

**UN PEACEKEEPING  
IN LEBANON AND  
SOMALIA:  
INTERNATIONAL  
AND NATIONAL  
LEGAL  
PERSPECTIVES**

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## Abstract

# UN PEACEKEEPING IN LEBANON AND SOMALIA: INTERNATIONAL AND NATIONAL LEGAL PERSPECTIVES

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The initial focus of the thesis is on Ireland, a small militarily neutral state, but one with a long tradition of contributing to peacekeeping operations. Despite its significant contribution to peace support operations to date, there is little research on the past and future implications of this for Ireland. This thesis seeks to address some of the key legal and political issues confronting Ireland, and to provide a unique perspective on the dilemmas and problems confronting many small states of the UN in the post cold war era.

The thesis uses two case studies, Somalia and Lebanon, to conduct a comparative analysis of traditional peacekeeping and that of peace enforcement. The conduct of UN forces in Somalia, and the outcome of the UN mandated operations there, had a profound effect on the willingness of states to support UN peace support operations in the post cold war period. UNOSOM II was one of the most ambitious and controversial multi-dimensional operations ever mounted by the UN. It reflected the optimism associated with the dawn of a 'new world order' and an effective Security Council. The UN operation in Lebanon (UNIFIL), in contrast, was a less ambitious traditional peacekeeping mission, but it too was controversial and the Force encountered serious difficulties implementing the apparently more

straightforward mandate. Both operations show that whatever the nature of a peace support operation, its role and effectiveness is dependent upon support from the Security Council. Without political support and adequate resources, especially at the time of its establishment, a UN force remains at the mercy of the parties to the conflict. Both operations also highlighted serious difficulties that arise in the command and control of UN peace support operations, although the larger more complex UNOSOM II mission presented significantly more serious dilemmas in this regard. These problems are often exacerbated by deficiencies in the municipal laws and domestic political concerns of contributing states.

An important distinguishing feature between traditional peacekeeping operations and that of more robust peace enforcement operations is the policy regarding the use of force. Nevertheless, both Lebanon and Somalia presented remarkably similar difficulties regarding devising and adopting appropriate rules of engagement, and the differing interpretations of what action justified the resort to, and the degree of force deemed appropriate in a UN multi-national operation.

The thesis seeks to draw lessons from the experiences of UNIFIL and UNOSOM in regard to these and related issues. The matter of the applicability of international humanitarian law to UN forces was also relevant to both sets of operations. Despite the recent adoption of the Convention on the Protection of UN Personnel, and a Secretary-General's bulletin on the applicability of humanitarian law to UN forces, the situation remains unsatisfactory.

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## Chapter 1

### INTRODUCTION

#### The UN and peacekeeping operations

The concept of peacekeeping is neither defined nor specifically provided for in the UN Charter.<sup>1</sup> Historically, it is by no means a concept associated exclusively with the UN.<sup>2</sup> Consequently, it does not lend itself to precise definition.<sup>3</sup> In the circumstances, it is not surprising that there is some confusion regarding what

