and implementation of this undertaking was 'delegated' to the Police Commissioners in the field who actually developed the operational concepts. This short presentation will not cover all the legal, operational and logistical problems related to this process.

The total lack of conceptual understanding regarding executive law enforcement activities created serious problems. It must be stressed, again and again, that no executive police activity can be seen in isolation. In order to achieve a functioning law enforcement activity it needs to have access to:

- A legal framework (criminal code and procedural code as well as supplementary administrative procedures);
- A functioning prosecution structure;
- A functioning court system; and
- A functioning penal management structure.

Unfortunately, this holistic approach did not exist and created severe problems in meeting the task of effectively maintaining law and order. In the interim, the military components had to engage in law enforcement activities, which they did not want to do and/or were not trained, staffed and equipped for. Also the UN police components had to engage in activity areas where they did not have the main competence, as prison guards and even as assistant prosecutors. It is

fair to say that the UN police components – due to the absence of a legal framework and lack of judicial support – in some areas violated international human rights standards which could have been avoided if the necessary support mechanisms had been in place.

Executive tasks in maintaining law and order mean that the UN police have to cover all aspects of police activities. These activities include patrolling, criminal investigations, traffic policing. In all post-conflict environments serious crime increases – such as ethnic-related crime, organised crime – and this requires specialised categories of police expertise and equipment. Member States were not prepared to release such expert police in the initial phase of these operations creating severe criminal investigation problems. The confidence of the local population was at stake.

These new types of missions also highlight other important issues such as the need for an effective accountability mechanism. UN police officers are covered by the *Convention on Privileges and Immunities for United Nations Personnel as Experts on Mission* (1946). This means that the officers are given partial immunity and that the UN Secretary-General can waive this immunity. Although internal disciplinary mechanisms were established within the missions, individual police officers with or without support from Member States ‘disappeared’ before being fully investigated for misconduct or criminal activities. In previous missions, this has severely damaged the credibility of the UN police in the eyes of the local population. It is important that Member States comply with UN rules and regulations in order to uphold the highest standards possible.

Apart from the new executive law and order missions, the majority of ongoing peace operations are non-executive in nature. The present non-executive missions are mainly ‘improved’ monitoring missions now focusing on advisory/mentoring and capacity building activities. The mission in Sierra Leone (UNAMSIL) is a good example, in theory, of how a modern non-executive mission can be tailored. However, in practice, some basic elements are missing from this mission, most of which are linked to the quality of personnel. Specialised activities such as capacity building (basic training, professional and management training) as well as advisory functions on all levels requires highly skilled and properly prepared personnel – something that is not easy to obtain from Member States.

IV THE FUTURE

Future police operations will require less quantity but far greater quality of personnel assigned for peace operations. The new types of missions, with all their complexity, need experts rather than the traditional generalists required for classical missions in the past. This is hard to achieve due to the lack of available police experts from Member States. The creation of the ‘stand-by arrangement’ system will hopefully improve the rapid deployment of expert

personnel required to start up mission headquarters structures and to commence capacity building activities. This can only be achieved with strong support from Member States.

The entire rule of law area needs to be addressed. This includes the development of rule of law strategies for peace operations as well as the creation of stand-by arrangements for rule of law personnel.

The increase in serious crime in post-conflict environments must be addressed in a more structured way. This includes international police cooperation mechanisms to be available – to, and as part of, peace operations. INTERPOL is already involved but regional police cooperation mechanisms should also be part of such activities in order to strengthen regional police cooperation.

Police and military components of peace operations will also, in the future, cooperate closely. With regard to executive law and order missions, such cooperation should be further developed and studied. Also in non-executive police missions, cooperation with military components is vital. The globalisation of crime and the challenges of terrorism must be addressed by the two components working in close cooperation on peace operations.

Yvette Rhana Thapa[†]

OPERATIONAL LEGAL VIEWS FROM THE FIELD: A MILITARY PERSPECTIVE

I INTRODUCTION

The UN is charged by Member States with the maintenance of international peace and security. It tries to ease tensions and find a solution to end disputes either by diplomatic means or, exceptionally, by force. If diplomacy fails then the Security Council may act. The Security Council does not have its own army. It asks Member States to provide military forces to act as peacekeepers and tries to end conflict in order to restore peace. The main objective of the UN peacekeeping force is to ease tensions and allow a negotiated solution to end the conflict. A UN peacekeeping force may consist of two parts: military observers and armed forces.

A Military Observers

Military observers are unarmed. Their main roles are the monitoring of ceasefires, verification of troop withdrawals, attempting to secure a halt to fighting, and negotiation of solutions to the conflict situation.

B Armed Military Forces

Armed forces are composed of different national contingents. They undertake many of the same tasks as military observers. However, they also act as a buffer between hostile parties. Armed forces on peace operations may use force in self-defence or to ensure that the parties to the conflict comply with the relevant Security Council resolutions.

Nowadays, peacekeeping work is not limited to purely security matters and the maintenance of peace. UN missions may also help the nation and its citizens to maintain stability in their country. Therefore, it is not only military personnel who are involved as peacekeepers; civilian police and other civilian personnel are also involved. All these sectors join together and help the government establish itself. Together, they help to rehabilitate refugees, demobilise the former fighters and reintegrate them into society, as well as organise and

conduct elections. Therefore, the meaning of a peacekeeping mission has become broader. It does not only consist of armed forces but is also a joint mission involving military, police and civilians. They unite and work under the UN flag to obtain one goal – to maintain international peace and security around the world. One reason for the success of peacekeeping forces is their impartiality in working to maintain peace in the world.

II THE UNITED NATIONS IN EAST TIMOR

Timor is to the northwest of Australia. It is roughly oblong in shape covering 32,350 km² and is about 470 km long and 110 km wide. The eastern half of Timor, known as East Timor, was ruled by the Portuguese for a long time. In 1975, Indonesia invaded East Timor, enabling it to establish a provisional government and secure Portugal's withdrawal. Civil war broke out between those who favoured independence and those who advocated integration with Indonesia. In 1976, Indonesia intervened militarily and integrated East Timor as its 27th province. However, the UN did not recognise this integration and asked for Indonesia's withdrawal.

In 1982, the UN tried to negotiate with Indonesia and Portugal to resolve the status of the territory of East Timor. Indonesia proposed a limited autonomy for East Timor within Indonesia. In 1999, the two governments signed an agreement to let the UN organise and conduct consultation in order to ascertain whether the East Timorese people accepted or rejected a 'special autonomy' arrangement for East Timor within the Unitary Republic of Indonesia.

A United Nations Mission in East Timor

The United Nations Mission in East Timor (UNAMET) was established on 11 June 1999 under Security Council resolution 1246,¹ with the aim of conducting consultations in East Timor in preparation for the autonomy vote. On 30 August 1999, 98 per cent of the East Timorese registered to vote went to the polls, and voted to become independent from Indonesia; 78.5 per cent rejected the proposed special autonomy arrangement.

The pro-integration militias (with the alleged support of elements from the Indonesian security forces) launched a campaign of violence, looting and arson throughout the entire territory. The UN tried to stop the violence using diplomatic efforts. With the agreement of the Indonesian Government to accept the assistance of the UN, the Security Council established INTERFET to restore peace and security in East Timor. Due to the outbreak of violence, Indonesian armed forces, police and administrative officials withdrew from East Timor, creating a political and legal vacuum. This vacuum caused the UN to establish UNTAET – the United Nations Transitional Administration for East Timor.

¹ SC Res 1246 (1999), 11 June 1999.

B International Force for East Timor

The international peacekeeping force was deployed in order to stop the bloodshed being perpetrated by militia groups. The militias had launched a campaign of destruction, killing hundreds of people. In order to ameliorate the humanitarian and security situation, the Security Council authorised the establishment of an international force in East Timor – the International Force for East Timor (INTERFET).

INTERFET's main objectives were to restore peace and security in East Timor, to protect and support the UNAMET in carrying out its task, and, within force capabilities, to facilitate humanitarian assistance operations. INTERFET was not a 'blue beret' force and was only deployed until a UN peacekeeping operation was approved, assembled and deployed to East Timor.

C United Nations Transitional Administration in East Timor

On 25 October 1999, UNTAET was established with the aim of administering East Timor during its transition to independence. The UNTAET mandate was to provide security and to maintain law and order, to establish an effective administration, to assist in the development of civil and social services, to ensure the coordination and delivery of humanitarian assistance, to support capacity building for self-government and to assist in the establishment of conditions for sustainable development.

Two years after the popular consultation, an 88 member Constituent Assembly was elected. The Constituent Assembly was required to draft a new Constitution, and to establish the framework for future elections and the transition to full independence. On 22 March 2002, a presidential election was held and on 14 April 2002, Mr Xanana Gusmao was appointed as President. On 20 May 2002, Independence Day was celebrated and legal authority for the governance of Timor Leste was handed over from the UN to the people of Timor Leste.

D United Nations Mission of Support in East Timor

In order to continue to maintain security and stability, the Security Council unanimously adopted a resolution creating UNMISET, on 17 May 2002. Its main aims, according to the mandate, are to provide assistance to core administrative structures critical to the viability and political stability of East Timor, to provide interim law enforcement and public security and to assist in developing the East Timor Police Service (ETPS), and to contribute to the maintenance of the new country's external and internal security.

Under that mandate, UNMISET has helped the East Timorese Government to establish the ETPS, and UNMISET is helping to provide assistance to the administrative structure, and is establishing peace and order throughout East

Timor. The downsizing of UNMISET is proceeding and final withdrawal from East Timor is expected by June 2004.

III ARMED FORCES IN EAST TIMOR

Eighteen different nations have provided armed forces to work under one mission to achieve the goal of the UN in East Timor. They work under one flag to provide East Timor with peace and security. The Security Council resolutions provided the mandates under which the peacekeeping forces were to conduct their duties.

A Mandate

Under the provisions of Security Council resolution 1272,² the UNTAET mandate consists of the following:

- To provide security and maintain law and order throughout the territory of East Timor;
- To establish an effective administration;
- To assist in the development of civil and social services;
- To ensure the coordination and delivery of humanitarian assistance, rehabilitation and development assistance;
- To support capacity for self-government; and
- To assist in the establishment of conditions for sustainable development.

The successor mission, UNMISET, was given the following new mandate under the provision of the Security Council resolution 1410:³

- To provide assistance to core administrative structures critical to the viability and political stability of East Timor;
- To provide interim law enforcement and public security and to assist in the development of a new law enforcement agency in East Timor, the ETPS; and
- To contribute to the maintenance of the external and internal security of East Timor.

In carrying out the objectives of the peacekeeping mission, peacekeeping personnel are given certain powers, which support the rule of law. These powers include authority to detain a person who commits serious crimes. They are allowed to detain such people where CIVPOL are absent and/or CIVPOL are unable to arrest them. If someone commits a hostile act or shows hostile intent, that person can be detained, searched and disarmed. If the person is detained for security reasons s/he can be held for 24 hours in military custody. However, if s/he is detained on suspicion of having committed a serious offence, then peacekeeping personnel can only hold that person for 12 hours to interview them. During the detention period s/he may be questioned, but there

² SC Res 1272 (1999), 25 October 1999.

³ SC Res 1410 (2002), 17 May 2002.

is a prohibition from humiliating the detainee or discriminating against them for reasons of race, colour, religion or faith, sex, birth, wealth or any other similar criteria. The detainee should be handed over to the nearest police station.

IV CODE OF CONDUCT FOR PEACEKEEPING FORCES

Despite being given such broad powers, the peacekeeping force is subject to many checks and balances, which ensure that these powers are not abused. The peacekeeping force must maintain the highest standards of integrity and conduct. The Code of Conduct is a fundamental basis of action and accountability for military personnel. The following rules are to be observed by all peacekeeping personnel:

- Remember at all times that the expectation of the local population will be high and your action, behaviour and speech will be closely monitored;
- Show understanding and appertain the local history and recent events;
- Respect the local, customs, traditions and practices;
- Treat all the local inhabitants with the utmost courtesy, respect and consideration;
- Do not indulge in immoral acts of sexual, physical or psychological abuse or exploitation of the local population or UN staff, especially women and children;
- Dress, talk and act in a manner befitting a UN staff member;
- Respect and regard the human rights of all.
- Support and aid the infirm, sick and weak.
- Do not act in revenge or with malice, in particular when dealing with detainees or people in one's custody;
- Properly care for and account for all UN money, vehicles, equipment and property assigned. Do not trade or barter with them to seek personnel benefit;
- Do not engage in excessive consumption of alcohol or traffic in drugs;
- Show respect for, and promote, the environment including the flora and fauna;
- Always respect the religion of the local people; and
- Exercise the utmost discretion in handling confidential information and matters of official business that can put lives into danger or soil the image of the UN.

Breaches of the Code of Conduct are considered to be misconduct and are punishable under the national military law of the offending person. If any person violates this Code of Conduct, the Contingent Commander or Force Commander may convene a Board of Inquiry (BOI), depending on the breach committed. The BOI's function is to act as a fact-finder.

V BOARDS OF INQUIRY

The main objective of the BOI is to support the maintenance of appropriate standards of behaviour in the peacekeeping force. If a member of the peacekeeping force breaches the Code of Conduct, a preliminary investigation is to be conducted into that incident. The main aim of the preliminary investigation is to find out about the incident and secure evidence. Military police, CIVPOL or specifically tasked unit personnel conduct the preliminary investigation. After the preliminary investigation, the report may be forwarded to the Contingent Commander for further investigation. After that, the relevant BOI is formed; either a contingent BOI, a Headquarters (HQ) BOI or a UNMISSET BOI.

The circumstances of the incident determine who the appropriate commander for convening the BOI is. If the involvement is within the unit then the Unit Commander will convene the BOI. If the involvement is within more than one contingent, then it is more appropriate for the Force Commander to convene the BOI.

A Contingent Board of Inquiry

The Contingent BOI should be convened in the following cases:

- Where a PKF member dies, is seriously injured or is injured as a result of some accident or incident;
- Where a third party dies or is injured in a case involving military personnel;
- Where there is major or minor property loss or damage exceeding US\$1,500;
- Where there is damage to, or loss of, third party owned property where PKF personnel are involved; or
- Where there is minor injury to a third party involving the case of PKF members.

The outcome of the BOI should be forwarded to the Sector HQ then to the PKF HQ with the opinions of the Sector and Contingent Commanders. This report will only be used for a claim or preventative action in other cases.

B Headquarters, Peacekeeping Forces Board of Inquiry

If the following incidents or accidents occur, then the Contingent BOI and the HQ PKF BOI are required:

- Where a PKF member dies, is seriously injured, or injured as a result of some accident or incident;
- Where a third party dies or is injured in a case involving military personnel;
- Where there is major property loss or damage exceeding US\$1,500; or
- Where there is damage to, or loss of, third party owned property where

PKF personnel are involved.

The Force Commander will convene a HQ PKF BOI with the help of the Chief Military Personnel Officer (CMPO). The CMPO will monitor and coordinate all the BOIs held, or to be held, during the mission. The Chief Legal Adviser and the Force Provost Marshal will help the CMPO.

C UNMISET Headquarters Board of Inquiry

Mission Headquarters BOI – in the case of East Timor, UNMISET HQ BOI – are convened, organised and conducted by the Head of the Mission. If a serious incident occurs or if there is likely to be a claim made against the UN then the UNMISET HQ BOI is convened by the SRSG or his/her delegate. This is an additional inquiry to the inquiries carried out by the PKF HQ and the Contingent BOI. If the incidents relate to the military, then a member of the military will take the chair and the BOI will usually involve one other military person. This BOI will be conducted by the UNMISET claims section and not by the HQ PKF.

D Powers of the Board of Inquiry

The BOI has every right to call UN staff members as witnesses and these people are obliged to cooperate with the BOI. Interference with the inquiry, including unreasonable delays to requests by the BOI will be noted and properly addressed by BOI. A note of failure to cooperate with the BOI shall also be placed in the staff member's personal file if s/he refuses to help the BOI. Witnesses shall be given an opportunity to speak and to give information in their own words. Witnesses can always offer such information, documents or other materials that may be of assistance to the BOI in addition to any that the BOI specifically requires. Persons under investigation will be questioned individually by the BOI in the absence of other witnesses, so that information received may be compared with that of others. At times it may be necessary to interview people simultaneously in order to avoid communication amongst them, which might jeopardise the inquiry. If required, the accused and witnesses can be further questioned to clarify their evidence, or questioned about facts not previously mentioned.

The evidence before a BOI can consist of anything relevant to the matter, from written documents to oral testimony. All the evidence must be kept safely and only authorised personnel shall have the right to examine it. The documents will be available to the Office of the Legal Adviser and to authorised personnel in order to implement the BOI's recommendations.

The authenticity of the evidence, whether written or oral, will be checked by the members of the BOI and their findings will be based on it. The BOI's final findings and conclusions should be fully supported by evidence. The BOI may make recommendations, however, any recommendations made must be reasonable and feasible to implement.

Once the report is completed and approved by the Office of the Legal Adviser, the Contingent and HQ BOI, it should be forwarded to the SRSG. Where the BOI was at the Contingent/HQ level, it should be forwarded through the Force Commander. Where the BOI was at the UNMISSET HQ level, the report should be forwarded to the SRSG through the Director of Field Administration to be reviewed.

After approval by the SRSG, the report will be provided to the Director of Field Administration and Logistics Division (FALD), Department of Peacekeeping, UN Headquarters, New York. The DOA shall take appropriate action to implement recommendations made by the BOI and approved by the SRSG. The Director of Field Administration will send copies of the reports to the DPKO.

The reports shall not be provided to subjects of the inquiry, witnesses or national governments unless requested by a law enforcement agency with responsibility to deal with matters that are the subject of the report.

Susan Harris Rimmer & Jennifer Wells[†]

RULE OF LAW ON PEACE OPERATIONS:
AN NGO PERSPECTIVE^{*}

I INTRODUCTION

This paper will briefly look at what defines development NGOs, the role they play in humanitarian emergencies and how they assist in the upholding of the rule of law. It discusses how NGOs operate and the laws and codes they operate under. These codes, more so than law, reflect the changing nature of the operational environment. Today, NGOs are required by their mandate and by donors to provide essential humanitarian assistance in many situations without the full protection of the international legal framework.

The paper also discusses the broader links between development and security, both regional and human. All stakeholders – government, UN and NGOs – need each other to succeed. They must recognise each other's strengths and constraints in order to effectively coordinate all activities and achieve 'unity of purpose and effort from the outset'.¹

A working definition of the 'rule of law' for the purposes of this paper is a regime with the following elements:

- Power that transcends particular individuals, usually of the state;
- Clarity of entitlements and prohibitions;
- Social publicity and acceptability of the content of rules;
- Judgments that are independent of prevailing political considerations;
- Reasonable access by the population to a judging forum;
- Some ability to participate in the outcome of decisions;
- Some rationale for decisions made;
- Some transparency of decision-making procedures;
- Some level of internal consistency of substantive decisions; and

[†] The views expressed in this paper do not necessarily reflect the views held by the authors in their official capacity.

^{*} Editors' note: Ms Susan Harris Rimmer and Ms Jennifer Wells were unable to attend the Conference, however they very kindly contributed this paper so as to provide Conference participants with an NGO perspective of the application of the rule of law on peace operations.

¹ UK Joint Warfare Publication, *Peace Support Operations* (1998) 2-5.

- Some level of judgment enforceability.²

This paper argues that the rule of law is upheld in any global context by strong civil actors working within a human rights framework. The focus of peace operations should be to protect and support civil societies in their rebuilding phase.

II THE ROLE & IMPORTANCE OF NGOS

A What are NGOs? Missionaries, Bleeding Hearts or a Valuable Resource?

Present day NGOs have emerged from the work of philanthropists in the early 19th Century. Early charitable work complemented by political action and advocacy brought about many changes in society including the abolition of slavery and of child labour and the instigation of universal adult suffrage in developed nations. Today, the ‘care and welfare’ activities and the ‘change and development’ work of community organisations reflect the common commitment shared with earlier philanthropists to bring about wider positive changes to society.³

NGOs can be broadly defined as organisations in civil society that have the following characteristics:

- Voluntary (ie non-statutory with an element of voluntary participation);
- Independent;
- Not-for-profit; and
- Issue based.

Development NGOs work at many different levels, from local to international, on a wide range of issues. They can be large organisations, smaller community groups or informal networks that have no formal organisational structure. Despite this diversity, they all operate from a common and distinctive value base – the desire to advance and improve the human condition. NGOs believe in the inherent dignity of the human person and the right and capacity of people to direct and influence their own destinies. Based on these core values, NGOs aim to intervene in the process of social change to bring about greater equity, justice, social cohesion and ecological stability. To effectively and sustainably achieve this NGOs are committed to three core principles: collective empowerment; equal participation; and the fulfilment of human rights.

² California Western School of Law Conference, *The Rule of Law: Creating an Effective Legal Environment for the Global Economy*, 14-16 November 2002, available at <<http://www.cwsl.edu/RuleOfLaw/>>.

³ The Commonwealth Foundation, *Non-Governmental Organisations: Guidelines for Good Policy and Practice* (1995) 14.

B The Importance of NGOs

The role and scope of work of NGOs has grown steadily in importance over the past three decades. This has happened in the context of a world characterised by rapid, complex and often unpredictable political, institutional, environmental, demographic, social and economic changes.

In such an environment, NGOs have proven their comparative advantage in responding to change. NGOs typically are more flexible and able to respond more rapidly to changing social and political environments than governmental and institutional donors.

One of the most important and challenging global changes is arguably the move towards regional and globalised economies. NGOs are increasingly playing an important role in ameliorating the negative impacts resulting from globalisation. In general, globalisation has increased the gulf between the rich and poor, the advantaged and disadvantaged.

UN agencies and NGOs agree that if these negative impacts are not addressed, sustainable human development cannot be achieved. The United Nations Development Program's (UNDP) *Human Development Report* (1999) makes it clear that if human development is left to the dictates of market forces alone, the opportunities and rewards of globalisation will continue to be spread unequally and inequitably – further concentrating power and wealth in the hands of a select few.⁴

The point here is that NGOs are more than just service providers of aid to the disadvantaged; NGOs are also agents for economic and social change for more sustainable development outcomes. At the core of this is the recognition that humanitarian and development actions are seen as part of a spectrum of human rights activities.

C NGOs as Credible & Legitimate Organisations

Internationally, NGOs are guided by various codes including the Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief (Red Cross Code of Conduct); the Sphere Humanitarian Charter and Minimum Standards in Disaster Response; and the People in Aid Code.

In the early 1990s, the Red Cross and NGOs sat together and defined the Red Cross Code of Conduct. Driven by the then increasing number and variety of actors in humanitarian aid, they elaborated 10 key principles. The principles provide an essential framework to help them in negotiating access to all victims of natural and man-made disasters.

⁴ UNDP, *Human Development Report* (1999), 25.

Humanitarian agencies are committed to the primacy of the ‘humanitarian imperative’ as outlined in the Red Cross Code of Conduct and later in the Sphere Humanitarian Charter.⁵ The ‘humanitarian imperative’ reflects a belief that all possible steps should be taken to prevent or alleviate human suffering arising out of conflict or calamity, and that civilians so affected have a right to protection and assistance. This distinguishes humanitarian action from military objectives. All legitimate civil/military interaction must serve this humanitarian imperative.