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<sup>1</sup> See B. Simma (ed.), *The Charter of the United Nations – A Commentary*, Oxford: Oxford University Press, (1995), 566-603; N. White, *Keeping the Peace*, (2nd ed.), Manchester: Manchester: University Press, (1997), 207-284; L. Goodrich, *The United Nations*, London: Stevens, (1960), 159-189; *The Blue Helmets- A Review of United Nations Peacekeeping*, (3<sup>rd</sup> Ed.), New York: United Nations, (1996), esp. 3-9; J. Roper, M. Nishihara, O. Otunnu, and E. Schoettle, *Keeping the peace in the post-Cold War era: Strengthening Multilateral Peacekeeping*, New York: A report of the Trilateral Commission: 43 (1993); D.W. Bowett, *United Nations Forces*, London: Stevens, (1964); L. Goodrich, E. Hambro and A. Simmons, *Charter of the United Nations*, (3 rd. ed.) New York: Columbia University Press, (1969), 71-72 and *passim*; S. Ratner, *The New UN Peacekeeping*, London: Macmillan, London, (1995), 117-136 and *passim*; W. Durch (ed.), *Peacekeeping, American Policy, and the Uncivil Wars of the 1990's*, London: Macmillan, (1997); J. Mayall, *The new interventionism 1991-1994*, Cambridge: Cambridge University Press, (1996); A. James, *Peacekeeping in International Politics*, London: Macmillan, (1990); I. Rikhye and K.Skjelsbaek (eds.), *The United Nations and Peacekeeping*, London: Macmillan, (1990); A. Cassese, A., *United Nations Peacekeeping: Legal Essays*, The Hague: Sijthoff & Nordhoff. (1978); D. A. Charters, (ed.), *Peacekeeping and the Challenge of Civil Conflict Resolution*. New Brunswick: Center for Conflict Studies, (1994); P. Diehl, *International Peacekeeping*. Baltimore and London: Johns Hopkins University Press, (1993); G. Evans, *Cooperating for Peace: The Global Agenda for the 1990s and Beyond*. Victoria, Australia: Allen and Unwin, (1993); A. B. Fetherston, *Towards a Theory of United Nations Peacekeeping*, London: St. Martins Press, (1994); H. McCoubrey and N.White. *The Blue Helmets: Legal Regulation of United Nations Military Operations*, Aldershot: Dartmouth, (1996); Weiss, T. G. (ed.) *Beyond UN Subcontracting*, London: Macmillan, (1998); D. Daniel and B. Hayes (eds.), *Beyond Traditional Peacekeeping*, London: Macmillan, (1995); J. F. Murphy, *The United Nations and the Control of International Violence: A Legal and Political Analysis*, Manchester Manchester University Press, (1983); I. Rikhye, *The Theory and Practice of Peacekeeping*, London: Hurst & Company, (1984); W. Wainhouse, *International Peacekeeping at the Crossroads: National Support, Experience and Prospects*, Baltimore and London: John Hopkins University Press, (1973); H. Wiseman, (ed.), *Peacekeeping: Appraisals and Proposals*, New York: Pergamon Press, (1983).

<sup>2</sup> See H. McCoubrey and N. White, *International Organizations and Civil Wars*, Aldershot; Dartmouth, (1995), 183.

<sup>3</sup> See *The Blue Helmets*, *op. cit.*, 3-9.

exactly constitutes peacekeeping. Indeed, it is sometimes easier to say that a particular mission or force does not possess the generally recognised characteristics of a peacekeeping operation, than it is to confirm that it fulfils the necessary criteria.<sup>4</sup> Part of the reason for this is the looseness with which states adopt such terms. It has a distinctly positive resonance, and those charged with the government of states are usually more concerned with public relations and opinion polls, than with legal criteria or political reality. For this reason, the term is often applied to controversial situations where states intervene militarily and then seek to justify or portray their actions as some kind of benign peacekeeping operation.

The cold war era between the US and the Soviet Union was marked at the UN by continual wrangling over the correct interpretation of the Charter provisions.<sup>5</sup> The Charter's own ambiguity and failure to make provision for specific problems contributed to these disputes.<sup>6</sup> In order to survive, the Organization had to be capable of adapting to the changed political circumstances and this meant adopting roles not specifically provided for in the Charter.<sup>7</sup> When the required consensus among the major powers did not materialise, it seemed the UN would be unable to fulfil a significant role in the maintenance of peace, and the growth of regional self-defence systems was just one indication of the lack of confidence in the Organization as the international guarantor of peace. In these circumstances, it was not surprising that the UN sought to circumvent the

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<sup>4</sup> The UN Emergency Force (UNEF), which was established and deployed after the British and French military intervention in Suez in 1956, is generally regarded as the first true UN peacekeeping operation; Summary Study of the experience derived from the establishment and operation of the Force: Report of the Secretary-General, 9 October 1958; GAOR, 13 Session, Annex 1: Document A/3943. See also document A/3289 and A/3302, the latter was approved by General Assembly Resolution 1001 (ES-I) of 7 November 1956. D.W. Bowett, *op. cit.*, 90-152 esp. 90-98 and *The Blue Helmets, op. cit.*, 37-55.

<sup>5</sup> See generally B. Simma (ed.), *op. cit.*, 25-44; and L. Goodrich, E. Hambro and A. Simmons, *op. cit.*, 1-17 and I. Claude, *Swords into Ploughshares*, New York: Random House, (1956), Chapter 12.

<sup>6</sup> Goodrich, Hambro and Simons, *op. cit.*, 107.

<sup>7</sup> See generally N. D. White, 'The UN Charter and Peacekeeping Forces: Constitutional Issues', in M. Pugh, (ed.), *The UN, Peace and Force*, 3 (4) *International Peacekeeping*, London: Frank Cass, (1996), 43-63.

obstacles caused by cold war rivalries.

When the divisions of the cold war blocked effective action by the Security Council, the concept of UN peacekeeping was invented.<sup>8</sup> However, it should be stressed that peacekeeping is not the sole preserve of the UN. The concept predates the formation of the Organization and peacekeeping missions continue to be organised outside its framework. In this way it can be argued that a peacekeeping force established and deployed by one or more states may legitimately profess to belong to some kind of internationally recognised category of peacekeeper. Peacekeeping operations were intended to end hostilities by peaceful means and create a climate in which the peacemaking process could be successfully applied. In recent years, this traditionally passive role has been replaced by a more active role of peace making, involving, *inter alia*, national reconstruction, facilitating transition to democracy, and providing humanitarian assistance.<sup>9</sup> Initially referred to as 'second generation'<sup>10</sup> or multi -dimensional peacekeeping,<sup>11</sup> the more generic title of peace support operations has been adopted to cover the wide range of activities involved.

The UN Charter, as finally adopted, contained two significant Chapters in relation to the maintenance of international peace and security. Chapter VI provides for the pacific settlement of disputes by, among other things, negotiation and adjudication; and Chapter VII contains the collective security provisions which were intended as the cornerstone of its policy in the maintenance of world peace. It is Chapter VII of the Charter that provides for enforcement measures under the direction of the Security Council as the central military instrument for the maintenance of peace and security. The lack of an express mention of peacekeeping in the Charter<sup>12</sup> has not inhibited its development and may, in fact,

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<sup>8</sup> Simma, *op. cit.*, 565-603 and *The Blue Helmets, op. cit.*, esp. 3-9.

<sup>9</sup> See J. Roper, M. Nishihara, O. Otunnu, and E. Schoettle, *op. cit.*, 4.

<sup>10</sup> *The Blue Helmets, op. cit.*, 5.

<sup>11</sup> See for example S. Ratner, *op. cit.*, 117-136 and *passim*. For a good definition of terms see W. J. Durch, 'Keeping the Peace: Politics and Lessons of the 1990's' in W. Durch (ed.), *Peacekeeping, American Policy, and the Uncivil Wars of the 1990's, op. cit.*, 3-7.

have helped its establishment as a flexible response to international crises but at the same time contributed to a misunderstanding regarding its true nature. Although authorities have differed on the exact legal basis for peacekeeping operations, the International Court of Justice has held that such operations are within the power of both the General Assembly and the Security Council.<sup>13</sup>

A further complication arises by virtue of the kind of operations conducted under Chapter VII and intended to be enforcement action in nature, despite the failure to conclude the requisite agreements with the UN under Article 43 of the Charter.<sup>14</sup> Military actions conducted during the Korean conflict, and more recently the Gulf conflict, belong to this category. Operations of this kind can be established under Article 42 of the Charter by way of a decision of the Security Council, or they may be authorized by way of a recommendation under Article 39.<sup>15</sup> In the special circumstances of the Korean conflict, the Uniting for Peace resolution procedure then adopted by the General Assembly provides a possible further mechanism that could be availed of in the future, though it would be a mistake to exaggerate its potential in such circumstances. Article 42 is the central element in enforcement operations and leaves a wide measure of discretion to the Security Council whether a particular situation calls for the application of military enforcement measures, and their nature and extent.<sup>16</sup>

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<sup>12</sup> See D. Ciombanu, 'The Power of the Security Council to Organize Peacekeeping', in Cassese (ed.), *op. cit.*, 23-25.