In Australia, NGOs receive official acknowledgment of their role and public support through Australian Government processes administered by the Australian Tax Office (ATO) in the form of tax deductibility and the Australian Agency for International Development (AusAID) via a strict accreditation process. NGOs that are members of the Australian Council for Overseas Aid (ACFOA) must also be signatories to the ACFOA Code of Conduct.

The ACFOA Code of Conduct is an accountability benchmark, defining standards of governance, organisational integrity, finances, management and human resources and communications with the public.⁶ The ACFOA Code of Conduct represents the active commitment of overseas aid agencies or non-government Development Organisations (NGDOs) to conduct their activities with integrity and accountability.

The ACFOA Code of Conduct aims to enhance standards throughout the NGDO community to ensure that public confidence is maintained in the way that community contributions to overseas aid are used to reduce poverty through effective and sustainable development. There are currently 113 organisations that are signatories to the ACFOA Code of Conduct, and of these, 85 are members of ACFOA.

III NGOS & PEACE OPERATIONS

A NGOs & the Rule of Law in Times of Peace

Pre-crisis, international NGOs may already be in country working on development interventions, often alongside local partners. They operate in countries under a Memorandum of Understanding or an agreement with the state authority (usually the national government). This occurs even in closed countries such as North Korea and Burma. Such agreements cover visas for expatriate staff and the nature of activities to be undertaken. NGOs undertake a contractual relationship with the host government similar to corporate business ventures.

⁵ The Sphere Project, *Humanitarian Charter and Minimum Standards in Disaster Response* (2000) 312-7.

⁶ The text of the Code of Conduct is available at <<http://www.acfoa.asn.au/cc/code.htm>>.

NGOs acknowledge that under international law, the primary responsibility for development lies with the national government, therefore, the decision to operate in a country is largely based on need and the lack of local capacity to address this need.

The Humanitarian Accountability Project recently identified the following legal limitations on NGO actors and their possible liability under the current jurisprudence:

- Problems of jurisdiction;
- Immunity;
- Applicability of national criminal, contract or tort law for activities taking place outside national boundaries (an extradition issue);
- Standards of evidence; and
- Absence of enforcement mechanisms.⁷

International NGO staff usually work alongside a majority of local staff and respect for local law, customs and traditions is crucial to ensuring the effectiveness of development interventions. Given their proximity to local communities, NGOs are frequently the first to be aware of changes leading to a crisis and issue public warnings (eg in East Timor). Signs that inform these warnings are often hard to validate as they are based on intangibles such as observation and mood. Despite this, these public warnings provide a valuable source of information and should be taken more seriously by other stakeholders such as governments and the UN. However, governments and militaries need to be aware that NGO sources of information have to be protected. There are also serious ethical and practical reasons that information cannot and should not always be shared freely.

B The Changing Nature of Conflict

The nature of conflict has changed substantially over the past 50 years and continues to change, at times very rapidly, for example the current war on terrorism.⁸ Briefly these changes have been characterised by:

- Internal or intrastate conflict rather than conflict between states;
- The predominance of irregular armed combatants (militias etc) rather than regular professional state forces;
- The conflict or fighting has moved into civilian areas such as towns/villages;
- The casualties are predominantly civilian rather than military; and

⁷ The Humanitarian Accountability Project, *Visions and Plans for HAP's Successor: Strategic and Operational Framework*, available at <<http://www.hapgeneva.org>>.

⁸ NGOs certainly do not have the answers to how to prevent terrorism – most would advocate a focus on the links between poverty and human rights violations which alienate and disempower individuals and groups so that they view violence as their only option.

- The conflict is visible around the world due to information technology advances.

For NGOs, these changes have meant that they now have to operate in a much less secure environment and have become open targets during hostilities in the field. The demand for humanitarian assistance has increased but the ability to deliver that assistance is much more difficult. The presence of the media and information technology advances have also placed additional pressure on NGOs to be seen to be responding at the frontline without public and community understanding of the protection, planning and containment activities being undertaken at the same time.

Being involved and responding to complex humanitarian emergencies or peace operations has meant a policy and operational shift for both militaries and NGOs. For NGOs this has meant becoming more security and 'conflict' wise both in the field and also at the policy and advocacy levels.

C The Broader Links between Development, Peace & Conflict

At the policy level, ACFOA believes that the nature of conflict has changed partly as a result of growing regional economic inequality and the lack of protection of human rights. Most conflicts are now based on civil unrest rather than differences between states. Current spending on defence, despite substantial increases, is not and will never be enough to ensure regional, let alone global, security. The reason for this is today, globally, we have a population of six billion people, of which 6 per cent possess 59 per cent of the world's wealth, 80 per cent live in substandard housing, 70 per cent are unable to read and 50 per cent suffer malnutrition. One fifth of people live in poverty, which increases their vulnerability and leads to social disintegration threatening both human and global security.⁹

Any concept of regional security must extend beyond planning for conventional conflicts to include measures to reduce the growing regional economic inequality, protect and expand human rights and democracy and protect the environment. Such a strategy needs to look not only at ways to deal with conflict when it breaks out, but ways in which action can be taken early enough to contain conflict and prevent the slide into violence.

An important emerging issue being acknowledged at the international level is the development of an emergency-to-development continuum. The United Nations Economic and Social Council (ECOSOC) recently passed a resolution at the conclusion of the humanitarian segment in July 2002 emphasising the need for assistance to vulnerable groups and the transition from relief to development. ECOSOC has stressed that coordination is the core element in

⁹ I Howie, *UNFPA – All Party Parliamentary Group on Population and Development Address*, New York (2000).

ensuring assistance.¹⁰

D Military/NGO Operational Issues

It is clear from Australia's recent involvement in conflict situations that we can contribute effectively to the prevention of conflict and to peacekeeping. However, this must be underpinned by sound poverty reduction and human development strategies if it is to be sustainable and not become just an expensive and extended peacekeeping exercise.

At the operational level, the changing nature of conflict and humanitarian disasters has meant that humanitarian agencies (UN, ICRC, NGOs) are increasingly finding themselves working in contexts where military forces are also present. Military forces are increasingly intervening in countries in conflict, forcing a more direct engagement than ever before between the military, local population and NGOs. Within this context, the military has, to varying degrees, become involved in humanitarian assistance. This engagement ranges from the protection of humanitarian convoys to the direct implementation of relief aid distribution. Military movement into what has traditionally been 'humanitarian space' raises significant issues of principle as well as policy and operational questions for humanitarian agencies.

Both NGOs and militaries involved in peace operations have a mutual interest in establishing and maintaining the peace. This mutual interest combined with a clear understanding and respect of our distinct roles and mandates should form the basis of a complimentary operational relationship. There are profound differences between the mandates and principles of formal military forces and humanitarian agencies. Once the political decision has been made by a state to contribute to a peace operation, the military has a core mandate to foster security and protect civilians by establishing and enforcing a safe stable environment. Humanitarian agencies have a mandate to directly implement humanitarian aid programs based on clear humanitarian principles.

Without a secure environment, NGOs are unable to operate effectively, while a lack of peace impedes development, creating further economic and social divisions. It is essential for the sustainable fulfilment of the mandates of both parties that these two roles – impartial humanitarian assistance as a response to an urgent and inalienable right, and peace operations with their inevitable partial and political mandates – are distinguished.

In the recent past, there have been many instances where the distinct roles of NGOs and the military have become clouded. This has had serious ramifications not only for NGOs but also for the success of a peacekeeping

¹⁰ Available at <<http://www.un.org/esa/coordination/ecosoc/>>.

mission, the civil and political recovery of the affected state and the follow-on regional and global security objective.

In emergencies, NGOs are able to negotiate access to civilians on all sides of the conflict. NGOs often have long experience and established networks in place before an emergency occurs and depend on the trust based on existing relationships with local communities to gain access and provide assistance to communities in need. By ensuring the principles of humanity, independence and impartiality, NGOs gain acceptance and access to populations most at risk. The core principles of the humanitarian imperative, impartiality and independence, as laid out in the Sphere Humanitarian Charter and the Red Cross Code of Conduct, form the foundation of NGO operational policy. The principle of impartiality is particularly critical in defining the distinct roles of the military and humanitarian agencies.

Being seen, or perceived, to be working with the military changes the local population's understanding of where NGOs stand and can threaten this relationship. NGO safety is largely dependent on not being perceived to take sides, of being impartial. When NGOs are perceived to be part of one side or another they become targets for aggression, as has been seen in the case of Red Cross staff in Africa and UNHCR staff in East Timor. Another important aspect of this is that once peace is restored, NGOs will revert to undertaking long-term development programs while the military withdraws. If NGOs are not careful about ensuring real and perceived impartiality, their own social development programs can be adversely affected.

Fostering security in refugee areas is a complex, political issue given the relation to state sovereignty, the questions of mandate and use of force, and the security factor. However, if the military wants to have a more meaningful role in humanitarian action, so that effective use is made of the complementarity of mandates, it should undertake tasks that only the military can perform. One of these is to provide protection from violence to refugee and displaced populations, as this is a task that humanitarian agencies are unable to assume. From the humanitarian perspective, several issues need to be considered if military forces become involved in providing protection for refugees and displaced persons. NGOs and the military use different operational frameworks. While NGOs have a bottom-up approach and start from the purpose of responding to the needs of the civilian population, military forces start from the end state, ie a stable and secure situation, and work backwards. This difference in thinking can have huge implications in planning and implementing operations in refugee areas.¹¹

Another essential element is the military forces' understanding of protection and security. A military understanding of these concepts focuses on the

¹¹Ed Schenkenberg van Mierop, *Keynote Address*, 'Exploring the Role of the Military in Refugee Camp Security: International Seminar' held at Enysham Hall, Oxford, July 10-12 2001.

security and protection of the troops. When this way of thinking is applied to humanitarian operations, it is believed that humanitarian staff want the military to protect their operations and convoys. However, many aid workers would find that their security derives from the quality of protection and security provided to the refugees. As such they want to see the military provide protection and security for the refugees and civilian population rather than having military escorts.¹²

An important measure of the effectiveness of a peacekeeping mission should not be how quickly peace is restored, but how quickly peace can be sustained locally, without the presence of external peacekeepers. This is largely dependent on the strength of local civil society to rebuild responsible political, judicial and military institutions and to be able to hold them accountable to the needs of the people. This, of course, takes a very long time and has to be based on strong community development principles of equity, participation and local ownership. NGOs are very conscious that the way emergency response operations are implemented can positively or negatively affect the effectiveness of follow-on sustainable development programs. This is important for military forces directly implementing assistance programs to understand. Activities that seem to be so obviously needed, like building a health clinic or water systems, can backfire if the local population are not consulted and involved. Questions concerning long-term maintenance, the replacement of equipment (who will do it? how will it be paid for?) need to be asked.

E The Humanitarian Imperative Comes First

The primacy of the humanitarian organisation in humanitarian work must be reaffirmed – in the first instance humanitarian work should be performed by humanitarian organisations. Civilian implementation is always preferable to military. The primary aim of international military peace support forces should be:

- To establish and maintain order and security;
- To protect civilians; and
- To facilitate a comprehensive settlement of the conflict.¹³

Independence is set out in the Red Cross Code of Conduct through the principle that '[humanitarian agencies] shall endeavour not to act as instruments of government foreign policy'.¹⁴ In doing so, a clear distinction is made between humanitarian agencies and the military, as the latter is inherently a political instrument.

¹² Ibid.

¹³ Steering Committee for Humanitarian Response (SCHR), *Position Paper on Humanitarian-Military Relations in the Provision of Humanitarian Assistance*, 3 available at <<http://aidworkers.net/management/military/SCHR.doc>>.

¹⁴ Red Cross Code of Conduct, principle 4.

Impartiality, as it is understood by humanitarian organisations, is significantly different to the definition given in the *Brahimi Report* where UN impartiality is based on adherence to the UN Charter.¹⁵ According to the Red Cross Code of Conduct, impartiality is based on a stated obligation to deliver aid on the basis of need, ‘regardless of race, creed or nationality of the recipients and without adverse distinction of any kind’.¹⁶

Humanitarian space is that space where humanitarian assistance is provided on the basis of need and is delivered with impartiality. Humanitarian space is ‘owned’ by humanitarian agencies and local actors and extends from their inherent values of independence and impartiality. Military forces must minimise any movement into ‘humanitarian space’. Any such movement serves to blur the distinction between humanitarian and military actors, and increases the risk of introducing unsustainable and/or inappropriate humanitarian initiatives.¹⁷

Additional complexity emerges when political intervention involving the use of military force is used to create humanitarian space, such as armed convoys and ‘safe havens’.

Humanitarian agencies assert that humanitarian activities and their coordination should be led by civilian actors and agencies, to ensure the primacy of humanitarian principles. Today, there is a clear requirement for these principles and practices to be reaffirmed. There is an urgent need to

disentangle humanitarian assistance from politics by reclaiming both humanitarian space and the core principles of impartiality and independence. This is not a shift to humanitarian minimalism, purism or isolationism – it is a clear affirmation of a commitment to the principles and values enshrined in the Geneva Conventions and the Red Cross Code of Conduct.¹⁸

F Military/NGO Legal Issues

During the emergency phase of a crisis a ‘patchwork’ of international humanitarian law (IHL), refugee law and human rights law applies to all actors. These situations are extremely complex, as seen by the examples in Appendix 1.

Human rights law and IHL are united in the common goals of preserving life and the dignity of the human being and limiting suffering. However, the two branches of law have developed separately because historically they have had two distinct purposes – human rights law seeks to regulate states, and IHL

¹⁵ Report of the Panel on United Nations Peace Operations (A/55/305-S/2000/809), 21 August 2001.

¹⁶ Red Cross Code of Conduct, available at <<http://www.ifrc.org/publicat/conduct>>.

¹⁷ ACFOA, *Guiding Principles for Civil-Military Interaction*, available at <http://www.acfoa.asn.au/about_acfoa/CIMIC.PDF>.

¹⁸ SCHR, *Position Paper*, above n 13, 1.

seeks ideally to establish individual criminal responsibility. The other key difference is temporal – IHL applies to defined categories of armed conflict, while human rights law operates at all times but can be derogated from during a declared state of emergency.

Non-derogable human rights and Common Article 3 rights (fundamental guarantees) are essentially the same, and apply at all times and in all circumstances. Basically these are:

- The right to life;
- Prohibition of torture;
- Prohibition of cruel treatment;
- Prohibition of humiliating and degrading treatment; and
- Prohibition of discrimination on the ground of race, ethnicity, sex or religion.

With the advent of the International Criminal Court (ICC) and the ad hoc Tribunals for Yugoslavia and Rwanda, and growing jurisprudence of regional human rights courts, such as the Inter-American Court of Human Rights and the European Court of Human Rights, the two branches are beginning to merge in legal terms. One key feature of this merger has been the development of jurisprudence around crimes against humanity, which can occur in peace or war. The new ICC will have some serious implications for all actors. New skills and training will be needed to monitor and report on protection issues, and increased accountability may gradually change the behaviour of actors in the field.

G Gaps in the International Legal Framework

If all actors have a better understanding of the protection needs of the local population, the response will be more effective. Moreover the law needs to reflect the reality of the needs of people affected.

Recent studies by the ICRC have shown that armed conflict can have a devastating effect on civilians, particularly women, in the following ways:

- Displacement – Increased insecurity and fear of attack often cause women and their dependents to flee. It is frequently pointed out that women and children constitute the majority (usually estimated at 80 per cent) of the world's internally displaced persons and refugees.
- Security – The absence of their men and the general instability and lawlessness that characterises many of today's conflicts heighten the insecurity of women caught up in these situations, and exacerbate the breakdown of the traditional support mechanisms upon which the community previously relied.
- Sexual Violence – Rape, forced prostitution, sexual slavery and forced impregnation are all criminal means and methods of warfare that have attracted attention in recent years, and not only in the Former

Yugoslavia. Sexual violence is brutal and terrifying for its victims and the whole community and constitutes a serious violation of both human rights and IHL.

- Missing Persons – One of the most harrowing consequences of armed conflicts, which continues long after the hostilities end, is that people go missing. The majority of missing persons are men, which leaves large numbers of women seeking news of their fate.

There are some serious gaps in the international legal framework in need of reform in the three overlapping areas of human rights, refugee and humanitarian law:

1. Human rights are not granted to ‘aliens’ in the same measure as citizens. There is no complaint mechanism for breaches of the *International Covenant on Economic, Social and Cultural Rights*, unlike the *International Covenant on Civil and Political Rights*. The human rights system is generally weak on issues of poverty and forced displacement.
2. Refugee law does not offer the same level of international protection to internally displaced people as refugees.
3. International humanitarian law is weak in the area of protection of non-combatants, especially in non-international armed conflicts. The legal issue of proportionate response to a legitimate military target, which is being illegally placed or shielded in a civilian area, requires urgent attention.

The President of the ICRC recently spoke on this point:

Specific challenges arising in modern conflicts relate to the definition of military objectives. There is considerable debate as to when traditionally civilian objects, such as TV and radio stations, make an effective contribution to military action and therefore become legitimate military targets.

The implementation of the principle of distinction is further challenged by the trend of the military to use civilian infrastructure, telecommunications and logistics also for military purposes. Such practices may be difficult to reconcile with states’ obligations to ‘avoid locating military objectives within or near densely populated areas’ and to ‘take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations’ to the maximum extent feasible.¹⁹

¹⁹ Dr Jakob Kellenberger, *International Humanitarian Law at the Beginning of the 21st Century*, statement made at the conference ‘The Two Additional Protocols to the Geneva Conventions: 25 years later – Challenges and Prospects’, 26th Round Table on Current Problems of International Humanitarian Law, 5 September 2002, available at <http://www.icrc.org/Web/eng/siteeng0.nsf/iwpList99/EFC5A1C8D8DD70B9C1256C3600EFC1E>.

IV A RIGHT TO HUMANITARIAN ASSISTANCE?

There are two areas needing attention regarding the role of NGOs in peace operations. The first is ensuring the protection of NGO staff, which requires better implementation of existing IHL relating to non-combatant status. The second is ensuring a right of access for humanitarian relief to vulnerable populations; a right that NGOs argue is not yet codified at international law.

A Protection of NGO Personnel

NGO personnel in an armed conflict situation are given protected status under IHL as non-combatants. Briefly, *Additional Protocol I*, in particular, obliges the parties to the conflict to distinguish at all times between the civilian population and combatants, as well as between civilian property and military objectives, and to direct their operations only against military objectives.

Article 27 of *Geneva Convention IV* sets out the general principles, and art 29 states that where these rules are infringed, the infringing state is responsible for the consequences of the infringement.²⁰

Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.²¹

Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution or any form of indecent assault.

The prohibition of attacks on civilian persons and civilian property includes all acts of violence, whether committed in offence or defence. Attacks or threats of violence intended to terrorise the civilian population are also prohibited.²² The prohibition includes attacks launched indiscriminately. The presence or movements of the civilian population or individual civilians must not be used to try to shield military objectives from attack or to shield, favour or impede military operations. *Additional Protocol I* prohibits the starving of civilian populations.

The *Rome Statute of the International Criminal Court* criminalises, for the first time, the actions of individuals, in either international or non-international armed conflicts, who intentionally attack 'personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission

²⁰ *Geneva Convention IV*, art 29.

²¹ *Ibid*, art 27.

²² *Additional Protocol I*, arts 49, 51 and 52.

in accordance with the Charter of the United Nations.²³ The operation in question does not have to be a UN operation.

B Access to Vulnerable Populations

The ICRC and Red Cross societies (including the Australian Red Cross) have special status under the *Geneva Conventions* that provide the right to assist people in need. The parties to a conflict must grant the ICRC all facilities within their power to enable it to carry out the humanitarian functions assigned to it by the *Geneva Conventions* and *Additional Protocols*, in order to ensure protection and assistance to the victims of conflicts. The ICRC may also carry out any other humanitarian activities in favour of these victims, subject to the consent of the parties to the conflict, which, in practice, is always sought.

Geneva Convention IV also states that the parties shall grant their respective Red Cross and Red Crescent organisations the facilities necessary for carrying out their humanitarian activities. Article 10 states that

The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of civilian persons and for their relief.

There is some regulation of access to humanitarian relief in international armed conflicts after a peace agreement has been reached. *Geneva Convention IV* provides for the conclusion by parties to a conflict of local agreements for the evacuation of the wounded, sick, disabled, elderly, children and women in labour from besieged or encircled areas, and for the passage of ministers of all religions, medical personnel and equipment on their way to such areas.²⁴

Apart from the ICRC provisions and these ‘local agreements’, NGOs do not have a right of access, in order to deliver services to people in need. They have to operate with consent – in practice, NGOs negotiate agreements with local decision makers, ie the relevant PKF or community leaders. Identifying who constitutes the ‘relevant party’ in an era of irregular forces, is often difficult to determine and can be a very sensitive decision; if an NGO signs an agreement with a particular faction this can be perceived as evidencing bias or partiality.

These factors have created massive difficulties in managing and coordinating assistance. For example, in Rwanda, this led to a litany of problems including a lack of accountability, lack of local input, terrible cholera outbreaks and so forth.

²³ See *Rome Statute of the International Criminal Court*, art 2(b)(B)(iii)(c) and art 2(e)(D)(iii)(c).

²⁴ *Geneva Convention IV*, art 17.

C The NGO Response

Internationally this has led to NGOs looking at ways of self-regulation and improving assistance. Global initiatives such as the Humanitarian Accountability Project, the Sphere Project and the People in Aid Code have been widely endorsed by the humanitarian sector and have played an important role in guiding the work of NGOs worldwide. Coordination bodies such as ACFOA, International Council of Voluntary Agencies (ICVA) and the UN Office for Coordination of Humanitarian Affairs have worked very hard in recent years to develop codes of practice, train staff and improve civil–military interaction.

The ACFOA *Guiding Principles for Civil–Military Interaction* aim to assist humanitarian agencies by setting out guiding principles for interaction with the military in order to assist them to maintain their organisational integrity and focus on the people in need in a humanitarian emergency.

In short, the practice of NGOs is changing, but the legal framework has not kept pace. There have been frequent attacks on NGOs, and the ICRC, showing what little law we have is not respected. This is an issue for the military as the delivery of emergency assistance and the transition into social/human development will always be crucial to the success of a peacekeeping mission. It is clear that all humanitarian actors should respect and promote IHL – we should all do our part with renewed vigour and extra resources.

V CONCLUSION – LESSONS LEARNED

Some of the lessons learned from experiences in East Timor and elsewhere can be summarised as follows:

A Better Coordination

The need for coordination reflects the complexity of the context in which both militaries and NGOs are operating and the multiple players involved.

B Respect and Dialogue between Humanitarian Actors

There needs to be proper acknowledgment by militaries, governments and UN agencies of the key role NGOs play in social development, stability and rebuilding of civil society after crisis.

Common points of tension between the military and NGOs include different attitudes to gender, hierarchy, cross-cultural awareness and issues of force protection versus the need to access vulnerable populations.

This can be improved in practice through effective coordination, respect of staff, and NGO input into the planning of interventions. It can be achieved in law through joint efforts to better implement existing law and joint advocacy

for law reform to ensure a right of access for humanitarian relief to vulnerable populations.