<sup>13</sup> *Certain Expenses of the United Nations - Article 17(2)*, Advisory Opinion, July 20, 1962, International Court of Justice Reports, 1962, 176. See generally N. D. White, 'The UN Charter and Peacekeeping Forces: Constitutional Issues', in M. Pugh, (ed.), *op. cit.*, 43-63.

<sup>14</sup> Goodrich, Hambro and Simons, *op. cit.*, 317-326 and Simma, *op. cit.*, 636-639

<sup>15</sup> The Korean action was taken on the basis of a 'recommendation' by the Security Council under Article 39, SCOR/5th Year/473-474 Mtgs./June 27 and 27, 1950. On the binding nature of resolutions, see R. Higgins, *Problems and Process - International Law and How We Use It*, Oxford: Clarendon Press, (1994), 24-27 and 37.

In spite of the controversy and problems encountered by peacekeeping missions, the concept has survived and developed. One of the primary reasons for its success is that it has combined adherence to basic principles with extraordinary flexibility. In particular, it has managed to maintain the essence of what is acceptable to UN membership at large, while at the same time adapting individual peacekeeping operations to the needs of particular circumstances. The Secretary-General plays a central role in the conduct of peacekeeping operations, but the exact nature and extent of this role has not been defined, and problems of demarcation with that of the Security Council remain to be resolved.<sup>17</sup> In the course of the peacekeeping operation in the Congo, serious difficulties arose in this regard.<sup>18</sup>

The legal authority for the creation of UN peacekeeping forces remains unsatisfactory and there seems little prospect of a change in their *ad hoc* nature.<sup>19</sup> While it may be argued that agreement on basic principles would lessen the opportunity for conflicting interpretations of the Charter and divisive controversies, there is merit in maintaining a flexible and adaptive approach to peacekeeping operations. The issues of consent and domestic jurisdiction raise difficult questions in the context of internal conflicts or civil wars.<sup>20</sup> There were reservations about UN involvement in the Congo, Somalia and Lebanon for these very reasons. However, internal conflicts frequently escalate into regional

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<sup>16</sup> Simma, *op. cit.*, 428-436 and Goodrich, Hambro and Simmons, *op. cit.* 315-315.

<sup>17</sup> See L. Gordenker, *The United Nations Secretary General and the Maintenance of Peace*, New York & London: Columbia University Press, (1967) esp. 235-260; and D. Sarooshi, *The United Nations and the Development of Collective Security*, Oxford: Clarendon Press, (1999), esp. 50-85.

<sup>18</sup> See generally R. Higgins, *United Nations Operation in the Congo (ONUC) 1960-1964*, London: Royal Institute of International Affairs, (1980); and L. Gordenker, *op. cit.*, esp. 261-296 and B. Urquhart, *Hammar skjold*, New York: Alfred Knopf, (1972), 389-456.

<sup>19</sup> On the legal parameters of peacekeeping, see generally N. White, *Keeping the Peace*, *op. cit.*, 224-247.

<sup>20</sup> McCoubrey and White, *op. cit.*, 38.

conflicts and these in turn may involve breaches of international law thereby removing the conflict from the reserved domain of domestic jurisdiction.