C Protection Needs Should Be a Core Component of Relief Interventions

All actors should make an assessment of protection needs a part of every needs assessment. They should always calculate and minimise the potential negative side effects of relief interventions as part of a ‘do-no-harm’ approach. They should be properly trained in the international legal framework and have a clear understanding of their potential role as a human rights monitor.

D Better Dissemination of International Humanitarian Law

All humanitarian actors should also undertake to better dissemination of IHL in all their activities.

E Greater Understanding of the Role of Civil Society

A strong and accountable civil society is one of the core catalysts for ensuring global security. Governments need to view their international aid programs as an important tool for strengthening civil society by promoting accountable governance at all levels. This will result in more effective conflict prevention and more rapid and sustainable rehabilitation – something that the defence program is unable to do.

The ultimate goal should be to contribute to accountable, effective and sustainable human security in order to ensure sustainable peace.

Appendix

Taken from: W O’Neill, *A Humanitarian Practitioner’s Guide to Human Rights Law* (2002), 55–62, available at:

<<http://www.reliefweb.int/library/documents/hrlaw1.pdf>>

- Rebels use civilians as shields to advance on the capital city. The commander of government forces says that next time he will order his troops to fire on the civilian ‘shields’. How should aid and human rights personnel respond to such a statement?
- Aid workers seeking to deliver essential supplies to refugees and IDPs [internally displaced persons] are prevented from doing so by armed men at roadblocks. They wonder whether they should note the names and affiliation of those controlling the roadblock, the date, time, and place of these incidents. If they did, what would they do with the information? On other occasions, those manning the roadblocks demand

money or supplies as the price of passage. What should aid workers do?

- Government radio or media are broadcasting or publishing material promoting hatred or violence based on racial, ethnic, or national grounds. International human rights law seeks to balance the right of free speech with the rights of others and prohibits, for example, incitement of genocide or racial hatred. Should assistance and human rights workers advocate closing down the radio station in question?
- Common penal practices in conflict include overcrowded prisons, the use of force by prison guards, and limited or no access of prisoners to family, medical care, and legal counsel. Secret detention centres are forbidden by international law. Prisons must also maintain up-to-date and accurate registers listing of inmates, yet many in conflict areas do not. What should aid workers do if they discover such violations?
- In one instance, prisoners were taken to an empty lot in a city and executed by the militia in charge, the bodies were left in the lot for several days with people afraid to approach the site. Should an aid organization that finally agrees to bury the bodies in a mass grave try to determine the identity of those killed, the manner in which they died, and the cause of death? Should it alert the UN, the regional human rights entity, international or national NGOs, or states to what has happened?
- Once granted refugee status, individuals are entitled to many rights in the host state, at least to the extent enjoyed by legal aliens in the state. Yet host governments often put severe restrictions on refugees that are contrary to international law. Restrictions on movement, employment, and access to education, medical care, and housing are common. To what extent should these restrictions be challenged?
- Although freedom of association and assembly are guaranteed under international human rights law, many states impose unreasonable restrictions on nongovernmental organizations. Some have onerous registration requirements, prohibitions on renting office space, obtaining telephone lines, or opening bank accounts. Some harass and arrest leaders and members. What would be the best strategy to promote respect for NGO rights?
- Government programs in the areas of economic, social, and cultural rights (eg regarding food, housing, medicine, education, and access to credit) favour a particular group or region. Thus women and girls may be denied equal access to relief or development activities. Such discrimination violates the core principle of non-discrimination established in human rights, humanitarian, and refugee law. To what extent should government practice be challenged and/or offset by international assistance efforts?
- Although the rights of children are specified in international law, grey areas require interpretation. Children may help out on the family farm, with housework, and even function as paid workers in non-hazardous industries. States have laws defining a minimum age of employment. Children should not be working so much that they cannot attend school

or enjoy childhood. What if children are routinely kept as domestic servants and forbidden from attending school?

- Development aid pours into a country, whose government receives consistently high marks from international financial institutions and aid agencies for its development policies. Its books are balanced and corruption is minimal. Yet serious human rights violations such as murder, torture, and disappearances are occurring and the development agencies, including World Bank officials, are aware of these abuses. What should such agencies do?
- Some conflicts are becoming ‘privatized’: that is, mercenaries are hired to conduct the conflict. To what extent are existing international laws binding on mercenaries? What are the responsibilities of those who hire them?

Part VII

SYNDICATE DISCUSSIONS

Rapporteur: Andrew Coleman

FRAMEWORK OF PEACE OPERATIONS

I EXECUTIVE SUMMARY

- Due to the nature of the process in which mandates are ‘born’, they are essentially a political compromise and this causes problems of being too vague and thus open to interpretation.
- Force Commanders desire a flexible, workable, practical document that will enable them to achieve the mission’s objective and comply with the rule of law.
- It is unrealistic to expect the original mandate to be able to predict changes in the environment and thus it is inevitable that it will be amended as the operation moves through its different phases.
- An advisory committee comprised of professional, experienced, and preferably former Force Commanders and SRSG’s, could be created under the auspices of art 29 of the UN Charter to assist the Security Council in the preparation and subsequent amendments of the mandate.

‘We are facing a challenge. How shall we design a mandate that won’t be subject to interpretation and yet is still applicable throughout the many phases of an operation and at the same time gives the commander sufficient freedom of action without being indistinct?’¹

II INTRODUCTION

To state that the legal framework of a peacekeeping operation is important to the mission’s success is quite an understatement. Every component of an operation depends on the legal framework. If the framework is inherently flawed, this places an extra, perhaps an insurmountable, burden upon all operational elements that follow. Alternatively, if the basis of the mandate, the

¹ Major General Stigsson, ‘Opening Comments: Frameworks of Peace Operations Syndicate Discussion’, Rule of Law on Peace Operations Conference, Melbourne, 12 November 2002.

Security Council resolution, is in conflict with the UN Charter, or principles of international law what is the effect of the mandate and the position of the troop contributing nations?

It is crucial therefore that the mandate be drafted with care, pragmatism and respect for humanitarian ideals and the rule of law. Is there a way to avoid these problems with the appointment of an advisory committee whose role is to translate the political nature of the Security Council resolutions into a workable and practical legal document, so there is no doubt with regard to the mandate?

III QUESTIONS FOR DISCUSSION

1 *Drafting & Preparation of Mandates*

- How do we ‘convert’ a political and diplomatic compromise into a mandate that will comply with the rule of law and still be able to accomplish the political and diplomatic goals and objectives of the mission?
- Would an advisory committee comprised of representatives from the TCNs assist in the formulation of a more realistic mandate that adheres to the rule of law? (consider art 29 of the UN Charter)
- Could the Military Staff Committee assist or be part of an advisory committee? (consider art 47(4) of the UN Charter)

2 *‘Ultra Vires’ Mandate?*

- If the Security Council resolution containing the mandate contradicts a principle of *jus cogens*, what obligations do the TCNs have?
- Do they continue to implement the mandate or are they entitled to consider it invalid?

3 *Multiple Phases versus Multiple Mandates?*

- Given the above difficulties, should there be one mandate with distinct phases; or should there be several mandates?

IV SYNDICATE DISCUSSIONS

After the syndicate members and panel introduced themselves, the chair Major General Stigsson introduced the topic by emphasising the need to achieve a workable/flexible mandate that retained the Commander’s initiative with minimal restraints and constraints that would last through the different phases of the operation and would enable a rapid response.

The facilitator, Mr Bakhtiyar Tuzhmukamedov, raised the issue of how the mandate canvasses the distribution of authority between SRSG and Force Commander and the balance of powers. Also, the constitutional and legislative issues within the TCNs own process when embarking upon a peacekeeping operation, thus raising such matters as democratic accountability; appropriate training of personnel and their legal enlightenment; and reconstruction of existing law and order.

The discussion then turned to the questions from the syndicate materials.

A Drafting and Preparation of Mandates

Currently, the major criticism of mandates relates to how often they are badly drafted, being too vague and thus open to interpretation. UNOSOM is one such example: ‘the operation’s mandate was vague, changed frequently during the process and was open to myriad interpretations.’² This problem is a direct result of the nature of the process in which mandates are ‘born’. As noted in the *Brahimi Report*, for the Security Council to pass a resolution, for them to act in response to a situation, they must firstly acquire a consensus amongst their members, in particular the permanent members (P-5). As a consequence, mandates are essentially a political compromise.³ Thus one of the problems raised was: how do we avoid regional and national interests that could be potentially carried out under the auspices and protection of the UN Charter, and also cause confusion over the nature of the ultimate objective and potentially minimise the chance for the successful achievement of the mission objective?⁴

Security Council mandates, by their very nature, will continue to embody political compromises reflecting the competing interests of member states. As such they are unlikely ever to satisfy a ground commander’s wish for an ‘unambiguous mission statement,’ a wish that in any UN-mounted peacekeeping operation is likely to be unfulfilled.⁵

Secondly, the Force Commander of a peacekeeping mission, like any commander, wants to be able to respond rapidly and effectively to the situation and any uncertainty in the mandate can lead to indecision and inaction on behalf of the Force Commander, potentially resulting in needless deaths.⁶

Flexibility is also a desirable characteristic for a mandate. Thus the next issue is how should a mandate be formulated so as to provide a tool capable of completing the task facing the Force Commander, without containing too many constraints?

Thirdly, it was recognised that a strategic mandate cannot detail everything and as such may require a more general ‘policy’ statement. Thus the mandate must

² DPKO, Lessons Learned Unit, *Comprehensive Report on Lessons Learned from United Nations Operations in Somalia, Peacekeeping*, (December 1995), para 10, as cited in Dennis Jett, *Why Peacekeeping Fails* (2000) 40.

³ L Brahimi, et al (2000), *Comprehensive Review of the Whole Question of Peacekeeping Operations in All Their Aspects: Report of the UN Panel on Peace Operations*, (A/55/305 S/2000/809) (*‘Brahimi Report’*), para 58, available at <http://www.un.org/peace/reports/peace_operations/docs/part2.html>.

⁴ This point was raised by the Chair, Major General Stigsson, in his opening remarks. Due to both French and US prohibitions (both had concerns over the loss of King Hassan, a moderate Arab leader and potential ally) there were no enforcement mechanisms, such as economic sanctions, to enforce acceptance by either Morocco or POLARISO of the outcome of the referendum: Jett, above n 2, 41.

⁵ Berdel, as cited in Jett, above n 2, 42.

⁶ The failure of the UN to become involved in Rwanda is one example.

retain as an objective a particular end state, eg a return to civil society, rather than simply detail a fixed timetable.

If these problems could be reduced by careful drafting of the mandate then the question is who would be able to assist the Security Council, particularly if the political problems and self-interest of members were to be avoided?

The use of Advisory Committees remains a desirable institutional innovation that the Secretary-General or Security Council should re-institute. This would help prevent the case where commanders of a national contingent receive instructions from their national command structure that are contrary to those issued by the UN Force Commander.⁷

This raises two key issues. First, does the UN Charter allow such an advisory committee to be formed? Second, who should comprise such an advisory committee?

1 Does the UN Charter allow the Creation of an Advisory Committee?

Two potential parts of the UN Charter could be used to create such an advisory committee: art 47(4) allows the Military Staff Committee (MSC) to create a regional sub-organ to assist it in its duties; and art 29 allows the Security Council to create a sub-committee to assist with its functions under the UN Charter, namely maintaining international peace and security. Both options would not raise any issues regarding the interpretation of the UN Charter and would in fact merely be using an existing power further fulfilling the purpose of the UN Charter. What groundwork could be done to speed up this process?

Given the lack of success of the MSC since its inception, due to the Cold War, it is clear that it could not itself be an advisory committee. Certainly not its present format; since it is comprised of military officers from the P-5, any auxiliary or sub-committee organised by the MSC under art 47(4) may face the same problems or alternatively be guilty of a charge that it merely represents the national interests of the P-5 (in other words, the MSC retains too much 'political baggage'). Finally, the advisory committee should include non-military specialists in order to achieve the holistic approach required for the successful resolution of disputes; and since the MSC is purely a military committee, it would be unsuitable. Also there is the problem that if none of the member of the P-5 contribute troops, they may not be willing to act in an advisory capacity when preparing the mandate.

Therefore it would be preferable to use art 29 of the UN Charter. It is hoped that the members would be divorced from the political agendas of the P-5 and thus be able to provide objective and practical advice. It may be advisable that the introduction of such a professional advisory committee be done

⁷ Danesh Sarooshi, 'The Role of the United Nations Secretary-General in United Nations Peace-keeping Operations' (1999) 20 *Australian Yearbook of International Law* 279, 291.

incrementally or ‘gently’ with such a body being created for existing operations as a means to assist them and then expand the role to planning an operation and finally drafting a mandate.

2 *Proposed Representatives of an Advisory Committee*

The type of personnel that would be highly preferable would be professional, highly trained personnel, with experience in peacekeeping operations, preferably former Force Commanders. Secondly, in recognition of the need for a holistic approach for the resolution of many conflicts, an advisory committee should include representatives from civilian police and other staff experienced in nation state building or the restoration of a civil society, again former SRSG’s would be most suitable.

It was noted that the UN has considered establishing a database of experienced personnel, particularly Force Commanders, for future peacekeeping operations. Such a database would provide an excellent cadre of staff for an advisory committee. Further issues to be explored at a later date would include the question of who pays and recruits them.

Whilst it would be preferable to include representatives from TCNs, their involvement would be unlikely at this stage since the actual details of the mandate would not be final and no nation state would be likely to make a commitment to contribute troops while the mandate remained unclear. However, if an advisory committee is comprised of former Force Commanders and SRSGs that may have worked with TCNs in past operations, then this would easily assist the TCNs in the military planning phase, thus providing continuity from the drafting stage of the mandate through to its eventual implementation. Secondly, if it were known that an experienced Force Commander (that had the approval of the TCNs) had participated in all stages in the planning of the mandate, it would be a factor that would not only encourage nation states to contribute troops but also closer cooperation in all phases of the operation. It is clear that the Force Commander has to have the confidence and trust of the Security Council, SRSGs and TCNs when in the field. The knowledge that the mandate has been prepared with the assistance of trusted, experienced professionals will lay a strong foundation for gaining and then maintaining that trust.

3 *The Purpose of the Advisory Committee*

The role of the advisory committee would be twofold:

- To assist in the preparation of the mandate; and
- To provide assistance for the ongoing implementation of the mandate throughout all stages of the mandate, and as the environment changes, perhaps make recommendations regarding amendments to the mandate.

In regard to the first role, this should not involve debate about the political aspects of the mandate since that is clearly a decision for the Security Council.

Rather, it should involve advising the Security Council of the feasibility of implementation and the best manner in which to achieve the desired objective or end state of the operation. Thus, it would provide practical recommendations and also feedback on drafts of the mandates.

An advisory committee can also actively 'plan ahead': contingency planning, identifying issues, and setting up broad plans so as to maximise the efficiency of the Security Council's response to future situations. This is a present problem with existing UN policy. It was noted, for example, that nothing was being done to prepare for the aftermath of the possible war in Iraq; what will be done about the Kurds; thus, will there be two nation states emerging from the defeat of Saddam Hussein's regime?

It must be noted that an advisory committee would not be intended to be an additional layer within the UN hierarchy and structure, as this would in fact slow the response time of the UN. The advisory committee would provide its assistance to the Security Council from the very beginning, when the Security Council considers the mandate.

One final point: it was noted that one of the problems with mandates was the lack of transparency in the process that the Security Council uses when drafting them. This may be difficult to change. However an advisory committee that is not beholden to any specific member of the Security Council, nor for the political decisions behind the mandate, would not face such problems. Greater transparency in the process of providing advice would restore and maintain the confidence of TCNs and also the parties in dispute. Further, it would promote the impartial nature of the UN in its peacekeeping operations when seeking to achieve international peace and security, rather than take sides in the dispute. It would also minimise the perception that the mandate was being used to further the national interests of the members of the Security Council.

The second point above may interfere with existing departments within the UN so this may be better resolved by including a liaison officer from the advisory committee to interact with the DPKO as a representative rather than an active monitoring role.

B 'Ultra Vires' Mandate?

This was considered to be presently more of a hypothetical problem. However, the likelihood of it occurring will increase now that the ICC has been introduced. The facilitator made an excellent point that everyone presumes that the Security Council is innocent and to date this presumption has not been seriously challenged; however, given potential situations in the field this will

change ‘one day’.⁸ It was felt that at this stage no recommendation could be made.

C Multiple phases versus multiple mandates?

The discussion began with the point that the complexity of situations are such that it is unrealistic to expect the Security Council to be able to devise a single plan to resolve the conflict, the so-called ‘silver bullet’ mandate. It is inevitable therefore that there will be changes to the mandate thus requiring someone or some organisation to assist the Security Council to make such changes so that the ultimate objective is attained. In the initial drafting of the mandate, care should be taken to identify the environment because this will influence the nature of the mandate, eg is this a fighting mandate? Secondly, domestic military forces take a long-term view of their operation and their objective or end state; in other words they are prepared for, or at least anticipate, changes. A similar approach should be taken when preparing a mandate.

It was noted that at the time of its creation, it is unrealistic for the Security Council or indeed any organisation to be able to prepare a mandate that is like a ‘silver bullet’. It is clear that the decision to amend or change the mandate should not be determined purely by a timeline, but rather by conditions in the field and the environment in which the peacekeepers are operating. Clearly the Force Commander should also play a pivotal role in making this decision since they are in the best position to acknowledge such a change in the environment and they are also the person most directly affected by any changes in the mandate.

It was also noted that as the situation changes or the operation moves forward from one phase to another, the mandate would also have to change. It would also be prudent to address the force composition and the ROE. The question raised by the Chair was: once the strategic or tactical environment has changed, who will decide when the mandate needs to be changed? Secondly, often an environment may initially require a military presence but over time the environment becomes a ‘civilian’ one. Thus the SOFAs and ROEs also need to change. So again: who should make the decision of when to change the mandate and how should a mandate be drafted to reflect the possibility of change? The Military Staff Committee is one possibility, however it would require substantial work, as it has lain dormant for far too long.

It was also noted that in previous operations, the Security Council has made incremental changes to mandates, every two to six months, depending upon the situation. There is no formal process followed; often, new tasks are merely added to the mandate of the peacekeeping force. The experiences Sierra Leone

⁸ Perhaps, with the exception of the *Lockerbie Case*: see *Questions of Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom)* [1992] ICJ Rep 3.

demonstrate why this issue requires additional examination. Thus it makes sense that the original mandate should state the ultimate objective to be reached with provision for changes and an acknowledgement that as the mission proceeds successfully, the mandate must change to reflect such progression.

V CONCLUSION

The preparation of a mandate is crucial to the overall success of the mission. The Force Commander must have faith in the authority delegated to him/her and thus the mandate must not be too vague. Yet it must be flexible enough for a rapid and effective response to the demands of the mission in the environment in which the operation is set.

The creation of an advisory committee that can provide advice for every phase of a mission would maximise the chances of success. Such an advisory committee, due to its early involvement with the Security Council, can provide the Security Council with ready access to a pool of knowledge. This is a very necessary and easily achievable solution to the mandate dilemma.

VI RECOMMENDATIONS

- *That a professional advisory committee comprised of experienced and trained personnel (preferably former SRSGs and Force Commanders, civilian police and other staff) be established to assist the Security Council in the preparation their mandate.*
- *That art 29 of the UN Charter be used to establish such an advisory committee.*
- *That a body, perhaps the same advisory committee established above, be created to work with, and respond to, the advice of the Force Commander to monitor and amend the mandate as required.*

Rapporteur: Jadranka Petrovic

CULTURAL CONTEXT OF PEACE OPERATIONS

I EXECUTIVE SUMMARY

- Culture itself can be a constraining factor in peace operations. Peace operation personnel should be aware of the dangers of cultural ignorance and parochialism. Training and education for all components of peace operations can contribute considerably to minimise obstacles in cultural communication in peace operations both internally and externally. Peace operation personnel need to exercise a high level of sensitivity *vis-à-vis* local culture(s). Because of the multiplicity of actors involved in peace operations, the question of the nature of the obligation of peace operations to respect local culture requires active thinking.
- Development aid plays a crucial role in the rebuilding of societies emerging from conflict. Local populations need to be involved in the process of defining and shaping how their country recovers from the trauma caused by conflict. Their needs and capacities must be assessed adequately. The development aid accountability mechanisms should be developed. There is also a need to improve cooperation and coordination between actors involved in aid-related processes.
- The Security Council resolution 1325¹ on the inclusion of a gender perspective in peace operations is a significant step forward in women's struggle to be recognised as equal partners in all spheres of action. Since the resolution provides for a number of operational mandates with implications for the UN, for its membership and for civil society, it needs to be taken into consideration. However, the resolution is not legally binding on members of the UN.
- Armed conflicts, both international and non-international, cause irreparable damage to the cultural heritage of all humankind. In some conflicts, cultural property has been deliberately destroyed to such an extent that the term 'cultural genocide' has been coined. However, the involvement of peacekeepers in guarding the objects of cultural property

¹ SC Res 1325 (2000), 31 October 2000.

was seen as a highly sensitive issue. Still, cultural property inscribed on the World Heritage List deserves to be considered in this regard.

II INTRODUCTION

Culture may be defined as behaviour peculiar to *Homo sapiens*, together with material objects used as an integral part of this behaviour. It is a complex concept which includes, but is not limited to, language, ideas, beliefs, customs, codes, institutions, tools, techniques, works of art, rituals and ceremonies. In multidimensional peace operations, where a multiplicity of actors are involved, culture plays a significant role. The success of a mission is considerably dependent on the degree to which culture has been taken into account.

The purpose of the syndicate was to discuss the legal dimensions of the cultural context of peace operations and to develop recommendations aimed at minimising ambiguities and addressing the vacuum relating to this aspect of peace operations. The syndicate was organised into two sessions. The first session focused on cultural constraints on peace operations faced both internally and externally and on the nature of the obligation of peace operations to respect local culture. The second session initially addressed the obligations of peace operations relating to development aid. Then it examined Security Council resolution 1325 (2000) on gender perspective in peace operations. Finally, the session dealt with the issue of feasibility of peacekeepers' involvement in guarding the objects of cultural property.

III SYNDICATE SYNOPSIS

A Cultural Universalism versus Cultural Relativism

The syndicate addressed two key questions relating to this sub-theme: the question of the 'cultural constraints' peace operations personnel should be aware of; and the nature of the obligation of peace operations to respect local culture.

Responding to the first question, the syndicate noted that a culture is a very wide and complex concept, which in the final analysis reflects a way of life. Today's peace operation missions, which are becoming increasingly multidimensional and circuitous, cannot afford to overlook the role that culture plays in peoples' lives. Success of peace operations, and thereby the likelihood of sustainable peace, depends significantly on an understanding of the cultural dynamics of conflict and on identifying and minimising the cultural constraints peace operation personnel might be faced with. It has been stressed that a culture, per se, can be a constraint in peace operations because 'self' and 'other' may clash and converse both internally and externally. Relating to the former, culture might be a constraining factor first within a single national

military contingent because a national contingent itself is sometimes culturally diverse, and then in interaction between various national military contingents, which comprise personnel of different cultural backgrounds. Civilian components of peace operations might face similar obstacles both within a single unit and in interaction between various units. Finally, culture might act as a constraining force in interaction between military and civilian units, where, in addition to the socio-based cultural differences, difficulties in communication, cooperation and coordination might be amplified by the differences emanating from the so-called 'military' and 'civilian' culture. With respect to the latter, culture as a constraint might come into play in interaction between military/civilian components of peace operations and local populations.

While cultural constraints would depend on many factors such as the nature of conflict, the nature of the mandate, context-specificity of local culture, a number of local sub-cultures and the possibility of culture atypical responses at the local level, the power of culture should never be estimated but should always be wisely taken into account. Thus, peace operations should be aware of the dangers of cultural ignorance and of parochialism or the only-one-way myth – our way is the only way; we do not recognise any other way of living, working, or doing things.

The syndicate observed that if peace operations take time to understand local culture prior to deployment, that time would be the start of building a bridge between peace operations and the local communities. Also, when deployed in the field, peace operations should not neglect this bridge but continue building it methodically and patiently. Personnel of all components of peace operations should keep this task in mind in their everyday interaction with the local population. Such an approach is important because the locals are often wary of 'imported' ideas and values, and unappreciative of being told what to do. Peace operations need to exercise a high level of sensitivity in relation to local culture(s) and personnel must each present themselves not as someone who would impose conflicting values and beliefs but as someone who would help in overcoming the difficulties of the local society. Thus, the local population needs to be involved in peace operation activities wherever appropriate from the early stages of the mission. This way, peace operations would enhance understanding of the local conditions, including the local expectations, and would ensure trust of the local population, which would all lead towards successful completion of the mission and thereby to the likelihood of sustainable communities. Therefore, if effort is made, instead of representing a constraint in peace operations, culture can be used in a positive way. As one participant in the syndicate discussion observed:

If we look at culture as something that can contribute to doing a job well in a particular situation, then actually by taking the trouble to appreciate the way people do things there, we can ... literally get them done better, faster and cheaper.

When responding to the second question relating to the nature of the obligation of peace operations to respect local culture, there was a strong consensus in the syndicate that peace operations are morally bound to respect local culture(s). However, the syndicate was cautious with respect to the legal dimensions of such an obligation. Some of the syndicate participants took a human rights approach to culture. They noted that the right to culture is one of the basic human rights which enjoys international legal protection, but pointed to the fact that cultural rules are entrenched in local customs and traditions which do not necessarily coincide with the rule of law. Consequently, when the rule of law comes into play, tension might be created. Some syndicate participants observed that as long as peace operations do not infringe upon local legal obligations relating to culture, there are no problems on the subject. Some also noted that every culture has its taboos and limitations, but that it is the local communities that can deal most appropriately and least painfully with problems that arise. Others pointed out that the nature of the conflict and the applicable international law might in some instances overrule respect for local culture. Notwithstanding this, it was observed that the right to culture might be limited by other human rights, such as women's human rights. Consequently, although the respect for local culture is to a large extent a *conditio sine qua non* for the success of a peace operation mission, in some instances, in order to ensure adherence to other aspects of human dignity that might be curtailed by culture, rethinking of this respect might be preferable.

However, a wide range of actors could be involved in peace operations and only part of them could be controllable. NGOs pose a particular challenge in this regard. Thus, as one syndicate participant warned, 'one should be very careful in saying that peace operations are or are not "legally" bound to respect local cultures.' In reaching the conclusion, the feasibility aspect of the issue should not be overlooked as 'the rule of law has to have some relation to reality'.² However, the issue should be neither belittled nor neglected. On the contrary, it would be desirable to have unambiguous rules relating to whether peace operations are legally bound to respect local culture. Thus, the issue deserves to be further explored and most certainly requires in-depth, active thinking.

B Development Aid & Local Population

While there is a difference between addressing the most immediate needs of the population affected by conflict and long-term development commitments, aid is always indispensable in alleviating human suffering caused by armed conflict. It is also a relevant factor in re-establishing stability. In some instances aid is accompanied with conditionality formulated as an incentive. The syndicate commented on Macedonia as one of the recent examples where aid was used as

² Professor Michael Bothe, 'Syndicate Discussions Briefing Session', The Rule of Law on Peace Operations Conference, 12 November 2002.

one of several means to re-establish stability. However, one syndicate participant cautioned that aid might also be aimed at establishing or re-establishing influence.

Notwithstanding this, the syndicate observed that aid has a crucial role in the rebuilding of societies emerging from conflict. Rebuilding these societies is never an easy task and it is never a task of the same complexity because all post-conflict countries are different. However, several factors such as well-planned development programs based on comprehensive needs assessment, adequate funding, long-term commitments, donor and development agencies coordination, transparency in work of all actors involved in development processes and sufficient involvement of the local population are common to and indispensable in the rebuilding of all post-conflict societies. Whether these factors are actually taken into account is quite another matter. Instances of marginalisation of the local population, disregard for indigenous skills and mechanisms, disregard for the local authority, inappropriate kind of aid, discrimination in aid distribution, competition between NGOs, to name just a few, point to a failure at the practical level.

Despite the complexity of this aspect of peace operations, there is not much that could have been done to remedy the wrongs. The syndicate noted that the obligations of peace operations concerning development aid depend on the mandate of the mission. It found the nature of the obligations of peace operations *vis-à-vis* development aid particularly trying because of the lack of rules and clear guidelines on the subject of aid. Its response to this issue was, therefore, similar to the response concerning the respect for local culture. That is, when developing mechanisms aimed at sustainable development and ultimately at sustainable peace, peace operations are morally bound to take into account local needs and capacity, and to allow the local population to play a role in defining and shaping how their country should recover from its violent history. However, it is difficult to enlist the 'legal' obligations of peace operations in this regard. Here, again, the NGOs, by whom aid is channelled, pose a challenge for peace operations, particularly concerning accountability for discrimination in aid distribution and other instances of badly managed aid. As with respect for local culture, this issue needs to be further explored.

C Gender

Women are greatly affected by violence in armed conflict. They are often targeted specifically because of their socio-cultural role in a society. Seen as a means for continuation of culture, women are raped, tortured and murdered. In addition to this, women are exposed to all other forms of violence occurring in situations of armed conflict. The need for inclusion of a gender perspective in peace operations and an expanded role and contribution of women in all components of UN field-based operations, recognised by Security Council

resolution 1325,³ was seen as having the potential to significantly contribute to a reduction of women's suffering. For instance, after being raped by a soldier during armed conflict, a woman will feel more secure communicating with a woman in uniform than with a man in uniform, because women are perceived as more sensitive in dealing with women specific issues.

At the same time, inclusion of a gender perspective in peace operations represents the recognition of equality between men and women. The very fact that the Security Council, as the principal UN organ, whose primary responsibility is the maintenance of international peace and security – the area perceived as a public sphere of action, reserved to the masculine half of humanity – deals with women's issues exclusively in its resolution, is a significant step forward in women's historical struggle to be recognised as equal partners in all spheres of action. Of particular importance is the recognition that dealing with women's issues appropriately 'can significantly contribute to the maintenance and promotion of international peace and security.'⁴

However, the resolution uses soft language in its provisions and mainly spells out requests relating to a gender perspective in peace operations directed to the Secretary-General of the UN: to increase participation of women in good offices; to seek to expand the role and contribution of women in UN field-based operations; to ensure that, where appropriate, field operations include a gender component; to provide Member States with training guidelines and materials on gender perspective; to carry out a study on the impact of armed conflict on women and girls, and on the role of women in peace processes; and to include reports to the Security Council on gender mainstreaming throughout peacekeeping missions and all other aspects relating to women and girls. These provisions are formulated in rather general and vague terms.

The rest of the resolution is even weaker. In only a few of its provisions, the resolution either 'urges', 'calls on' or 'invites' Member States to, ie ensure increased representation of women at all decision making levels in national, regional and international institutions and mechanisms for the prevention, management, and resolution of conflict; to provide female candidates to the Secretary-General, for inclusion in a regularly updated centralised roster for good offices, and; to incorporate a gender perspective in their national training programs for military and civilian police personnel in preparation for deployment. In a single provision, the resolution addresses all Member States by emphasising their responsibility to end impunity for genocide, crimes against humanity, and war crimes including gender based crimes, and to exclude these crimes, where feasible, from amnesty provisions.⁵

³ SC Res 1325 (2000), 31 October 2000

⁴ Ibid, Preamble.

⁵ Ibid, para 11.

The syndicate noted that although, in accordance with art 25 of the UN Charter, '[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council', due to an absence of any real obligation created for Member States, it would be difficult to consider resolution 1325 to be a binding decision. The syndicate considered the resolution to be rather recommendatory in nature, at least in part concerning Member States, and, thus, saw its implementation to be heavily dependent on moral force and the political will of the UN membership.

Notwithstanding this, the syndicate stressed the importance of improving gender balance within peace operations and emphasised the significance of training relative to women's issues in the context of peace operations. However, it warned that one has to be realistic in their expectations concerning gender balance. In some instances, although states provide for equal opportunities, achieving the actual gender balance might be unfeasible due to the lack of women's interest, inadequate qualifications or women's other priorities. In other instances culture might be a restraining factor. It was cautioned that there might be resistance in a number of Member States because Security Council resolution 1325 might have strong cultural connotations, and, thus, might cause considerable problems.

D Cultural Property

Due to time limitations, the syndicate focused on two out of six questions envisaged for the discussion, and managed to deal with them only briefly. It covered the question of guarding the objects of cultural property by peacekeepers and touched upon the question of a specialist unit or specialist personnel in the UN force whose purpose would be to secure protection of cultural property.

Cultural property includes both movable and immovable property such as works of art, manuscripts, books and other objects of artistic, historical or archaeological interest, monuments of architecture or history and archaeological sites. Cultural property is the product of human genius, but it is humans who have caused the greatest losses in this property. In the countless wars that have afflicted humanity, many works of art have been deliberately destroyed, works that used to be part of our common heritage and that we shall never see again. However, wars have caused millions of deaths, millions of wounds, millions of refugees, millions of homeless. Then why are we weeping at the crumbled bridge or the destroyed painting, and why are we seeking protection for objects which are, after all, only a pile of stones or a tube or two of paint when there is greater human misery caused by war?

Objects of cultural property are unique objects endowed with perennial qualities. They represent the progress of civilisation through the ages and join the present with our past. Their destruction greatly impacts upon the people concerned because of the special meaning these objects have for them. The

consequences of the destruction might be tragic as it could intensify the existing conflict or cause new conflict. Also, the destruction may greatly affect the process of reconciliation. While the loss of every object of cultural property is a tragedy of its own and always represents someone's disinheritance, loss of certain cultural property that forms part of the cultural heritage of all humankind is particularly devastating as it impacts on the entire international community and therefore disinherits us all.

The syndicate noted that peacekeepers' involvement in guarding the objects of cultural property could be a sensitive issue. For example, in instances where different factions are involved in conflict, guarding the object of cultural property belonging to one of the factions could be perceived as peacekeepers taking sides. However, it was noted that guarding the objects of cultural property inscribed in the World Heritage List deserves consideration because of the special importance of this property to all humankind. Notwithstanding this, it was stressed that at present, cultural property stands very low on the priority list in the UN, as there are not even enough troops to do security jobs.

IV CONCLUSION

Culture is a relevant factor in peace operations. It needs to be taken into account wisely in relation to all components of peace operations. Understanding of local culture and local needs considerably contributes to the success of the peace operation. However, in the absence of clear rules, it is difficult to determine the legal dimensions of the issues relating to the cultural context of peace operations. The multiplicity of actors involved in peace operations plays a significant role in this regard. But this also indicates that cultural issues do not rank highly on the UN priority list.

V RECOMMENDATIONS

- *That peace operations personnel in all units, both military and civilian, be provided with 'cultural' training and education prior to deployment so that they can familiarise themselves with what to expect in the field. The local customs and traditions of the country to which the peace operation is deployed should be incorporated into training and education. Where possible, joint training should be carried out. Training should continue upon the deployment in the field.*
- *That a study on the nature of the obligation of peace operations to respect local culture be carried out.*
- *That the UN develop a code of conduct with clear and substantive instructions with respect to the obligations of peace operations relating to development aid.*
- *That a study on the nature of the obligations of peace operations relating to development aid be carried out.*

- *That a code of conduct with clear and substantive instructions relating to the obligations of NGOs with respect to development aid be developed.*
- *That donor conferences be used so that donors can make a contribution to the understanding of the obligations of peace operations relating to development aid and local culture.*
- *That all components of peace operations be provided with training relating to women's issues.*
- *That DPKO carry out a study on the feasibility of peacekeepers' involvement in guarding the objects of cultural property inscribed on the World Heritage List.*

Rapporteur: James Field

DISARMAMENT, DEMOBILISATION & REINTEGRATION

I EXECUTIVE SUMMARY

- The purpose of this syndicate was to discuss, from a rule of law perspective, strategies for the practical implementation of a Disarmament, Demobilisation and Reintegration (DD&R) process. To achieve this, the syndicate focussed first on the peace process that needs to be in place prior to any successful DD&R process and then on a possible template for the drafting of a mandate for UN action in the furtherance of DD&R objectives. The aim of this was to provide a report as to the implementation of a possible DD&R framework.
- Feasibility was a vital consideration in this process; the syndicate had, in the materials, an almost perfect Generic DD&R Plan, however the syndicate was acutely aware that the implementation of such a plan is almost impossible in the real world. The aim of this discussion was to achieve suggestions for a practically feasible DD&R process.
- The main conclusion raised by our discussion was that, because each situation in which a DD&R process is required is unique, the rigid application of a pre-drafted legal framework can only lead to disaster. DD&R is an area in which enormous flexibility is required for the process to be successful; as such, allowing the legal framework to limit the scope for compromise is to invite failure.
- Another significant conclusion raised by our discussion was the importance of recognising the place of the DD&R process as part of a comprehensive development process rather than an end in itself. It was noted that the reintegration of former combatants is often neglected, being a high cost, long-term and low profile undertaking. More importantly, reintegration requires the economic and social re-development of the society into which the former combatants are to be integrated, something that requires a framework of assistance from donor nations, non-governmental organisations and international financial institutions to be in place.
- It was also noted that the definition of ‘combatant’ is too frequently interpreted to refer only to the individuals directly engaged in armed

violence. It must be acknowledged that there are many individuals intimately involved in the dynamics of conflict who do not actually participate in fighting. Families of combatants and other individuals who provide unarmed support to them often have a clear stake in the peace process and, as such, require recognition in any DD&R effort.

II INTRODUCTION

A The Peace Process

The syndicate first focussed on the range of conflict situations in which a DD&R process may be required, and the means by which a cessation of hostilities could be bought about in each case. This discussion focussed on the areas of ceasefire enforcement, cantonment and virtual disarmament, means for building confidence in the peace process, the definition of ‘combatant’ and the possibility of conducting DD&R operations where there is no peace agreement between opposing parties.

B The Mandate

The syndicate then discussed the options for a Security Council mandate for a DD&R process, be it in a peacekeeping or peace enforcement role. This discussion incorporated such areas as the scope of such a mandate, the legal basis for enforcement, the practical mechanics of such a process and options for compliance incentives – both positive and negative.

C Reintegration, Development and a Sustainable Future

The final topic of debate was the area of reintegration, often the neglected part of DD&R. The syndicate discussed the role of DD&R as a management tool within a wider national redevelopment process for regions devastated by conflict and the consequences of failing to reintegrate former combatants.

III SYNDICATE SYNOPSIS

A The Peace Process

The first major point raised was the enormous difference between cause-driven conflicts, such as interstate border disputes and wars of secession, and failed-state conflicts, where the rule of law has disappeared entirely and warlordism and armed banditry are rife. These two types of conflicts must be viewed differently as they present entirely different challenges for peace operations.

It was accepted that, in the former case, combatants are far more likely to agree to a peace process, and DD&R missions can therefore be carried out in the context of an existing ceasefire. In the latter case, however, parties are far less

likely to agree to or abide by ceasefire agreements. In such situations, armed violence is not so much a means of settling disputes, the Clausewitzian maxim of continuation of politics by other means, but a tool for obtaining and preserving economic and social power. It is in these situations that disarmament is most difficult yet most vital because, in the failed state, disarmament constitutes a social and economic disenfranchisement of the individuals involved. In these situations, it is far more likely that a peace enforcement mandate, backed by considerable armed force, will be required to begin an effective DD&R process.

B Separation and Disarmament

Where a peace agreement or ceasefire is in place, the syndicate acknowledged that the most important initial goal of a UN mandate is to foster confidence in the peace process. It was accepted that, whilst disarmament is essential to the greater peace process, parties will usually not initially be prepared to relinquish weapons, especially where those weapons represent the only real bargaining tool possessed by non-governmental combatant groups. In this case, the syndicate agreed that separation of the combatant parties is essential to foster confidence in the peace process through the avoidance of continuing hostilities. This 'virtual' disarmament, where weapons are not used but are still possessed by parties, is an important tool for peace as it can foster confidence in the legitimacy of the peace agreement, paving the way for actual disarmament and a mutually agreeable and lasting peace.

For this, it was felt that cantonment or separation of forces by UN peacekeepers is extremely effective, however, for cantonment to be successful, it must be adequately financed. It was noted that NGOs are often extremely reluctant to distribute aid to combatant cantons, preferring instead to focus on morally blameless non-combatant groups such as refugees and internally displaced persons. In order to keep combatants inside cantons, and thus strengthen the peace process, they must be adequately fed, sheltered and have access to the amenities of normal life. Since dedicated aid organisations will either be unwilling or not mandated to do this, specific funding must be sourced from donor nations.

The syndicate also discussed the problems of disarmament in cultures where weaponry is viewed as a social norm or right of manhood. The problem of eliminating small arms from Afghanistan, for example, is almost unassailable without either massive funding or considerable military coercion. It was felt that international bodies are not the best parties to carry out such disarmament and, instead, disarmament is best left to the emerging government through the legal processes of legislation and criminal sanction. Laws allowing the state or transitional authority to arrest and charge transgressors for arms possession are therefore vital to assist disarmament through non-political processes.

Where disarmament processes are in place, the syndicate considered it vital that rearmament be prevented from taking place. Where parties are adequately financed, it is important to prevent parties gaining access to arms importers; this must be accomplished both through cutting off the finances of warring parties and adequately policing the activities of arms dealers. On a similar point, the syndicate discussed the options for disposing of weapons collected during a disarmament process. It was the unanimous opinion of the syndicate that such weapons, especially small arms, should be immediately destroyed through crushing or dumping at sea to avoid recirculation.

The importance of information was also considered vital to the continuing peace process. It was agreed that the UN should fund information operations in order to influence public opinion; such 'hearts and minds' operations can support the disarmament process and improve consent for the peace process in the local populace, having a beneficial effect which is completely disproportionate to the cost involved. Such operations require translators and interpreters to work with the locals, printed media and radio stations funded by the peacekeepers and will often require assistance on the ground where communication infrastructure is not present. The Haitian example, where simple transistor radios were distributed to the populace and a radio station broadcasting popular music with frequent political messages was established, was cited as a successful example of such an operation. These operations must be adequately supported, however, with ongoing financial and logistical assistance with everything from battery supply to funding for communications infrastructure.

C Gender Issues

Issues of gender were also discussed by the syndicate as a matter of importance. It was agreed that the definition of 'combatant' currently used is too restrictive, excluding female members of combatant organisations that, whilst not directly engaged in armed violence, carry out frequently dangerous support functions vital to the conduct of hostilities. Failing to recognise such individuals in the peace process risks breeding resentment, which can be detrimental to a lasting peace.

It was also discussed that cantonment is often an issue involving whole families rather than just combatants and, as such, adequate attention must be paid to the women and children in cantons as well as the combatant men they were designed to contain.

D Reintegration and Reconciliation

Reintegration was agreed to be the most problematic part of a DD&R process, and the aspect of peace operations most frequently ignored by the international community. It was accepted that reintegration of former combatants is a lengthy, expensive and low profile undertaking unpalatable to many aid donors.

Nonetheless, without an adequate reintegration process, the chances of rebuilding a war-ravaged nation are very low indeed.

It was agreed that reintegration, at its heart, requires finding ways for former combatants, often completely without saleable job skills, to become normal, productive members of society. This, in turn, requires gainful employment and an economy capable of supporting it, because if former combatants cannot find productive outlets for their talents, they are likely to revert to banditry and other damaging employment, thus continuing to exist as socially destructive fringe dwellers in society.

The syndicate discussed the lack of success enjoyed by other means of reemploying combatants, such as appointing former combatants as 'special constables' in the Solomon Islands. The destabilising effect of incorporating all former combatants into the armed forces as occurred in Cambodia was also discussed and considered as an unsuitable means of reintegrating former combatants.

The syndicate also discussed the potentially destabilising effect of long-term refugee camps. Whilst such camps are essential for the humanitarian relief of displaced persons, camps require an exit-strategy to end their existence as soon as practicable in order to avoid genuine refugee camps becoming a place where defeated combatants can go to regroup and thus continue the conflict. It was agreed that pressure should be placed on states to prevent them from supporting the militarisation of refugee camps, and that the practice of converting a place where victims of conflict can find refuge into a base for continuing that conflict should be condemned.

It is for these reasons that any DD&R process must be combined within a wider development process aimed at creating a nation capable of finding productive employment for former combatants, a process which requires long-term commitment from donor nations and international financial institutions.

E The Mandate

The syndicate agreed that, due to the complexity and uniqueness of individual conflicts, any attempt to introduce a rigid pre-prepared framework for DD&R will be doomed to fail. There were, however, points that the syndicate considered vital for a successful DD&R mandate.

The most important of these was, as discussed, the inclusion of DD&R in a wider development program rather than as an end in itself. This requires any mandate to clearly set out the expectations of a DD&R process and, more importantly, requires any expressed goals to be adequately funded.

It was also agreed that a mandate should be flexible enough to allow a UN deployment to switch from peacekeeping to peace enforcement as the situation warrants in order to safeguard the peace process.

IV CONCLUSION

The major conclusion of the syndicate was that a DD&R plan must be flexible to account for the unique nature of individual conflict situations; this precludes the imposition of a pre-prepared legal framework for DD&R operations.

The syndicate also concluded that information operations, facilitated by popular media, are an essential and relatively inexpensive means of safeguarding the peace process and fostering cooperation with DD&R mandates.

The syndicate further resolved that cantonment of combatants is an important tool for conflict resolution, and it is imperative that such cantonments receive adequate financial and logistical support.

It was also considered important that the definition of 'combatant' be expanded to include non-militant participants in conflicts who have a legitimate stake in the peace process.

In order to safeguard the peace process, it was also considered essential that the access of combatant parties to weapons and the economic means to acquire them should be limited to the fullest extent possible.

The issue of the militarisation of refugee camps was also considered important, and the syndicate concluded that refugee camps should be commissioned with a clearly envisioned exit strategy and severe sanctions imposed on those that would seek to convert refugee camps into a base for the continuation of conflict.

Finally it was considered that reintegration is the most important yet most frequently overlooked aspect of the DD&R process and must be adequately supported within a wider economic and social development process in order to build a lasting peace.

V RECOMMENDATIONS

- *That the establishment of a generic DD&R plan not be considered.*
- *That means for information campaigns be further studied and adequately funded.*
- *That means for incorporating DD&R into a wider social and economic development program be further studied.*

Rapporteur: Nicole Schlesinger

CRIMINAL LAW

I EXECUTIVE SUMMARY

- While military personnel are clearly covered by discipline defence laws, many civilian actors are not held accountable for criminal acts they commit on peace operation ‘missions’.
- The *United Nations Convention on Privileges and Immunities* often has the effect of providing immunity from criminal prosecution for UN and associated personnel, despite provisions for waiver of immunity.
- In addition, host states are often unwilling or unable to prosecute. This sends a message which is antithetical to the purpose of the UN, especially to the local population.
- The range of international actors participating in peace operations is diverse. Given this, the lack of direct control of a single party over all of the actors and the important leadership role the UN plays in the peace operations, the syndicate discussion decided to focus on the options for holding Security Council mandated UN employees and contractors (hereafter referred to as ‘UN personnel’) accountable for criminal behaviour.
- To this end, the syndicate discussion recommends further research into the feasibility of the development of a standard UN criminal code, process and enforcement mechanism that would bind all UN personnel participating in a peace operation.
- To supplement such an initiative and to capture peace operation actors who are not covered by another regime, Member States should be encouraged to enact and enforce extraterritorial legislation applicable to their nationals working abroad in respect of criminal behaviour.
- All initiatives should be accompanied by information outreach programs to inform local populations of steps the international community is taking to hold international actors in peace operations accountable for criminal infractions.

II INTRODUCTION

A wide range of participants are involved in modern day peacekeeping missions – military personnel, civilian police, administrative and technical staff and humanitarian workers from non-governmental and intergovernmental organisations (NGOs and IGOs). Apart from the newly established International Criminal Court, which deals only with the most serious of crimes (genocide, crimes against humanity and war crimes), there is no single criminal regime that is applicable to all of these participants.

This has resulted in a failure to prosecute in some instances and inconsistent prosecution in others. Where this occurs, it creates the impression of a culture of impunity in direct opposition to the purpose of the UN, especially in those missions where the UN is tasked with helping to implement the rule of law.

While military personnel serving in missions abroad are subject to the national laws of their contributing countries through the application of military justice laws, civilian personnel are not and are generally subject only to the criminal law of the host country. The host country is often unwilling or unable to prosecute, so effectively civilian personnel can escape criminal prosecution.

III SYNDICATE SYNOPSIS

A Who are the Actors in Peace Operations?

In order to understand the options available for strengthening accountability, the range of actors in the mission area needs to be understood. They are:

- UN mission employees and contractors, that is those acting under the Security Council mandate ('UN personnel');
- Other UN agency employees; other international organisation (IO) personnel. For example UNHCR staff who are in the area because of the situation, but are not acting under the Security Council mandate;
- National actors (governmental and contractor, and seconded to IOs); and
- NGOs (international/independent and those contracted to the UN).

The SRSG of a given peace operation has direct control of the first group only. Given this, the proposal for a standard criminal code below, is envisaged as applying to this group only. It may be possible to extend it to the second group if chain of command arrangements allow this.

While a standard criminal code could not be binding on the third and fourth groups (except if it was applied as applicable law – see below), it could serve as a standard that could be incorporated as a non-binding code of conduct into employment agreements.

B A Standard Criminal Code for United Nations Personnel

The syndicate felt strongly that there should be a clear accountability mechanism for UN personnel. A standard criminal code and enforcement mechanism could be one instrument to achieve this, even though such a code would not be binding on NGOs and other civilian actors not under the control of the UN.

1 The Legal Basis for a Standard Criminal Code

The syndicate discussed what the legal basis for a standard criminal code could be. The key question, as the group understood it, is whether the UN as an institution is able to exercise criminal jurisdiction.

If so, the Secretary-General may be able to promulgate regulations in respect of a standard criminal code, procedures, and enforcement mechanisms that would deploy along with each UN peace operation. Alternatively, the Security Council might mandate such a standard criminal code and procedures for each operation.

If there is no existing legal basis for the UN to exercise criminal jurisdiction, then there may be a call for General Assembly action and/or a treaty-like arrangement to establish it.

2 What Would Be in the Standard Criminal Code?

The syndicate did not discuss the substantive provisions of the proposed standard criminal code in detail. Several participants noted that some crimes are already contained in humanitarian law and human rights treaties (such as torture, murder, sexual exploitation and human trafficking). Such crimes could be used as the basis of further discussion on the content of the standard criminal code.

3 Investigation and Enforcement Mechanisms

The syndicate envisaged a mission-based investigation and tribunal system, possibly similar to that the Board of Inquiry (BOI) regime for military personnel, although it was noted that BOIs are administrative, not criminal investigative mechanisms.

Any jail sentence arising from trial could be served in the country of a Member State with which the UN has an agreement, along the lines of the present system for those serving sentences following convictions through the ICTY and ICTR.

4 *The Standard Criminal Code as 'Applicable Law' where the UN is the Transitional Administration*

Where the UN is acting as the transitional administration, it has the authority to determine the applicable law through regulation; eg in East Timor the UN pronounced that the Indonesian Criminal Code would be applicable law.

In such cases, the UN could determine that the standard criminal code be the applicable law during transition. This standard then becomes 'the law' for the country during transitional administration, applicable to anyone on the territory.

C *Extraterritorial Legislation*

For actors who do not come under the control of the UN, the syndicate thought that the only feasible option for accountability in the absence of prosecution by the host state is the extension of extraterritorial legislation on the grounds of nationality.

Nationality has been recognised as a jurisdictional basis in international law. Australia used the nationality principle as the basis for the *Crimes (Child Sex Tourism) Amendment Act 1994* (Cth). Other countries, such as Sweden, have made their extraterritorial jurisdiction contingent on the act alleged also being a crime in the territory in which it was committed (this principle is known as 'double criminality').

In addition, states have legislated to extend extraterritorial criminal jurisdiction to meet their treaty obligations. For example:

- The *Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons* (1973) is a multilateral agreement that provides for the protection of heads of state, ministers of foreign affairs, and diplomatic personnel. Under its terms, states must enact legislation to criminalise any attack or threat on protected persons or on their 'official premises', 'private accommodation', or 'means of transport'. States must not only provide for jurisdiction over these offences when they are committed on the state's territory, but they must also provide for jurisdiction 'when the alleged offender is a national of that State': art 3(1)(c).
- The *Convention on the Safety of United Nations and Associated Personnel* (1994) requires every signatory state to criminalise certain offences against UN peacekeepers, such as murder, assault, and kidnapping. States must establish jurisdiction over their nationals who commit any of the listed offences: art 10(1)(b). States are obliged to establish jurisdiction over 'stateless persons whose habitual resident is in that State': art 10(2)(b).

States could be encouraged to legislate extraterritorially through a Security Council resolution or through a treaty.

D *The Importance of Accountability to Local Populations*

One participant described success in peace operations as a ‘hearts and minds’ issue. Traumatized populations need to be able to trust peace operations personnel. Justice not only must be done but must be seen to be done.

To this end, UN mission public information programs should include an outreach component that informs the local population of steps taken to ensure accountability pursuant to complaints made against UN personnel by local people.

This can happen immediately and can be expanded as accountability initiatives expand.

IV CONCLUSION

Much work still needs to be done to close criminal accountability gaps for international civilian personnel participating in peace missions. There is scope for both the UN as an institution and Member States to take up the challenge of building effective criminal accountability mechanisms. As the ‘lead agency’ in peace operations and as a representative of the international community, the UN should proactively seek to ensure such accountability mechanisms are developed, rather than simply relying on Member States to enforce what criminal jurisdictions they may have over relevant actors.

V RECOMMENDATIONS

- *That a system be created by which UN civilian personnel in Security Council mandated peace operations are held accountable by the UN for criminal behaviour, to a common standard.*
- *That further research is done to determine the legal basis for such a standard, as well as the options for procedural and enforcement mechanisms to support the application of the standard.*
- *That states be encouraged to enact national extraterritorial legislation applicable to their nationals working abroad in respect of criminal behaviour, to function parallel to the UN accountability framework.*
- *In the interim, that UN mission public information programs should include an outreach component that informs the local population of steps taken to ensure accountability pursuant to complaints made against UN personnel by local people.*

Rapporteur: Jessica Howard

POLICE

I EXECUTIVE SUMMARY

- The limited role played by the concept of rules of engagement for civilian police represents significant cultural, legal and structural differences between the military and the police on peace operations.
- Where acting under an executive mission, civilian police are bound by the applicable law, including international human rights standards.
- The key accountability mechanism for civilian police is the UN disciplinary system, which functions fairly effectively but needs to be improved.
- There is a need for a more effective follow-up mechanism with Member States regarding discipline of their nationals.
- The absence of a civil responsibility mechanism is a gap in the accountability process that needs to be addressed.
- Where the UN intends to act as a transitional administration, consideration should be given to whether the trusteeship provisions in the UN Charter can be utilised.
- It is crucial that expert advice, especially on internal security and law enforcement, is sought during the political processes leading up to the drafting of mandates.

II INTRODUCTION

The increasing complexity and variety of peace operations has seen a dramatic change in the demand for, and role of, civilian police. The *Brahimi Report* noted that ‘a doctrinal shift’ is required in how the UN conceives of, and utilises, civilian police in peace operations. Successful future peacekeeping and peace building operations require that the ‘modern role’ of civilian police be better understood and developed.

The syndicate aimed to produce concrete recommendations in light of the observations in the *Brahimi Report*. In meeting this challenge, the syndicate discussions focussed on the following sub-themes:

- The role of rules of engagement for civilian police;
- Governing the conduct of civilian police; and
- The legal authority or basis for action by civilian police on peace operations.

III SYNDICATE SYNOPSIS

A The Role of Rules of Engagement for Civilian Police

The syndicate considered the role of rules of engagement (ROE) in the context of civilian policing on peace operations. It was noted that ROE arose from a military context and the direct application of the concept of ROE to civilian policing raises cultural and practical issues.

Members of the military are trained to use maximum force in pursuance of their objectives. ROE ensure that there is clarity about the level of, and circumstances in which, force may be used. In contrast, law enforcement officials are trained to use force only as a last resort and when they do to use ‘no more force than is absolutely necessary to achieve the legitimate law enforcement objective.’ These important cultural differences about the use of force reflect the different functions performed by the military and police. The military’s role is to ensure external security; internal security is generally a policing function.

In addressing the internal security needs of a peace operation, police may be armed or unarmed. Two factors will generally govern the decision as to whether police should be armed – the mandate governing the peace operation and the nature of the threat faced. A comment was made that whether a mission is armed or unarmed is not the right starting point. The key question is what kind of mandate is given to the police on a particular operation. This will then govern the decision about how police should be equipped. The arming of police where there is a non-executive mandate is extremely rare (but consider Haiti). Where police are mandated with executive functions – as was the case with UNTAET – arms are more likely to be necessary.

The syndicate also considered the fact that the nature of the internal security threat faced by the police force on a particular peace operation will also govern the decision about whether to arm the force. For example, in a highly weaponised society, being armed may unreasonably compromise the policing imperative of integrating into the society and building trust amongst the local population.

The syndicate noted that to run an executive law and order mission with unarmed police officers would be very complicated. Peace operations are

extremely different operational environments to those from which most civilian police will have come. Some police come from national contexts where the community is used to, and expects, a ‘soft’ approach to policing, eg the UK where police are unarmed. Comments were made that in a post-conflict society it would be extremely difficult for police to establish themselves as a credible law enforcement authority without being armed. This gives rise to a prima facie distinction between executive and non-executive missions – in one, police are likely to be armed, in the other, they are not.

Where police are armed and acting under an executive mandate, they exercise their executive powers according to the applicable law. Unlike the military, police operate within and under a legal framework – in the case of peace operations, the legal framework, or applicable law, will be drawn from the mandate and any regulations made pursuant to that mandate. The use of force by law enforcement officials on peace operations is further governed by international human rights standards (see the *Code of Conduct for Law Enforcement Officials* (1979) and *Basic Principles on the Use of Force and Firearms* (1990)). In this context, there is no ‘space’ for ROE. The applicable law and human rights standards set the terms and conditions for engagement by civilian police.

The syndicate noted that there might be circumstances where ROE are necessary. The first is where civilian police are armed but are not exercising executive functions – which will be rare. In that case, use of force will only be condoned where it is in self-defence and ROE may be required to clarify this position. The second case is where there are formed police units that are armed. In this situation, ROE may be necessary to govern the actions of the unit as a whole.

The limited role played by the concept of ROE for civilian police represents significant cultural, legal and structural differences between the military and the police on peace operations.

B Governing the Conduct of Civilian Police

The syndicate agreed that civilian police should be accountable for their actions – both to the UN and to the people that they serve. On some missions an ombudsman’s office has been established to investigate any allegations of impropriety and oversee the observance of human rights and criminal standards, eg Kosovo. The syndicate noted that consideration could be given to a wider application of this accountability mechanism.

Breaches of the *Code of Conduct for Law Enforcement Officials* are generally dealt with within a disciplinary framework; criminal offences usually fall for determination either under the local criminal laws or by the responsible Member State upon repatriation of the alleged offender. Where serious crimes, in particular, are committed or alleged to have been committed by deployed

personnel, Member States invariably remove that person from the mission and repatriate them in order to avoid the uncertainties of the domestic legal process.

Where acting under an executive mandate, civilian police are bound by the applicable law, including the *Code of Conduct for Law Enforcement Officials*. The key accountability mechanism for civilian police on these operations is the UN disciplinary system. Comments were made that the UN disciplinary procedure needs to be improved and updated. The syndicate welcomed the fact that DPKO is currently reviewing the UN disciplinary process and await its final report.

The syndicate felt that the most pressing issue was the lack of commitment from some Member States to adequately follow-up disciplinary matters for repatriated personnel. Where there are violations not covered by the UN disciplinary process, or where an ‘offending’ person is repatriated to avoid that process, the onus falls on Member States to investigate and prosecute. In this case, there needs to be a commitment from Member States to investigate and prosecute allegations of impropriety amongst their personnel; in some cases, this issue is not being taken seriously.

The syndicate noted that the UN is attempting to improve the process by following up on Member States’ actions. Comments were made that there is a view amongst some Member States that the follow-up mechanism is discriminatory and biased and so do not trust the system. The reputation of the UN disciplinary procedure will continue to be jeopardised until the follow-up mechanism is strengthened.

The difficulty in holding contracted police responsible for their actions whilst on peace operations was identified as a further weakness within the accountability system. Civilian police from some contributing countries are effectively immune from prosecution due to jurisdictional issues arising from their status as non-governmental employees. This may be contrasted with countries that have a national police force from which civilian police are drawn. These police are usually subjected not only to the UN disciplinary process but also their own domestic accountability mechanisms that follow them wherever they are deployed.

The syndicate also briefly considered the issue of immunity from prosecution for UN personnel on peace operations. Comments were made that the issue of immunities needs further consideration in order to standardise practice in relation to the application and granting of immunity.

A serious question arose about accountability of UN personnel, including police officers, for civil liability. The UN has attempted to establish a civil liability mechanism; however, all attempts to date have failed. One participant raised the possibility of introducing a requirement that Member States indemnify debts incurred by their deployed personnel. In response to this

suggestion it was noted that whilst Member States are responsible for their personnel, they are not responsible for the costs incurred by individual officers. The fundamental problem is the absence of any contractual relationship between the individual officer and the UN. Consequently, civil liability issues are currently addressed on an ad hoc basis, if at all. The syndicate felt that this relies too heavily on the willingness of individuals or Member States to voluntarily deal with the issue and suggested that a more formal mechanism is required.

C Legal Authority for Action by Civilian Police on Operations

The syndicate noted that the UN Charter was not drafted with modern peace operations in mind. Consequently, there is no mention in the UN Charter itself of the role and responsibilities of civilian police on peace operations. However, in many transitional administration scenarios, the UN could have applied the UN Charter's trusteeship provisions which may provide a clearer legal basis for action in future peace operations similar to that in East Timor.

The syndicate also noted that executive civilian policing need not necessarily be confined to Chapter VII peace operations. An example where this has occurred in the past is Haiti, where there was a Chapter VI mandate. However, Haiti consented to cede its executive policing powers to a UN civilian police force, as part of that peacekeeping mission. This highlights the fact that civilian police may be able to exercise executive functions under both Chapter VI and Chapter VII mandates.

The syndicate discussed the reality that Security Council mandates are often imprecisely drafted and detail is scant, especially on the role of civilian police. The 'flesh' of the mandate is found in background documents and reports such as the Secretary-General's Report and reports of fact-finding missions. Historically, experts – especially internal security and law enforcement experts – have not been consulted in the drafting of these reports. This is an issue that is being addressed by the UN.

However, in some cases, the Security Council mandate is based on the conclusion of a peace agreement. As a general rule, peace agreements are negotiated between the Member States with diplomatic and military advice, but with no input from internal security experts. This is despite the fact that in many conflicts, serious internal security and law enforcement issues need to be addressed before peace can be achieved (including issues of transnational crime and terrorism). The Ethiopia/Eritrea Peace Agreement provides an example of serious law enforcement issues not being addressed. Therefore, in the negotiation and conclusion of all background documents, including peace agreements, it is essential that internal security experts be consulted.

The syndicate also emphasised the importance of a comprehensive planning process prior to the conclusion of a mission mandate, such as the joint planning undertaken between the military and the police in the DPKO.

IV CONCLUSIONS

A The Role of ROE for Civilian Police

In relation to the role of ROE for civilian police, the syndicate concluded that, whilst ROE are appropriate and necessary for military personnel, ROE are of only limited utility for civilian police. This is due to the different legal framework in which civilian police operate. Where deployed under an executive mandate, the use of force by civilian police will be governed by the applicable law – including the mandate and any regulations promulgated pursuant to that mandate – and relevant international human rights standards.

The syndicate also concluded that the question as to whether to arm law enforcement officials on peace operations depends on both the mandate for a particular peace operation and an assessment of the nature of the internal security threat. Civilian police should only be armed where both the mandate and threat warrant their arming. However, meeting the demands of an executive policing mandate will be extremely difficult unless police are armed.

B Governing the Conduct of Civilian Police

The syndicate concluded that the UN disciplinary system is in need of improvement, particularly regarding the Member State follow-up mechanism. It noted the problems of holding contractors accountable to the same level as government employed personnel.

The syndicate also concluded that the issue of immunities for personnel on peace operations requires clarification and consistency of application.

The syndicate further concluded that there is a need for a civil responsibility/liability mechanism. Holding Member States liable for individual debts incurred on a peace operation is not the solution. It is important that this matter be addressed in order to fill the gap that exists in the accountability framework.

C Legal Authority for Action by Civilian Police on Operations

The syndicate concluded that in future peace operations where the UN intends to act as a transitional administration, consideration should be given as to whether the trusteeship provisions in the UN Charter can be utilised. Use of the trusteeship provisions may provide a clearer legal framework for the execution of executive mandates.

The syndicate concluded that executive policing functions could be granted to civilian police in Chapter VI operations, where there is consent from the host state.

The syndicate also concluded that it is vital that internal security and law enforcement experts be consulted as early as possible in the mission planning process. This would mean including experts on fact-finding missions, in drafting the Secretary-General's Report and in peace agreement negotiations. The syndicate emphasised that it is crucial that expert advice (including on internal security and the rule of law) is sought during the political processes leading up to the drafting of mandates.

V RECOMMENDATIONS

- *That the DPKO continues to emphasise the need for comprehensive strategic planning on a cooperative and collaborative basis.*
- *That the DPKO address the need for sound management of police within a peace operation to effectively implement the mandate.*
- *That internal security experts be consulted in the negotiation of peace agreements.*
- *That the UN pursue a more effective follow-up mechanism with Member States regarding discipline of their nationals.*
- *That the UN address the absence of a civil responsibility mechanism for peace operations.*

Rapporteur: Dale Stephens

MILITARY

I EXECUTIVE SUMMARY

- The legal framework that underpins the conduct of military activity in contemporary peace operations is in a process of refinement. The reassessment of the cardinal features of a peacekeeping operation in tandem with the emergence of doctrine accompanying enforcement action, offers many possibilities for ensuring that peace operations may be more effective.
- Questions as to the use of force are critical in any military operation, particularly one carried out under the UN aegis. The broadening scope of mandates provided to UN forces engaged on peace operations gives rise to a serious consideration of the question of the use of force permitted by such forces. The ‘all necessary means’ formula used in an increasing number of Security Council resolutions, particularly those related to ‘enforcement action’ provides a liberal licence for the application of force but such licence is not without limits. There exists very real contextual and constitutional limits to an ‘all necessary means’ resolution.
- It has been recognised by the Secretary-General that the use of force in self-defence by UN forces may itself give rise to the application of the law of armed conflict. In 1999, the ST/SGB outlined the obligations and rights which would apply to a UN force in such circumstances.¹ The ST/SGB itself seems to go beyond the stipulations of the *United Nations Convention on the Safety of United Nations and Associated Personnel* (1994), which set a narrow basis for the application of laws of armed conflict (LOAC) to UN forces. Suffice to say, in the face of these two developments, the arguments as to the application of the LOAC to UN forces have now largely subsided. The remaining challenge, however, is to ensure that the legal and political criteria for acknowledging the

¹ Observance by United Nations Forces of International Humanitarian Law, UN Doc ST/SGB/1999/13, 6 August 1999, (‘ST/SGB’).

existence of an armed conflict involving a UN force are properly defined and enunciated.

II INTRODUCTION

Questions concerning the use of force by military members engaged on peace operations are becoming more complex as the demands placed upon military members are becoming greater. Traditional peacekeeping always allowed force to be used in personal self-defence and such narrow authority was consistent with the relatively limited mandate provided to the PKF. The broadening scope of activities mandated by Security Council resolutions applicable to peace operations has given rise to a reconsideration of the extent of force which may be authorised. This has presented new challenges to determining the level of force which could/should be employed.

Security Council resolutions which contain ambitious security aims and which invoke the 'all necessary means' formula in their content, provide a useful basis for military members to employ force within necessary limits. Such resolutions are not open-ended however, and peacekeeping forces, even under the aegis of such Security Council resolutions do not have an unlimited licence to employ force.

Coupled with the growing authority to use force is the concomitant question of the application of legal regimes that go beyond the normal self-defence parameters. Hence, due consideration is to be given to the circumstances under which peacekeeping forces may be engaged in an armed conflict. The test for the application of such a body of law is ambiguous and somewhat contentious in the context of a peace operation.

III SYNDICATE SYNOPSIS

A Legal Limits on the Forces

In examining the legal regime applicable to the use of force by a peacekeeping force, two questions were identified. These questions were, firstly, 'does a Security Council resolution authorising PKF to use 'all necessary means' place any legal limitations on those forces?' and secondly, 'is it now an accepted legal principle that the LOAC applies to all UN peacekeeping forces that are in armed conflict?'

In respect of the first question posed, there were limits identified in respect of the authority to use force even in circumstances where a peacekeeping force was acting under a Security Council resolution which included the 'all necessary means' formulation. These limits may be broadly split into two

categories, namely ‘contextual’ and ‘constitutional’, and it was recognised that these two categories were not necessarily mutually exclusive.

1 *Contextual*

The use of the term ‘necessary’ in the ‘all necessary means’ formula carries its own self-limiting mechanism; namely, the stipulation that actions must be reasonably construed as necessary. This will entail a factual analysis of the issues at hand to determine whether the conduct contemplated is in fact ‘necessary’.

2 *Constitutional*

The interpretation of a Security Council resolution, even one including the ‘all necessary means’ formula, must be undertaken having regard to the objects and purposes of the UN Charter. Accordingly, a Security Council resolution must not violate fundamental obligations, ie those possessing a *jus cogens* character. Thus genocide could never be authorised as a ‘necessary means’ to anything.

As a matter of construction, it would be presumed that an ‘all necessary means’ stipulation would have to be interpreted consistently with general international law. An operational imperative could, however, justify overriding general international principles where necessary and there is an applicable Security Council resolution with the ‘all necessary means’ formula included.

It was generally recognised by the group, however, that the UN Charter plainly accords priority to a Security Council resolution by virtue of art 103. This priority is reinforced by arts 25 and 48 which oblige compliance by Member States with decisions of the Security Council. Accordingly, a broadly worded Security Council resolution does permit a wide legal ambit.

B *Application of the Laws of Armed Conflict*

In respect of the second question identified, namely ‘is it now an accepted legal principle that the LOAC applies to all UN peacekeeping forces that are in armed conflict?’ it was generally agreed that the answer to this question must be in the positive. However, the question contains within it a number of assumptions that did cause considerable debate.

Hence, it is acknowledged that a national contingent engaged in an armed conflict, even when acting under the aegis of the UN, gives rise to complex issues of law and fact which have to be determined in each case. National contingents are very likely to be bound by differing treaties that may be applicable in an armed conflict, especially in relation to the *Additional Protocols* to the 1949 *Geneva Conventions* and those conventions directed towards specific weapons controls, ie the *Ottawa Convention* on anti-personnel landmines. While UN status has very real legal significance in respect of privileges and immunities, a Force Commander did not ‘command’ a UN force but rather only controlled, in an administrative sense, such a force. The UN was

not a party to the numerous instruments applicable to an armed conflict and hence national contingents were still bound by that law which their countries had agreed to be bound.

In respect of the existence of an armed conflict, there was a general consensus that common art 2 of the *Geneva Conventions* applies the relevant test, however the criteria contained within that common article are necessarily general, ie 'all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.'

There was considerable debate as to the status of the ST/SGB. The consensus position was that, at best, the ST/SGB represented 'guidelines' which were not fully binding on national contingents. Moreover, it was recognised that the ST/SGB was not a precise statement of customary international law, and if read literally some aspects were representative of a 'progressive' development of the law.

There was considerable discussion as to when a UN force would be party to a conflict. While the current trend of peace enforcement operations surely raised the possibility of participation in an armed conflict more easily than before, there was some disquiet as to the circumstances when such a conflict would be triggered. The principal objection emanated from the consequences of a determination that an armed conflict involving a UN force was in existence. Principally this concerned the status of a UN force as 'combatants' in any such armed conflict which was not regarded as a desirable outcome. In this regard, the dangers of an opposing force setting up the legitimacy of their actions by applying an intense use of force was particularly troublesome. Accordingly, it was the strong view held by many in the group that the test for the existence of an armed conflict involving a UN force was higher than what might apply to two national military forces. This was predicated upon the view that a UN force represented the will of the international community and should be accorded a particular status in such circumstances. While it was acknowledged that actions in 'self-defence' may ostensibly trigger the application of an 'armed conflict' (as anticipated by ST/SGB) the better test was that contained in the *United Nations Convention on the Safety of United Nations and Associated Personnel* (1994) ('*Safety Convention*').

The particular relevance of the *Safety Convention* to the issue of the application of LOAC to UN forces lies in art 2(2) of the *Safety Convention*, which states:

This Convention shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.

This *Safety Convention* now has a number of States Parties and recognises the application of the LOAC to UN forces in circumstances of a Chapter VII 'peace enforcement' operation, where the threshold for armed conflict is commensurately set at a higher threshold.

In essence, there was a consensus that the definition of self-defence applicable to a UN force must be wide enough to permit a realistic opportunity for UN forces to protect themselves and others they are charged to defend, whatever the prevailing threat situation. There was a concomitant recognition that while UN forces could be parties to an armed conflict (to which the LOAC would apply), the threshold for the application of such a body of law is set at a high level.

IV CONCLUSION

The use of force to be employed upon a peace operation is a dynamic issue. It has been a traditional criticism of peacekeeping operations that the minimal authorisation for the use of force has severely compromised the effectiveness of the UN Force. The emergence of 'enforcement action' operations in the 1990s, coupled with broad Security Council mandates have given rise to serious questions concerning the use of force. It is plainly the case that ambitious mandates should authorise a greater use of force by UN forces to meet such aims when in troubled areas. This does necessarily give rise to the potential involvement of UN forces in an armed conflict. Such an occurrence presents both advantages and disadvantages in respect of the use of force. It is timely for serious investigation of the application of the LOAC to UN forces to be undertaken by UN agencies themselves.

V RECOMMENDATIONS

- *That a statement from the UN Secretary-General be issued on the circumstances when the common art 2 threshold applies to UN peacekeeping forces.*

Rapporteur: Jackson Maogoto

HUMAN RIGHTS

I EXECUTIVE SUMMARY

- Much of the thinking, as well as the existing organisational structures in this area, remain mired in the history of traditional peacekeeping rather than in the future of peace building. The UN has not declared its formal adherence to any human rights standards or obligations.
- Factors that have prevented the UN from holding its personnel accountable for failing to follow its own high standards, such as insufficient resources, unclear instructions, and lack of appropriate command and control arrangements are still a matter of concern.
- There is a lack of formality surrounding the UN's responsibilities for upholding human rights. The issue of the nature and extent of the UN's obligations under international human rights law when it conducts peacekeeping operations has repeatedly arisen. Key among the issues is the lacuna that has developed as UN operations have assumed governmental functions without the UN formally committing to uphold international human rights standards. There has been official resistance to formalising the UN's human rights obligations.
- The UN's human rights obligations in its peacekeeping capacity stem from general principles of international law and the application of the principle of functionality. General principles of international law, however, have evolved principally through state practice. Given that neither a general principle of international human rights law, nor the application of the principle of functionality establish a link to the monitoring and complaint mechanisms of the principal human rights treaties, and given the current lack of UN regulations, any provisions for applicable standards and enforcement mechanisms have to be separately drafted and incorporated into the mandates of UN missions, if they are to appear at all.
- The *Memorandum of Understanding between the Office of the High Commissioner for Human Rights (OHCHR) and the Department of Peace Keeping Operations* (1999) is a result of the Secretary-General's 1997 reforms to 'mainstream' international human rights standards into

all areas of the UN's work. However it does not establish any form of human rights regulations to be incorporated into the mandates of operations, being rather a statement of areas and methods of cooperation between the departments.

II INTRODUCTION

The objective was to examine the trend in human rights with a view to identifying:

- The nature and scope of the call to integrate human rights;
- The potential legal bases upon which peace operations may be bound to comply with human rights standards;
- Those 'human rights' which are relevant to peace operations; and
- The obligations of peacekeeping personnel with respect to these human rights.

There was an effort to provide the basis for the adoption of recommendations on the most appropriate method of achieving the integration of human rights considerations into peace operations – thus reconciling the rhetoric of human rights with the reality of the issues confronted by personnel in peace operations.

Discussion took place on UN practice in a variety of situations, where it has been involved in brokering peace agreements, and has committed itself either through the presence of a military force, a multi-functional operation, or by technical or developmental assistance.

The legal principles which govern human rights were discussed. These are derived, *inter alia*, from the UN Charter, the *Universal Declaration of Human Rights*, the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights*. The development of constitutional parameters that govern UN operations was analysed.

An exposition of the legal doctrines pertaining to applicability of human rights and attendant obligations on the UN, and an examination of the scope of responsibility, were debated. This was followed by a consideration of how UN practice in the field of human rights protection in peacekeeping situations complies or does not comply with the legal principles. Suggestions of an improvement to UN practice, the formation of a set of principles under which human rights protection assistance by the UN should be given and what form it should take, were also considered.

III SYNDICATE DISCUSSIONS

A *Potential Legal Bases on which Peace Operations May Be Bound to Comply with Human Rights Law*

The object was to resolve the issues regarding the legal basis upon which a peace operation may be bound to comply with international human rights standards. In many ways this issue is moot as the UN has the primary responsibility for setting and maintaining human rights standards and the development of best practice in this area. It was essential however to at least map out some of the potential bases for such an obligation.

1 *UN Charter*

The UN Charter does not create any immediate or binding obligation upon the UN or its members to protect human rights and speaks in aspirational terms of the need to 'reaffirm faith' in fundamental human rights (Preamble). At the same time, the UN Charter frames human rights protection as a matter of global concern and states that 'promoting and encouraging respect for human rights and for fundamental freedoms' as well as maintaining international peace and security are fundamental purposes of the UN (art 1(4)).

2 *Security Council Resolutions*

An evolving trend in UN peacekeeping since the end of the Cold War, has been the involvement of UN operations in developing governmental institutions in conflict-ravaged lands. For this purpose, some peace operations have temporarily assumed some or all sovereign powers. Despite this trend, when the UN has undertaken governmental functions, its human rights obligations under international law have remained ambiguous. There has been a marked commitment by the Security Council in the last decade to incorporate human rights based provisions into its peace operations. These aim to address the lack of formality surrounding the UN's responsibilities for upholding human rights.

3 *Host State Obligations*

Where a state has ratified or acceded to a human rights treaty, all peacekeeping personnel are arguably bound to respect and observe the relevant standards as part of domestic law. As the Code of Personal Conduct for Blue Helmets notes, all personnel must 'respect the law of the land' (rule 2).

4 *Sending State Obligations*

Where a state has ratified or acceded to a human rights treaty, it is arguably bound to ensure that the residents of that state who participate in a peace operation, but remain subject to the jurisdiction of the state, comply with the relevant human rights standards. This position would apply only to agents of the state such as members of the defence or police forces as opposed to private residents.

5 *Memorandum of Understanding between the Office of the High Commissioner for Human Rights and the Department of Peace Keeping Operations*

The *Memorandum of Understanding between the Office of the High Commissioner for Human Rights (OHCHR) and the Department of Peace Keeping Operations* (1999) is a result of the Secretary-General's 1997 reforms to 'mainstream' international human rights standards into all areas of the UN's work. It does not establish any particular form of human rights regulations to be incorporated into the mandates of peace operations. Significantly, however, the *Memorandum of Understanding* promotes the integration of 'human rights components' into peace operations whose work is to be based upon the standards of international human rights law defined in the covenants, declarations, guidelines, and other instruments.

B *Human Rights Relevant to Peace Operations*

The calls for the integration of human rights into the mandate of peace operations have been exceedingly general. References to human rights have generally been used in a generic sense without any reference to what this term actually entails. But this is a significant issue if peace operations are to operationalise the calls of the Security Council and others to integrate human rights into their work.

The list of rights deemed relevant to peacekeepers in the *United Nations Peacekeeping Handbook for Junior Ranks* is drawn explicitly from the *Universal Declaration on Human Rights*. But this is but one part of the corpus of international human rights standards (which is actually non-binding in its own right). Thus there is a threshold question as to the meaning of human rights. Does it extend to all human rights instruments both binding and non-binding, or is it confined to the six key human rights treaties? Does it include those human rights which are recognised as forming customary international law or generally accepted principles of law? Moreover, are only certain rights relevant to peace operations and if so which ones?

C *The Obligations of Peace Operations with respect to the Implementation of Human Rights Standards*

As a guide, states are generally considered to have three obligations with respect to each human right:

- An obligation to respect, which requires a state to refrain from actions which would violate the right;
- An obligation to protect, which requires a state to protect an individual against the violation of his or her right by a non-state actor; and
- An obligation to fulfil or promote which requires a state to take active measures to secure the full and effective enjoyment of the right.

The calls for the integration of human rights into the mandate of peace operations do not provide any explicit direction as to the nature of the

obligations with respect to human rights. The obligation to respect human rights as set down in the Code of Personal Conduct for Blue Helmets is not particularly onerous or problematic.

IV CONCLUSION

There has been an evolving trend in UN peacekeeping since the end of the Cold War, in which UN peace operations have become involved in developing governmental institutions in conflict-ravaged lands. For this purpose, operations in Namibia, Cambodia, Eastern Slavonia, Kosovo and East Timor have temporarily assumed some or all sovereign powers. Despite this trend, when the UN has undertaken governmental functions, its human rights obligations under international law have remained ambiguous. Respect for human rights in the context of UN operations is often precarious. Frequently, UN operations are deployed into situations of public emergency and breakdowns of the rule of law that justify the temporary limitation or derogation from international human rights standards.

It should be strongly emphasised that although the UN Charter does not create any immediate or binding obligation upon the UN or its Member States to protect human rights and speaks in aspirational terms of the need to 'reaffirm faith' in fundamental human rights, at the same time, the Charter frames human rights protection around the world as a matter of global concern. The Charter states that 'promoting and encouraging respect for human rights and for fundamental freedoms' is a chief purpose of the UN, enmeshed within its basic purpose of maintaining international peace and security.

V RECOMMENDATIONS

- *The syndicate endorses the Standardised Generic Training Module (SGTM) on Human Rights and the Code of Conduct developed by DPKO, and encourages the continued development of training modules in human rights for all personnel on peace operations, which integrate all relevant human rights standards and obligations (eg the rights of women and children).*
- *That redeployment training include a focused country analysis that contextualises the situation by identifying the key threats to the enjoyment of human rights, drawing on existing materials and country reports.*
- *That the development and provision of focused and mission-dedicated human rights training for specialists (eg all personnel who enjoy high mobility, such as military observers) to empower more accurate monitoring and reporting of human rights violations.*
- *That the mainstreaming of the institution of an independent ombudsman to monitor, collect and document human rights violations of all personnel acting under a UN mandate be encouraged.*

Rapporteur: Jon Cina

ACCOUNTABILITY

I EXECUTIVE SUMMARY

- Accountability is a broad concept that impacts on every area of peacekeeping operations. The syndicate discussed what accountability implies and the consequent obligations on peacekeeping deployments and the personnel who work on them. The group noted that past practice reveals serious inconsistencies in the processing of allegations that peacekeepers have been involved in human rights violations, and that such shortcomings can undermine the transparency and legitimacy of the peacekeeping operations concerned.
- The syndicate explored two questions. First, whether the Fact-Finding Commission provided for in art 90 of *Additional Protocol I* to the 1949 *Geneva Conventions* could be used as a standardised accountability mechanism for responding to allegations against peacekeeping personnel. The group considered that it could not fulfil such a role due to its limited mandate and lack of acceptance by the international community but that it might provide useful guidance for the establishment of uniform processes.
- The second question concerned the potential complicit liability of NGOs under the *Rome Statute*. The group felt that this issue was of little practical relevance, given the likely focus of the ICC, the need to show intent to establish criminal liability, and the applicability of the universal principle of individual criminal responsibility to NGO personnel.
- The syndicate suggested general measures that could be implemented to improve current accountability awareness and processes, including the enhancement of individual contracts of employment, SOFAs and SOMAs; the establishment of a standard accountability mechanism with jurisdiction over specific peacekeeping operations; the expansion of the UN Special Rapporteur system to peacekeeping operations; and an international instrument to define and enforce agreed standards of accountability on peacekeeping operations.

II INTRODUCTION

A *Mandate*

The syndicate convened to discuss the accountability of actors on peacekeeping operations. Members of the group were asked to examine two specific problems:

- The feasibility of creating a uniform mechanism for responding to allegations that members of a peacekeeping operation have committed human rights violations; and whether the Fact-Finding Commission established under art 90 of *Additional Protocol I* to the *Geneva Conventions* of 1949 provided a useful model for such a mechanism;
- How NGOs could avoid complicit liability under the *Rome Statute* for activities that have a possible nexus with human rights violations.

B *Preliminary Issues*

The syndicate noted that the question of accountability was one of the most fundamental issues in peacekeeping operations as it concerns the transparency and therefore the legitimacy of the operation. The centrality of the concept was reflected in the frequent references to accountability during many of the Rule of Law Conference presentations and syndicate reports.

The syndicate began by establishing the context in which it would consider the two problems, defining accountability and delineating a framework of issues intrinsic to any system of accountability. The group next analysed various aspects of the problems and explored potential solutions. Finally, the syndicate proposed general recommendations for improving accountability on peacekeeping operations.

III SYNDICATE SYNOPSIS

A *Definition*

The syndicate endorsed the Humanitarian Accountability Project's definition of accountability, noting that it included what discussants considered to be all of the required elements of the concept:

Being accountable means explaining one's actions and inactions and being responsible for them. Individuals, organisations and states have to account for their actions. Accountability also means that individuals, organisations and states may safely and legitimately report concerns and complaints and receive redress where appropriate.¹

¹ Humanitarian Accountability Project, *Humanitarian Accountability: Key Elements and Operational Framework*, 11 October 2001, HAP Index ACC/01/09/2001.

B The Accountability Framework

The syndicate suggested a conceptual framework for accountability, and considered that it should define:

- Who is accountable;
- To whom such actors are accountable;
- What such actors are accountable for; and
- Who implements accountability mechanisms.

The group stressed that fundamental goals of accountability are transparency and accessibility, as the rule of law requires that justice should be universal and should be done and be seen to be done.

In the context of peacekeeping operations, the syndicate identified two distinct types of accountability:

- Political accountability, which involves reporting and processing allegations through a regulatory system that has no independent enforcement power, such as the UN; and
- Legal accountability, which focuses on criminal and civil proceedings and the availability of compensation.

More specifically, the syndicate felt that:

- All actors in all peacekeeping components on deployment, including those granted immunity, as well as non-governmental and other private entities, should be accountable;
- Actors are accountable to variety of different entities, including national and intergovernmental civilian and military authorities, and UN mission, headquarters and agency regulatory mechanisms;
- Actors should be accountable for serious human rights violations;
- Accountability mechanisms are implemented by a variety of actors, including national criminal and civil justice systems and the UN.

C A Uniform Accountability Mechanism

Can the Fact-Finding Commission envisaged in art 90 of *Additional Protocol I* to the *Geneva Conventions* be used to investigate allegations that members of a peacekeeping operation have committed human rights abuses, or be used as a model for such a standard investigative mechanism?

1 The Need For a Uniform Mechanism

The syndicate discussed various examples of inquiries and accountability mechanisms, focusing in particular on UN BOIs and the reviews conducted into allegations against the Canadian Airborne Regiment in Somalia and into the UN's activities in Srebrenica and Rwanda. The group noted the inconsistencies of approaches and results represented by these differing responses to allegations that personnel on peacekeeping deployments had been

involved in human rights violations. The group agreed that in an accountability context, the major shortcomings of existing response options was a lack of certainty and clarity, and that they therefore failed to provide the transparency and accessibility that were deemed to be prerequisites of an effective system of accountability.

2 *The Article 90 Fact-Finding Commission*

After sketching the history, composition and theoretical operation of the Fact-Finding Commission established in art 90 of *Additional Protocol I* to the *Geneva Conventions*, the syndicate considered whether it could be utilised in peacekeeping operations. It was noted that the Fact-Finding Commission could have a theoretical role as an accountability mechanism in the context of allegations of human rights violations by peacekeeping personnel. However, the group recognised that any such role would be limited to considering alleged grave breaches of the *Geneva Conventions*, and would be further restricted by the limited availability of the Fact-Finding Commission: to commence an inquiry, a state or states that have met the threshold requirements under art 90 must trigger the Fact-Finding Commission's competence.

Given these limitations and the fact that the Fact-Finding Commission's goals or legitimacy have not been accepted by states – it has never conducted an inquiry despite having had the requisite number of qualified State Parties since 1991 – the syndicate concluded that as it is presently configured, the Fact-Finding Commission is unsuitable as a uniform accountability mechanism.

However, the group agreed that the Fact-Finding Commission might provide a useful analogy to guide reform of existing peacekeeping operations accountability practices. The syndicate identified four elements of the Fact-Finding Commission's design that could have broader application:

- Standing nature encourages consistency;
- Use of expert panels composed from a standby list of 'fact-finders'
- Fact-finding based on an agreed body of principles or rules; and
- No competence to determine criminal liability.

Developing this line of reasoning, the syndicate proposed reform of accountability apparatus within and outside peacekeeping missions. Within missions:

- A standard fact-finding process to respond to alleged violations could be incorporated into the mission, drawing its members from a standing panel; or
- Alternatively, existing ombudsman and complaints authorities could be enhanced and standardised.

Outside the peace mission framework:

- Clarification of the applicability of human rights standards to peacekeeping operations, a proposal lying between the current

unsatisfactory situation and external judicial processes – national and international;

- Extending the focus of UN human rights system Special Rapporteurs or Special Commissions of Inquiry (such as those used to report on human rights abuses committed in the Former Yugoslavia and East Timor) to cover peacekeeping operations.

The syndicate further noted the desirability of encouraging broader accountability of peacekeeping operations. While efforts to secure accountability focus on alleged violations of human rights and international humanitarian law, the group recognised that there are other important subjects that warrant inclusion within the jurisdiction of formal accountability mechanisms, in particular obligations towards the environment. The syndicate highlighted the need to identify such areas and to review and develop appropriate bodies of rules with a view to facilitating accountability as a means of increasing protection.

D NGO Complicity under the Rome Statute

How can NGOs avoid being charged with complicity under the *Rome Statute*? The syndicate acknowledged that there is a legitimate technical argument that complicity is a legal problem in this context. However, the experience of the ICTY and ICTR indicates that the ICC is likely to focus on primary perpetrators of crimes within its jurisdiction, and that if any peacekeeping personnel fell within that category, the ICC would assert jurisdiction on the basis of individual criminal liability rather than those individuals' associations with NGOs. For those reasons, the group concluded that the complicity argument had little practical implication.

Nevertheless, the syndicate considered it useful to make recommendations to enhance NGO accountability, focusing on increasing transparency. Proposals focused on voluntary and coercive means of securing NGO agreement that their activities on peace operations be subject to the jurisdiction of applicable fact-finding processes or other accountability standards and mechanisms:

- Voluntary measures entailing the enhancement of existing codes of conduct in the NGO movement, such as the Red Cross and Red Crescent Code of Conduct, the Sphere Project and the Humanitarian Charter, or the development of new international and domestic codes of conduct that NGOs would subscribe to; and
- Coercive or conditional methods include utilising existing accreditation procedures that allow NGOs to register at UN HQ, Geneva and even peacekeeping missions, making NGO accreditation conditional on agreement.

The group noted that the most effective means of engaging NGOs was to appeal to their most valuable asset, their reputations.

*E General Measures to Increase Accountability**1 Short-Term*

The syndicate discussed immediate short-term measures that might increase accountability and identified a number of approaches:

- Enhanced protection of the local population against abuse, especially gender-based, should be given high priority;
- Where exclusive criminal jurisdiction is reserved to the sending states, an obligation on those states to take action and report back to the Secretary-General should be explicitly built into SOFAs, Letters of Assist and other relevant instruments;
- Where exclusive criminal jurisdiction is waived by the sending state, a standard mechanism should provide for a fair and prompt trial in the domestic jurisdiction where possible, agreement that any sentence should be served in the home state, and widely accessible compensation procedures;
- Troop contributing nations should agree to certain standards of training, deployment and response to allegations against personnel;
- There should also be an increased emphasis on accountability at all levels of training, especially during national contingent and mission briefings;
- The regulatory framework should be strengthened, beginning with codes of conduct;
- Enforcement should be given a higher priority, through for example more rigorous monitoring of behaviour;
- The development of accessible mechanisms including ombudsman and complaints authorities, should be encouraged;
- Individual contracts should include agreement to be bound by enhanced accountability procedures and mechanisms;
- Mission wide guidelines should be adopted, particularly on operations where the mission is vested with executive authority; and
- Compensation mechanisms should be widely publicised and accessible.

2 Long-Term

The syndicate considered that a convention or other international instrument to define and enforce agreed standards of accountability on peacekeeping operations would be a worthwhile long-term goal.

IV CONCLUSION

The syndicate concluded that there is a clear and urgent need to enhance the consistency, certainty and effectiveness of responses to allegations that personnel on peace operations, broadly defined, have committed human rights violations. While the art 90 Fact-Finding Commission is not a suitable model, the syndicate proposes that some of its characteristics, if combined with various

strategic and technical improvements to existing mechanisms, would increase the effectiveness and credibility of the current system of accountability.

V RECOMMENDATIONS

- *That DPKO, in partnership with other interested parties, including the UN, intergovernmental, national and private entities, define minimum standards of accountability applicable to peacekeeping operations, focusing in particular on the subjects and scope of accountability in that context.*
- *That DPKO undertake a review of existing accountability mechanisms relevant to peacekeeping operations to identify areas that do not meet such standards.*
- *That DPKO and other interested parties consider and implement various immediate and longer term measures to address the lack of consistency, clarity and transparency that characterise current accountability processes governing peacekeeping personnel.*

Rapporteur: Britt Conidi

TRANSITIONAL ADMINISTRATION & ASSISTANCE

I EXECUTIVE SUMMARY

- Participants considered the nature and scope of the international legal obligation to prosecute individuals suspected of committing violations of IHL and human rights norms, and the potential violation of international law through the grant of amnesties. The syndicate also considered the broader issues of transitional administrations, particularly the specific aspects of peace operations in the pre-operation planning stages of transitional administrations.
- The recommendations proposed by the syndicate focussed on the pre-operation planning stage, particularly the assessment of rule of law institutions and human resources in the host country. A number of recommendations were made that focussed specifically on the recognition of rule of law expertise and principles in the planning stages of peace operations. This planning stage arises after peace agreements have been concluded, so the discussion focused on the implementation, as opposed to negotiation, of peace agreements. The vulnerable nature of failed, collapsed and dysfunctional states was explored with reference to the previous peacekeeping operations in East Timor and Kosovo.

II INTRODUCTION

The Chairman, Sir Ninian Stephen, and the Facilitator, Professor Ove Bring, identified the key issues of the syndicate discussion at the outset. These key issues were identified with reference to the concept paper prepared by the syndicate rapporteur and with reference to the general issues concerning transitional administrations.

Professor Ove Bring clearly identified at the outset that the obligation to prosecute and extradite suspected perpetrators of genocide, crimes against humanity, torture and grave violations of the *Geneva Conventions*, had legal

content. It was normative, persuasive and important from a legal policy perspective. Whilst the relevant treaty law was 'dormant' through lack of use, recent interest by Member States in the application of principles of international law was indicative of the normative quality of these principles. The application of international legal principles was apparent in a number of important developments including: the establishment of the ad hoc international criminal tribunals for the Former Yugoslavia and Rwanda; the Pinochet extradition proceedings and decision of the House of Lords; the proceedings in relation to the former dictator of Chad; and the ratification of the *Rome Statute of the International Criminal Court*. A noted exception to the primacy of prosecution was the impact of Security Council resolutions that identified reconciliation, as opposed to accountability, as a priority of establishing and maintaining international peace and security. If the Security Council so determined that reconciliation was a priority, then international lawyers need to accept this although any amnesties that are subsequently granted may have important implications for peacekeeping operations. It was recommended that the syndicate should discuss a recommendation that amnesties were not to be granted for serious international crimes unless the Security Council determined otherwise.

III SYNDICATE SYNOPSIS

The syndicate discussion was polarised between two philosophical views of international law, those that emphasised the normative quality of international law and those that adopted a realist approach to the issues. The recommendations reflect this polarisation, although ultimately both approaches were able to contribute to the recommendations made.

A Amnesty

The issue of granting amnesties, particularly the implications of UN practice in doing so despite applicable principles of international law concerning certain amnesties, was a controversial issue for the syndicate discussions. At the outset there was some confusion about the actual definition of amnesty and the stage at which an amnesty may be granted. It was acknowledged that amnesty could apply in an obvious way by a general amnesty granted to a class of people, that it could apply in the civil and criminal contexts such as in South Africa and that the prosecution process itself in common law countries had in-built mechanisms for amnesties to facilitate the prosecutorial process. In the case of the last example the syndicate discussed the distinction between the general grant of amnesty and the giving of an indemnity by an individual prosecutor.

Whilst it was conceded that UN practice was inconsistent in relation to amnesties, there appeared to be recognition that amnesties would not be granted by the UN for certain international crimes. In the absence of a specific policy or directive from the General Assembly, Security Council, other organ of the UN and or any of its agencies, this matter remained unresolved.

The syndicate was unable to reach a consensus on proposing a recommendation that would give some direction to future peace operations, particularly in relation to UN practice and the individual actions of peacekeepers. The philosophical polarisation of the syndicate prevented a full and frank discussion of the inconsistent practice of the UN and its policy on amnesty. Due to the lack of clarity and willingness to agree to a recommendation for the future, the syndicate resolved to emphasise the existing Security Council resolution 1325.¹ That Security Council resolution, on Women and Peace and Security, acknowledged that amnesties could be considered. The syndicate noted the formulation of that Security Council resolution. It recommended that the UN look further into the issues of amnesty and prosecution and assess how the ambition expressed in Security Council resolution 1325 and other UN documents has worked in the actual practice of peace processes and in the context of recent peace operations.

B Rule of Law and the Planning of Peace Operations

The primary focus of the syndicate discussions was the approach of the various players in peace operations, particularly in relation to recognising and applying rule of law principles.

The syndicate benefited from the high level of expertise of the participants, particularly in relation to previous peace operations and the actual decision making processes of the different members of the UN family. The syndicate drew from this experience and made a number of specific resolutions concerning the inclusion of rule of law principles and expertise in the planning of peace operations.

C The Expansion of Stand-By Arrangements

The syndicate discussed how further use could be made of existing stand-by arrangements for peace operations. It was recommended that such arrangements be expanded to include rule of law specialists as an integrated part of these stand-by arrangements.

D Rule of Law Specialists and Assessment Teams

The expansion of stand-by arrangements had a number of dimensions. In the current preparation for peace operations the UN engages in critical stage assessments of the host country situation. This assessment, and the inclusion of aspects of the rule of law, serves as a background to the Secretary-General's Report. The Secretary-General's Report is presented to the Security Council before it provides the mandate for the particular peace operation. In this process, it was recommended that the UN early assessment include a rule of law team. Such teams would include police, judicial and human rights experts.

¹ SC Res 1325 (2000), 31 October 2000.

It was recommended that specialists in juvenile justice and gender should be considered for inclusion in such teams. It was acknowledged that children were often the unfortunate casualties in armed conflict through recruitment and coercive cooption into the armed forces. The teams would, *inter alia*, identify the human resources available in the host country, such as judges, court administrators, lawyers and other members of the legal profession, and assess the capacity of these rule of law resources.

The mandate of assessment teams varied according to the mission concerned but the inclusion of a rule of law approach to the planning stage had important implications.

1 Training Needs

It was recommended that the UN early assessments, in consultation with local experts, include training needs in host countries with regard to judicial personnel in those countries.

2 Physical Infrastructure

If a rule of law assessment of the host country was carried out, then the Member States, through the Secretary-General's Report, would have information concerning the physical infrastructure of rule of law institutions and human resources. The examples of Kosovo and East Timor highlighted the plight of states in post-conflict settings, with damage and destruction of physical infrastructure and the need to rebuild judicial systems. The rebuilding of judicial systems incorporated a number of key rule of law institutions and human resources. These institutions included police facilities, court buildings, and detention facilities. It was recommended that assessment teams should assess and take into account the host state's problems with physical infrastructure.

3 Applicable Law

The applicable law in post-conflict operations was also raised as an important issue. The identification and application of the domestic law in and of itself has important implications. It was recommended that the assessment teams must take into account the law that is applicable in the operation area, including relevant criminal procedure. The failure to assess this as an issue at an early stage was a feature of the peace operations in East Timor and Kosovo. It was emphasised that earlier awareness of this issue would assist in future operations.

E Integrated Mission Task Force

It was recommended that the Integrated Mission Task Force (IMTF), established on the suggestion of the *Brahimi Report*, include a rule of law working group. That working group would liaise with the World Bank, agencies of the UN and other actors. It was identified that the World Bank

conducts its own rule of law assessment of Member States and this expertise could be of assistance to peace operations.

F Budgetary Considerations

The budgeting of rule of law assessments and specialists was a matter raised in the discussions. It was recommended that the early budgeting process should include allocation of rule of law means in the funding of human resources and material support resources. Human resources comprise personnel and material support comprises infrastructure.

It was recommended that a general rule of law trust fund be established to provide for critical needs in the area of rule of law institutions. This trust fund would not fund UN needs but could be drawn upon by the host state to pay for human resource and infrastructure expenditure. It was raised during the final stage of the overall conference proceedings that the creation of yet another trust fund with specific terms of reference in the UN system, could be impractical. This is a matter that was not discussed in a comprehensive way in the syndicate discussions, due to time limitations.

G Training of External Rule of Law Experts – Debriefing Programs

It was emphasised that the training of rule of law specialists was an important aspect of the relative success of peace operations. The shortage of qualified and appropriate lawyers and judges combined with the immense challenges that such rule of law experts experience in the host state required an enhanced focus on training needs.

The use of external actors in the judicial system of the host state presented a range of challenges. It was recommended that the UN induction program should a) include appropriate training of rule of law experts before peace operations; and b) that existing or concluded peace operations should yield debriefings, the results of which should be fed into the induction program. This recommendation acknowledged that international judges in host states could assist with the development of strategies and plans for future peace operations, particularly the kinds of issues that external rule of law experts encounter in peace operations involving reconstruction or construction of judicial and penal systems.

H ‘Lessons Learned’ Mechanisms

Acknowledging the success and failures of peace operations, particularly in relation to rule of law experts and principles, was an issue of discussion. The inclusion of ‘lessons learned’ mechanisms was also an important area for future peace operations. The syndicate discussed and made recommendations about ‘lessons learned’ mechanisms, including the use of seminars, periodic evaluations and reporting from the field.

Participants identified several operations with aspects of rule of law in their mandates. They included Kosovo, Sierra Leone, East Timor and Afghanistan. It was important to recognise that ‘lessons learned’ from previous missions would inform future operations. Previous operations could also serve as a reminder of past failures and the need to change methods and processes in future operations. The syndicate made four particular recommendations in relation to ‘lessons learned’ mechanisms.

It recommended that ‘lessons learned’ mechanisms that focussed on rule of law aspects, and which include all players such as the UN, OSCE, EU, national actors, rule of law experts and international judges, should be implemented. The players could then discuss different models, describe their respective experiences and exchange viewpoints.

The syndicate further recommended that a special comparative seminar be held concerning key mission experiences in East Timor, Sierra Leone, Kosovo and Afghanistan.

It further recommended that the UN conduct periodic evaluations within each operation, with such evaluations to include the participation of external rule of law experts.

Reporting from the field was also identified as an important priority. The syndicate recommended that each operation should include reporting from the field to Headquarters in New York on rule of law activities.

IV CONCLUSION

Adopting a rule of law approach has important implications for the UN and the international community as this Conference has highlighted the importance of the rule of law on peace operations. Despite the breadth of the concept of the rule of law, the syndicate was able to develop a series of recommendations with potential utility to the pre- and post-operation processes of future operations. Whilst the syndicate was divided along fundamental philosophical lines, the recommendations reflect an analytical and practical approach to the wide range of issues that arise from the rule of law approach to peace operations.

V RECOMMENDATIONS

- *That the UN look further into the issue of amnesty and prosecution and assess how the ambition expressed in Security Council resolution 1325 and other UN documents has worked in the actual practice of peace processes and in the context of recent peace operations.*
- *That existing stand-by arrangements be expanded to include rule of law specialists as an integrated part of these stand-by arrangements.*
- *That the UN early assessment in a prospective peace operation area:*

- *Include a rule of law team. Such teams would include police, judicial and human rights experts. Specialists in juvenile justice and gender should be considered for inclusion in such teams;*
- *In consultation with local experts, include training needs in host countries with regard to judicial personnel in those countries;*
- *Take into account the host state's problems with physical infrastructure; and*
- *Take into account the law that is applicable in the operation area, including relevant criminal procedure.*
- *That the Integrated Mission Task Force, established on the suggestion of the Brahimi Report, include a rule of law working group.*
- *That the early budgeting process should include allocation of rule of law means in the funding of human resources and material support resources.*
- *That a general rule of law trust fund be established to provide for critical needs in the area of rule of law resources and infrastructure.*
- *That the UN induction program:*
 - *Should include appropriate training for rule of law experts before deployment on peace operations; and*
 - *That existing or concluded peace operations should yield debriefings, the results of which should be fed into the induction program.*
- *That 'lessons learned' mechanisms should be implemented that focus on rule of law aspects, and which include all players such as the UN, OSCE, EU, national actors, rule of law experts and international judges.*
- *That a special comparative seminar be held concerning key mission experiences in East Timor, Sierra Leone, Kosovo and Afghanistan.*
- *That the UN conduct periodic evaluations within each operation, such evaluations to include participation of external rule of law experts.*
- *That each peace operation should include reporting from the field to Headquarters in New York on rule of law activities.*

Professor Michael Bothe

SYNDICATE REMARKS*

I INTRODUCTION

My starting point in this attempted summary is a question: why do we insist on the rule of law for peacekeeping operations? There are, in principle, two answers to that question. We insist because the rule of law is a principle of good governance, and secondly, we insist because it is a prerequisite to peace. These responses have come up quite clearly on several occasions in the syndicate discussions.

The rule of law is, of course, related to other principles of good governance. One of these principles is the promotion of welfare, and since the decline of the welfare state, we tend to speak of sustainable development. We also discussed the relationship between welfare and the rule of law, and one of the answers is that welfare, promoted through aid or other means, is indeed a means to ensure stability and therefore peace.

This brings me to the next point, which is also related to peace, and that is the participation of those governed in government; in other words, democracy. Democracy is a principle of good governance and it is related to peace. I am not going into the details of the theory of democratic peace, which was rightly mentioned in the first presentation by Bill Durch. There is a relationship between democracy and peace proven by the simple observation, which is uncontroversial even amongst political scientists, that democracies do not generally wage war with each other, or only rarely.

And then, of course, there is a very simple answer to the question: how can we build peace on earth? The answer is that we do this through democratisation. This is an issue which has indeed come up in a very relevant context in the debate, namely, how to re-establish society through the reintegration of warring factions and ex-combatants. There we see the need for confidence building

* Editors' note: Professor Michael Bothe made these remarks immediately after the syndicates made their submissions to the Conference in plenary.

measures as a means to achieve reintegration, stability and a possibility for democratic government.

II DEFINING THE RULE OF LAW

So far I have discussed the principle of the rule of law and other principles of good governance. Now, of course, we have to address the question of what is rule of law. It is certainly more than a formal principle saying that the law has to be respected. It has a substantive content. It is not just formal or procedural. An unjust legal system cannot be a principle of good governance, nor can it lead to peace; on the contrary, it tends towards violence. I come from a country where, sadly enough, twice in the last century the law and lawyers were perverted and used as instruments of evil. The most important substantive element of the rule of law is human rights. What does the rule of law mean in the context of peace operations, and how can it be promoted?

We have discussed the principle of the rule of law from two perspectives. The first is the rule of law as a yardstick against which the behaviour of peacekeepers and of other personnel involved in peace operations is measured. The other perspective on the rule of law that we have discussed is the rule of law as a goal to be promoted in conflict-torn societies – whether national or international – in order to bring that society back on to the path of good governance and peace.

On that basis, let me analyse a few elements which have been highlighted in the syndicate discussions. The first element is the rule of law as meaning respect for the law. An element of that aspect of the rule of law is, as we all know, that the exercise of public authority has to be based on law and is limited by law. It is in this context that we come to the question of the mandate.

The mandate of a peace operation is the source of its powers and at the same time the limitation of its powers. The discussions singled out two different sources of the mandate. On the one hand, there is the resolution of the Security Council, but on the other hand there is the agreement between the parties to a conflict or between the parties to a conflict and the UN, ie both legal instruments form the basis of the mandate.

That being so, the formulation, interpretation, application and, as the case may be, adaptation of the mandate is a fundamental question. The procedure of the formulation of the mandate was addressed, because it was felt that a clear, and in the circumstances realistic, mandate is vital. The proposal to create a kind of advisory body to help the Security Council in drafting mandates which take this requirement of clarity and realism duly into account, is a very useful one.

I hope that the members of the Security Council are wise enough to recognise this. Coming to the interpretation of the mandate, this is a fundamental function. The mandate, as it is usually formulated, is not simply translated into

a guideline, or an instruction for whatever actor we have in the field. It has to be translated into concrete instructions for action.

We have debated, as an example, the interpretation of the words ‘all necessary means’, and there it becomes very clear that it is both a source of, and a limitation on, the powers of a peace operation. It limits (and gives) all those powers which are necessary, and I think the contextual and the constitutional approaches advocated for the interpretation of the mandate are not mutually exclusive.

Of course, determining the powers necessary requires stating the mission goal and means quite clearly. In determining this, other elements of the legal order, including the UN Charter must be taken into account. It was shown that very helpful conclusions can be drawn using this method.

Who then is the interpreter? There is a phrase in the famous International Court of Justice, *Advisory Opinion On Certain Expenses of the United Nations* (1962), saying that each organ, in the first place at least, is to interpret its own powers.

Which organ has the central function here? Undoubtedly, it is the Secretary-General, because it is the Secretary-General, as a rule, who is entrusted with the power to execute the mandate. Peace operations function under the Secretary-General’s direction. I think it is an implied power of the Secretary-General to interpret and translate the mandate, in order to transform it into concrete instructions for action.

I think to this point, we are on safe legal grounds, but this does not solve all problems. There is also a political framework – the question of political acceptability of this function of the Secretary-General and of the results at which the Secretary-General may arrive. Therefore the participation of stakeholders is important – politically important – and this includes, of course, the participating states.

Coming to the more substantive issues of the mandate, there is the problem of the complexity of operations. In this respect, I think a very useful distinction was made between different types of mandates; executive and non-executive. This distinction is based on the fact that executive mandates involve legal authority.

Executive mandates are to be exercised as determined by law, and to the extent granted by law. This is typical, for example, for the exercise of powers by police. It is a legal power and therefore we have always to look for the legal basis. On the other hand, non-executive mandates in this context involve *de facto* powers which are exercised according to the rules of engagement. It is in this context that the term rules of engagement makes sense.

Also, this type of *de facto* power must respect the applicable law. In this respect international humanitarian law is important and relevant. I think it is very useful that this meeting has confirmed what I think is a growing trend in international doctrine and practice, that once there is a factual situation requiring the application of international humanitarian law, that law is indeed applicable also in relation to UN peace operations.

III HUMAN RIGHTS

Respect for human rights is the major substantive content of the rule of law. That being said, of course, we have to consider the question: on what basis are human rights binding upon peace operations? The UN is not a party to any human rights conventions, but the UN is a subject of international law, which means it is not above international law. The UN is bound by applicable rules of international customary law. In fact, there is ample jurisprudence of the International Court of Justice that the essential elements of human rights law form part of international customary law, and for this reason the UN is bound by those rules.

This raises the question: which human rights rules, in more concrete terms, form part of customary international law? With due respect, the notion of *jus cogens* does not provide much assistance. Human rights norms that are *jus cogens* represent only the core human rights principles. I would suggest that customary international law recognition of human rights goes much further than just the *jus cogens* core.

IV ACCOUNTABILITY

Accountability is also a fundamental notion of the rule of law. What does it mean? It means that actors have to face the consequences of, and are made responsible for, action or inaction in the violation of applicable rules.

This holds true in particular in terms of criminal responsibility and financial liability. Now, what are the essential elements of accountability? Firstly, there is a standard of behaviour, and secondly, there are the consequences if that standard of behaviour is violated. So if we want to determine accountability we must first look for the applicable methods to do so. Then we have to look for the relevant actors; in other words, who is accountable to whom?

We must also address the consequences of misconduct. There are two questions that arise in this context. The first one concerns procedure: who decides, and according to what procedure, whether there is accountability? And then on the other hand, as a matter of substance, what happens where accountability is determined? What type of accountability is applicable in a particular case?

The first step is to determine the applicable rules. In this context, one major question was that of a standard criminal code, a transitional criminal code, to be applicable in the case of a transitional administration. The result of the

discussion, if I understood it correctly, was that in the case of transitional administrations, the rule is that the local law applies. The UN trusteeship or transitional administration does not displace the local law. However, this local law may contain elements which are not acceptable, for instance, where a local law violates fundamental human rights or is unjust. There is a need for the local laws to be scrutinised, in order to ascertain whether there is a need for amendment by the UN transitional authority.

The second question that was discussed is a code of conduct for NGOs. I think this is a point which needs further elaboration. I think much more research, and also negotiation, is needed.

Let me then turn to my second sub-question, which concerns the different actors involved in peace operations. There are many different personnel and different types of organisations whose accountability may be relevant during a peace operation – soldiers, civilian personnel, governmental organisations and non-governmental organisations. The question of NGO accountability is a difficult question because it is relatively new. However, these organisations are increasingly important actors in their own right on the international scene, so they have to be integrated into the accountability systems under international law.

This then raises the related issues of the consequences of accountability and the question of procedure. The first step in determining accountability is of course ascertaining the facts. In this respect, the use of the International Fact-Finding Commission established under art 90 of *Additional Protocol I* to the *Geneva Conventions* is a very interesting idea.

Being one of the two members of the Fact-Finding Commission present here today, I can say that the Fact-Finding Commission has also discussed this problem. There seems to be, if not a consensus, then at least a majority, who say that this is a possibility. At the next regular meeting of the Fact-Finding Commission, I expect that this will be pursued further. It is true that this is not exactly the mandate of the Fact-Finding Commission under the terms of *Additional Protocol I*, because the idea of that *Additional Protocol* is that States Parties are responsible in this situation.

However, there is a procedure available under *Additional Protocol I* for the Fact-Finding Commission to be seized of a matter on an ad hoc basis. This possibility could be pursued in the field. As the costs of this procedure have to be borne by the parties submitting a case to the Fact-Finding Commission, other States Parties to *Additional Protocol I* are more likely to accept its use in this way. So, there are clearly financial implications involved.

In addition, there is an array of ideas about possible organs that could be used to determine accountability. However, more thought is needed in order to establish appropriate institutions. We are far from having those appropriate

institutions. We also need to address the fundamental procedural rules used to determine accountability – what I call the ‘double principle of fairness’.

The double principle of fairness requires fairness to the accused and fairness to the victim. To make both requirements compatible is not always easy. In terms of fairness to the victim, there is a gender issue that arises; namely, ensuring that the feelings of victims of sexual assault are appropriately taken into account. This is a difficult problem, however, there are precedents we can follow; for example the role played by NGOs in the context of the ICTY.

Bars to the imposition of responsibility were also discussed, and there are two issues that arise in this context. The first is the question of immunity and this is probably a question which needs reconsideration. The second is the question of exclusive national jurisdiction, which applies, in particular, to the members of military contingents provided by Member States. This is a principle which we cannot realistically expect to be waived. Given the reality of the situation, it is all the more important that there are controls or limits on the exercise of that exclusive jurisdiction by Member States.

Finally, what type of response should there be to the need for an accountability mechanism? Some might argue that the only appropriate response is the death penalty. But as the death penalty is prohibited by most countries as well as the international ad hoc tribunals and the new International Criminal Court, it is not an available option. This then leaves the impression that imprisonment is the only option. However, the demands of accountability are not necessarily only met by sending people to jail. The major issue discussed in this context was the competing demands of peace and justice. Now, an amnesty does not necessarily mean that there is no accountability. An approach which involves ascertaining, finding and publishing the truth has been shown to be a very important accountability mechanism.

V INFRASTRUCTURE OF THE RULE OF LAW

The last point, very briefly, is what was called the infrastructure of the rule of law, and we have had a number of very important recommendations in this area. Some of these recommendations raise the question of human resources on various levels; these resources must be found and trained. This is true for both the UN and the host state of a peace operation. Having adequate resources also means that physical facilities – courtrooms and adequate detention facilities – must be provided. All these matters are simply a question of finance and, therefore, I think that the proposal to establish a rule of law trust fund is a very healthy one.

I regret that it has not been possible to do justice to the wealth of ideas which were expressed during the syndicate discussions and presentations. I apologise to those whose ideas I have not mentioned. I can assure you that I have shortened my remarks, because there was much more to be said.

But I hope that the few remarks I have made here have demonstrated to you how important a meeting that this has been. I am sure that from this Conference, consideration will be given to ways to improve the ability of both governmental organisations and civil society to promote the rule of law on peace operations.

Part VIII

CONCLUSION

Lieutenant Colonel Michael Kelly

CLOSING REMARKS

I INTRODUCTION

It is my sad and daunting duty to conclude and summarise these last three highly rewarding and fruitful days. It has been stated here that the rule of law is the most essential aspect of a peace operation, and I have to say that the members of the APCML also believe that to be so. We see the rule of law as the key link in building the virtuous circles that are needed to generate the momentum necessary for long-term success.

Why do we believe this to be the case? It is because our experience teaches us that it is true. For example, the photo that we have used on the Conference flyer carries a lot of meaning for us. The photo depicts Trooper Church, a fine young soldier who is no longer with us. The photo was taken in the context of the Kibeho massacre in Rwanda. A handful of soldiers and medical personnel were providing medical support to a refugee camp. They found themselves caught in the middle of a situation where a Rwandan Peoples Front (RPF) battalion launched an assault on the unarmed refugees. Thousands of men, women, and children were massacred. This situation posed the real dilemma for the soldiers and other personnel of ‘what can we do, what should we do?’

If the soldiers and other personnel were to act, they would be faced with armed resistance. Any response would have meant their own total annihilation because they were confronting a heavily armed RPF battalion. The personnel involved wanted to know – they needed to know – what their legal rights were and what principles they were governed by. They had confusion in their eyes, they had fear in their hearts, but they felt frustration and anger more than anything else as they were forced to watch this massacre unfold in front of them. Those that have survived – those comrades of Trooper Church – carry that memory with them, and it is a very searing one.

It is a painful memory for the surviving victims as well. The child in this photo represents the children that anyone involved in peace operations will have come across in the various fields of operation. The child represents the

thousands of children who have died and suffered as a result of the lack of the rule of law. These victims provide the service men and women and the civil field workers – all of whom have also experienced the same frustrations and anger – with the motivation to continue. The memory of the victims of conflicts and the personnel who have died during peace operations demands that we do more, and that is why we are gathered here for this Conference.

II SUMMARY OF PROCEEDINGS

In briefly summing up the themes that we have worked on these last few days, I will add some observations that the APCML has on some of these issues.

A *Framework of Peace Operations*

We have talked about mandates and how they are sometimes poorly framed, and how they should be framed in the future, but we know that there is a limit to the guidance that will be provided by a UN mandate or Security Council resolution. It may authorise the use of ‘all necessary means’, but ‘all necessary means’ is not an open licence to kill, although killing there may be.

The authority to use ‘all necessary means’ is also not the authority to arbitrarily incarcerate people for an indefinite period of time. It is not a green light to torture or summarily execute. The UN mandate does not place personnel on peace operations above the law; they serve the law. The UN Charter makes this very clear itself. The duty and responsibility of peace operations personnel, therefore, is to put flesh on the bones of the mandate, and in so doing, to win the battle for legitimacy and moral authority.

In this context, the Australian approach – when faced with mandates including the broad concept of ‘all necessary means’ – has been to refer to the key principles relevant to the circumstances.

One of the tools used by Australian personnel in both Somalia and in East Timor to guide our operations was *Geneva Convention IV*. It has served us well in both situations, where we needed merely to facilitate the reinstatement of the rule of law (Somalia), through to the situation in East Timor, where we had to in fact provide a substantial rule of law mechanism for a period of time. So, *Geneva Convention IV* has been a useful tool for us, and we would like to recommend its use – in the appropriate circumstances – to the peacekeeping community and the international community in general.

B *Cultural Context of Peace Operations*

When discussing the cultural context, we have heard how essential this is, and how often it is neglected. We have highlighted the need to consult, include, and develop local capability. We also need to explore the possibilities of using traditional justice and dispute resolution mechanisms where appropriate. Many of the communities that we have worked with have interesting and viable

concepts of communal justice that can be utilised and drawn upon in this respect.

C Disarmament, Demobilisation & Reintegration

We have talked about the issue of disarmament, demobilisation and reintegration. This will, of course, differ in every mission. However, there are basic principles, such as sealing off an area of operations to prevent the influx of weapons, and the fact that an evenhanded – as opposed to a neutral – approach to this is necessary. I say ‘evenhanded’ as opposed to ‘neutral’ because it is not, in fact, possible to move into these environments and not challenge the interests of someone. Further, there is a time and a place for intervening, for using force and for becoming the arbiter, and we are increasingly confronted with such scenarios. This has been driven in part by the increasing status of the individual in international law and the pressure on the international community act on behalf these individuals where their rights are subject to massive violation.

There is a need to employ a regime of incentives for disarmament, which should be allied with disincentives to remain armed. We need to build the confidence of the community that we work with, and our relationship with them, as a means of promoting the long-term disarmament objective. Relationship building will also help us to build the human intelligence aspects that are critically important to achieve disarmament. Demobilisation and reintegration requires resources, but possible means for achieving these objectives include incorporation into a defence force, absorption into the police force, compensation and support for veterans, and finding alternative employment. These strategies have a relatively common application and need to be planned for in every operation.

D Criminal Law

In relation to the issue of criminal law, we have noted the arguments against the standard criminal code approach, and the positive arguments in favour of relying on the local law where possible. However, we acknowledge that the criminal procedures in these contexts may need to be adapted or streamlined. It is clear that the military and follow-on administrations in these environments may have to be prepared to intervene and deliver law and order, as required. The policing aspect remains problematic, but we have seen highlighted once again the need to find a better way to mobilise and train police. Also, the need for the military to fill the public security vacuum on an interim basis must be recognised and prepared for. Too much can be lost by way of damage to infrastructure, looting, violence and the actions of vigilantes to stand idly by.

E Human Rights

As far as human rights are concerned, it is obvious how important the training requirement here is, and we note the development of the UN packages to

address this. In fact, the APCML has prepared the first draft for the human rights standard generic training module. The necessity of training needs to be reinforced, perhaps with the requirement that all stand-by personnel are trained in human rights, coupled with the implementation of some form of Inspector-General regime within the UN.

This Inspector-General regime could validate, verify and certify that this training is taking place and that it is taking place adequately. It could be done on a confidential basis, but there is a definite need to monitor its implementation. There is also a need to ensure that troops or police do not deploy on a mission unless they have attained certain human rights standards through training. This is something that the UN could realistically implement and it would not be terribly costly.

The early phases of these operations are periods where we have to be realistic about the human rights standards imposed or applied by the intervening actors. It is for this reason that the *Geneva Convention IV*-type approach, or style of regime, is particularly useful due to the exigencies of the situation, the level of threat, and the military operations that are often occurring earlier on in a mission. In essence, what we are talking about is a state of emergency, and derogations from some human rights standards are, and should be, expected in this phase. However, these should be 'acceptable' derogations, fitting within an overall framework of principles that are well established and clearly defined, in order to ensure accountability. Perhaps a formal statement from the Secretary-General is required to delineate what the permissible derogations will be. This statement should be subject to periodic review.

This would provide a mechanism similar to a proclamation of a state of emergency in the state context. We must have an eye, from the earliest moment in these operations, to shaping the long-term human rights environment and embedding human rights in the institutions and frameworks of the restored state. Our ability to successfully do this is seriously affected by the manner in which deployed personnel conduct themselves and how the local actors are dealt with. Also important in this regard is long-term engagement and oversight tied to financial and economic support and outcomes.

F Accountability

With regard to accountability, we now have a new partner in the International Criminal Court. For the military, this may generate additional support requirements in the areas of intelligence, security for investigative personnel, and evidence, and also the muscle to back it up for arrest action. Some of the people who need to be dealt with by the ICC will be in charge of large heavily armed bodies of militia or criminal gangs.

Also discussed was the need for intervening actors to be subject to greater accountability. The ombudsman system, as we have pointed out, needs to be

extended to the military. NGOs must also be subject to accountability, which should extend to their expulsion from the area of operations and possible criminal sanctions, by negotiation where necessary. We have all had experience of a small minority of these NGO actors jeopardising the overall success of a mission. The UN BOI system needs to be reinforced with an inclusion of a stronger sanctions regime where there is a lack of cooperation.

G Transitional Administration

With respect to transitional administration, it is important to focus on two key phases: the transition from the military to international civil actors; and from international civil actors to the local capability. Quite often the focus is only on the transition from international actors to the local capability. The military must be prepared to seize early opportunities to ensure a sound basis for the civil actors to build on, while also maintaining the greatest pressure and seeking early opportunities for scaling back military involvement. The military can provide continuing advice and support during the transition at critical points of weakness, but needs to be wary about creating dependencies and sending the wrong message about the role of the military in society. This is something we have had to pay close attention to in the recent phases of operations in East Timor.

From the earliest moment, international civil actors must seek to incorporate local participation and create consultative mechanisms for this purpose. In this respect, an important objective is the marginalisation of 'counter actors'. Too often we reinforce and entrench the position of warlords in society, making it much more difficult for the transition in the long-term. This also brings into play the issue of reconciliation versus retribution, and the indicators are that generally a combination of the two is needed. We have heard mention of Security Council resolution 1325, which points the way here, when it talks of bringing to account those responsible. In this way, retribution can be confined to those responsible; however, the scale of these disasters or emergencies often requires us to find alternative means of dealing with the reconciliation/retribution issue.

The local capacity we leave behind must be sustainable. There is no point in us talking about forensic laboratories and that degree of support. We must accept that less elaborate systems are nevertheless valid and that incarceration is not an immutable element of justice. We need to be flexible, creative, consultative, and ready to think outside the square. We have to avoid the paradigm paralysis of attempting to impose what we are familiar with, and what has worked elsewhere. This was a critical element in the early days of the UNTAET administration where people from Kosovo attempted to impose a similar solution to East Timor, which was not appropriate to the circumstances.

My final key point is that the current international response capacity of the UN is institutionally incapable of delivering a total solution. I am not sure whether

it ever will be, but at this stage, it certainly is not. There is no escaping the need for external support. Professor Tim McCormack and I recently floated the idea of establishing an international institute for good governance that could be engaged in both preventative and remedial action. Such an organisation could be the home for the lessons learned, and the precedents from earlier operations and the much-touted database of personnel. We would hope that perhaps a coalition of willing nations could fund such a venture.

III CONCLUSION

Finally, would like to thank you all, the Challenges family. It is said that evil triumphs when good men and women do nothing, and it is therefore not good enough just to be good – we must also act. It has been a real privilege and a thrill for us to host this gathering of the community of the ‘doers’. You send us away with a renewed sense of mission and comradeship. It is important for all of us to know that we are not alone in our struggle to lighten the darkness, so we thank you all for reinvigorating us.

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Lieutenant General Satish Nambiar (Retd) PVSM AVSM VRC

Lieutenant General Nambiar had a long and distinguished military career in the Indian Army, from which he retired in 1994. Prior to his retirement, Lieutenant General Nambiar was the Deputy Chief of the Army Staff. He had also served as the Force Commander and Head of Mission of the UN forces in the Former Yugoslavia. In 1996 he was appointed Director of the United Service Institution of India.

Annika Hilding Norberg

Ms Hilding Norberg has been the Project Director and coordinator of the Challenges Project at the Swedish National Defence College since 1997. She is the co-editor of several reports within the Challenges Project, including the Concluding Report, presented to the Secretary-General of the UN in April 2002. In 2001, Ms Hilding Norberg received an honorary award from the Swedish Chief of Defence for her efforts to enhance international peace and cooperation.

Jadranka Petrovic

Ms Petrovic holds an LLB (Mostar) and an LLM (Melbourne). She is PhD (Law) candidate at the University of Melbourne and is affiliated with the APCML. Her major research interests are in the areas of international humanitarian law, international criminal law and international dispute resolution.

Captain Yvetta Rana Thapa

Captain Thapa, of the Royal Nepalese Army, has held the position of Deputy Chief Legal Adviser, UNMISSET, since July 2002. Captain Thapa holds a degree in Law and a Masters degree in Political Science. Prior to joining the Royal Nepalese Army, Captain Thapa worked as a Pleader and Advocate.

Nicole Schlesinger

Ms Schlesinger is a final year PhD (Law) candidate at the University of Melbourne, and is affiliated with the APCML. She is researching the impact of national system background on the development of the law of the International Criminal Tribunals for Yugoslavia and Rwanda.

Mandira Sharma

Ms Sharma is the Executive Director of the Advocacy Forum, which investigates and documents human rights violations in Nepal and interviews detainees held in Nepalese prisons. In 1999 she was awarded the Chevening Scholarship to pursue an LLM in International Human Rights Law in the UK.

Commander Dale Stephens RAN

Commander Stephens RAN is currently Fleet Legal Officer at Maritime Headquarters in Sydney. He holds an LLB (Hons) (Adelaide) and an LLM (Melbourne). He was the legal advisor to the Naval Component Commander of the INTERFET and subsequently served as Chief Legal Officer to the UNTAET Force Commander. He received a Maritime Commander's Commendation in November 2002.

Jennifer Wells

Ms Wells is the Program Coordinator (Emergencies) for the Australian Council For Overseas Aid. She holds a B Bus Agric from the Curtin University. She is a Masters (International Development) candidate at the Deakin University.

Sastrohandoyo Wiryono

Mr Wiryono is a Senior Fellow at the Centre for Strategic and International Studies and a Member of the Board of the Indonesian Council on World Affairs. In February 2002, he became a Negotiator in the Aceh Peace Process. In 1996, he was appointed the Indonesian Ambassador to Australia and the Republic of Vanuatu. He retired from diplomatic service in September 1999.

Ralph Zacklin

Mr Zacklin is the UN Assistant Secretary-General for Legal Affairs and was appointed to this position in 1998. He has served in a variety of legal and human rights positions in the UN Secretariat for almost 30 years. In his current position, he is the official principally responsible for advising on all legal aspects of peacekeeping and peace enforcement operations. He drafted the reports of the Secretary-General leading to the establishment of the ad hoc criminal tribunals for the Former Yugoslavia, Rwanda and Sierra Leone.

LIST OF ABBREVIATIONS

ACFOA	Australian Council for Overseas Aid
ADF	Australian Defence Force
ADO	Australian Defence Organisation
AO	Area of Operations
APCML	Asia-Pacific Centre for Military Law
ASEAN	Association of South East Asian Nations
AusAID	Australian Agency for International Development
BiH	Bosnia and Herzegovina
BOI	Board of Inquiry
C34	Committee of 34
CIVPOL	Civilian Police
CLJAU	Criminal Law and Judicial Advisory Unit
CPI	Convention on Privileges and Immunities
CSS	Convention on Safety and Security
DAC	Development Assistance Committee
DD&R	Disarmament, Demobilisation and Reintegration
DPA	Department of Political Affairs
DPKO	Department of Peace Keeping Operations
EU	European Union
FYROM	Former Yugoslav Republic of Macedonia
GAM	Gerakan Aceh Merdeka (Free Aceh Movement)
HAP	Humanitarian Assistance Program
HQ	Headquarters
ICC	International Criminal Court
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDF	Israeli Defence Force
IFOR	Peace Implementation Forces
IGO	Intergovernmental Organisation
IHL	International Humanitarian Law
ILAC	International Legal Assistance Consortium
IMTF	Integrated Mission Task Force
INTERFET	International Force for East Timor
INTERPOL	International Police Agency
IPA	International Peace Academy
IPTF	International Police Task Force
IPTFUNMIK	International Police Task Force United Nations Interim Administration Mission in Kosovo
ISAF	International Security Assistance Force

LOAC	Law of Armed Conflict
MINURCA	United Nations Mission in the Central African Republic
MSC	Military Staff Committee
MINURSO	United Nations Mission for the Referendum in Western Sahara
MNLF	Moro National Liberation Front
MONUC	United Nations Organisation Mission in the Democratic Republic of Congo
MOU	Memorandum of Understanding
NATO	North Atlantic Treaty Organisation
NGO	Non-Governmental Organisation
NIC	National Intelligence Council
NZ	New Zealand
NZDF	New Zealand Defence Forces
OECD	Organisation of Economically Developed Countries
OEF	Operation Enduring Freedom
OHCHR	Office of the United Nations Commissioner for Human Rights
OIC	Organisation of the Islamic Conference
OLC	Office of the Legal Council (UN)
ONUC	United Nations Operation in the Congo
OSCE	Organisation for Security and Cooperation in Europe
P-5	Permanent Five Members of the United Nations Security Council
PKF	Peacekeeping Force
PKO	Peace Keeping Operation
RCD-GOMA	Rassemblement Congolais pour la Démocratie
ROE	Rules of Engagement
ROL	Rule of Law
RPF	Rwandese Patriotic Front
RNA	Royal Nepalese Army
SFOR	Peace Stabilisation Forces
SGTM	Standardised Generic Training Module
SOFA	Status of Forces Agreement
SOMA	Status of Mission Agreement
SOP	Standard Operating Procedure
SRSG	Special Representative of the Secretary-General
ST/SGB	Secretariat/Secretary-General's Bulletin
UN	United Nations
UNAMET	United Nations Mission in East Timor
UNAMSIL	United Nations Mission in Sierra Leone
UNDCP	United Nations Drug Control Program
UNDOF	United Nations Disengagement Observer Force
UNDP	United Nations Development Programme
UNEF	United Nations Emergency Force
UNFICYP	United Nations Peacekeeping Force in Cyprus
UNHCR	United Nations High Commission for Refugees
UNICEF	United Nations Children's Fund
UNIFIL	United Nations Interim Force in Lebanon
UNIKOM	United Nations Iraq-Kuwait Observation Mission
UNITAF	Unified Task Force
UNMEE	United Nations Mission in Ethiopia and Eritrea
UNMIBH	United Nations Mission in Bosnia-Herzegovina

UNMIK	United Nations Interim Administration Mission in Kosovo
UNMISET	United Nations Mission of Support in East Timor
UNMOGIP	United Nations Military Observer Group in India and Pakistan
UNMOT	United Nations Mission of Observers in Tajikistan
UNOMIG	United Nations Observer Mission in Georgia
UNOSOM	United Nations Operation in Somalia
UNPROFOR	United Nations Protection Force
UNSCORD	United Nations Security Coordinator
UNSCR	United Nations Security Council Resolution
UNTAB	United Nations Technical Assistance Board
UNTAET	United Nations Transitional Administration in East Timor
UNTSO	United Nations Truce Supervision Organisation
USG	Under-Secretary-General
WFP	World Food Programme
WMD	Weapons of Mass Destruction

Asia Pacific Centre for Military Law

The Asia-Pacific Centre for Military Law (APCML) is a collaborative initiative of the Australian Defence Force Legal Service and the University of Melbourne Law School.

The APCML Charter is to facilitate cooperation amongst the military forces of the Asia-Pacific Region in the research, training and implementation of the laws governing military operations.

Amongst other things, the APCML:

- ▶ Prepares and delivers operations law and other appropriate training programs for legal officers and operational commanders from the Asia-Pacific regional militaries;
- ▶ Develops and delivers graduate level legal training for appropriate military officers within an established academic regime of verification, validation, assessment and accreditation;
- ▶ Organises conferences, workshops, seminars and other activities designed to provide solutions to particular legal problems, to ensure the incorporation of new legal developments within the Asia-Pacific region and to develop relationships with regional militaries and with relevant academic, humanitarian relief and other public communities;
- ▶ Promotes academic research into key military law issues of current concern and relevance in the Asia-Pacific region;
- ▶ Produces legal publications and materials in support of legal officers and regional defence forces generally;
- ▶ Participates in, and contributes to, the development and validation of military law doctrine as appropriate and relevant;
- ▶ Centralises the accumulation and processing of legal lessons learned through regional experience and through deployment and other overseas experience;
- ▶ Undertakes and supports initiatives to promote and improve the flow of information to legal officers in relation to professional matters such as opinions and legal developments;
- ▶ Participates in military exercise design and development;

- ▶ Develops military, government, academic and other relevant relationships within the Asia-Pacific region for the promotion of the rule of law in military and defence affairs and opportunities for assistance in training in operations law within regional military organisations;
- ▶ Develops contacts and mutual exchanges with other academic/military centres and with leading subject matter experts internationally to encourage the fullest exchange of information and ideas and to promote interoperability with allied partners; and
- ▶ Provides support for deployments, particularly for peace operations, including assistance to pre-deployment training, the development and maintenance of manuals and reference resources, and the identification and appropriate retention of information from operational lessons learnt.

For further information about the APCML visit our website at www.apcml.org.

THE ASIA-PACIFIC CENTRE FOR MILITARY LAW (APCML) HOSTED A CONFERENCE TITLED 'THE RULE OF LAW ON PEACE OPERATIONS' FROM 11-13 NOV 2002 AT THE UNIVERSITY OF MELBOURNE LAW SCHOOL.

The Conference studied strategic, operational and tactical issues relating to the planning and management of peace operations. Topics discussed included: the challenges facing peace operations; Asia-Pacific regional views of peace operations; UN management of legal issues; rule of law strategies for peace operations; operational and tactical experiences; and challenges facing peace operations. Syndicate discussions were also held on the framework of peace operations; cultural context of peace operations; disarmament, demobilisation, and reintegration; criminal law; police; military; human rights; accountability and transitional justice and administration.

The 'Rule of Law on Peace Operations' Conference was the first conference of the second series of the 'Challenges of Peace Operations' Project. The Challenges Project consists of a series of international seminars that examine and discuss aspects of peace operations. The Project comprises ten Partner Organisations from different countries, bound together by their common concern over the challenges and consequences of conducting peace operations. The Project has two key aims: first, to explore and convey more effective and legitimate ways of dealing with regional conflict; and second, to foster and encourage a culture of cross-professional cooperation and partnership between organisations and individuals from a wide variety of nations and cultures.