The resolution of internal or domestic conflict has been a dominant feature of recent operations and involved the establishment of democratic governments culminating in the nation building attempted for a time in Somalia. Any interventions by UN forces may, intentionally or otherwise, alter the delicate balance of power between the warring parties.<sup>21</sup> Maintaining impartiality can present peacekeepers with a dilemma, especially when they confront situations in which civilians are victimised, or when UN forces are themselves the subject of attack.<sup>22</sup> The question of consent to a UN presence is particularly problematic in those situations. The blue berets involved must be prepared to resort to force rather than be bystanders to large-scale human rights abuses or even genocide. In this way, the continuum from peacekeeping to peacemaking and enforcement can be difficult to track, but when all else fails and the political will exists, the Security Council retains the right to resort to the use of force under Chapter VII.

### **Peacekeeping and enforcement operations<sup>23</sup>**

There is a great deal of semantic and conceptual confusion surrounding peacekeeping and peace enforcement operations.<sup>24</sup> In general terms, peacekeeping involves non coercive intervention based on the consent of the parties to a conflict, and it does not permit the use of force except in self

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<sup>21</sup> See J. Peck, 'The U.N. and the Laws of War: How Can the World's Peacekeepers be Held Accountable', 21 *Syracuse Journal Of International Law*, (1995), 283-310, at 288.

<sup>22</sup> *The Blue Helmets, op. cit.*, 5.

<sup>23</sup> See generally E. Schmidl, *Peace Operations Between War and Peace*, London: Frank Cass, (2000) and I. Rikhye, *The Politics and Practice of United Nations Peacekeeping: Past, Present and Future*: Clementsport NS, Canadian Peacekeeping Press, (2000).

<sup>24</sup> See for example J. G. Ruggie, 'Wandering in the Void: Charting the UN's New Strategic Role,' 72 (5) *Foreign Affairs*, (November/December 1993), 26; and A. Roberts, 'From San Francisco to Sarajevo: The UN and the Use of Force,' 37 (4) *Survival*, (Winter 1995-96), 26.

defence.<sup>25</sup> Many discussions are characterised by a failure to understand and distinguish between traditional peacekeeping and enforcement, and the grey area in between.<sup>26</sup> This was especially evident in debates on Somalia, which involved a combination of operations and mandates embodying all three elements mentioned, and more besides. Peacekeeping remains quite distinct from the enforcement measures envisaged by the Charter. Nonetheless, both concepts are based on similar conditions, in particular, the availability of military forces and the effective co-operation of members of the Security Council. Not surprisingly, there is considerable confusion regarding these very distinct and separate concepts. Recent deployments in Albania and East Timor could be described as hybrid operations comprised of coalitions of the willing based on consent also, but the consent involved, especially in the case of East Timor, is somewhat qualified by the international pressure brought to bear on the Indonesian government at the time.

Peace enforcement must also be distinguished from enforcement action as envisioned under Chapter VII of the UN Charter. Peace enforcement does not involve identifying an aggressor, but it may involve the threat and actual use of force to 'compel or coerce' the implementation of international norms or mandates.<sup>27</sup> In this way, the two most important characteristics that distinguish traditional peacekeeping from the more robust peace enforcement operations are the use of force and the issue of consent. Closely linked to these issues, and also of crucial importance, is the principle of impartiality. Impartiality is easily maintained in traditional peacekeeping but difficult in enforcement operations. Insistence that intervention in intra-state conflict adhere to the principles of consent and impartiality is not always

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<sup>25</sup> See A. James, *op. cit.*, 1-13; N. White, *Keeping the Peace, op. cit.*, 232-247 and D. Bowett, *op. cit.*, 196 and *passim*.

<sup>26</sup> See T. Weiss, 'Rekindling Hope in UN Humanitarian Intervention', in W. Clarke and J. Herbst, *Learning From Somalia*, Boulder: Westview Press, (1997), 207-228, at 211.

<sup>27</sup> See D. Daniel, 'Wandering Out of the Void? Conceptualizing Practicable Peace Enforcement,' in A. Morrison, D. Fraser and J. Kiras, *Peacekeeping With Muscle: The Use of Force in International Conflict Resolution*, Cornwallis: Canadian Peacekeeping Press, (1997), 1-15 at 4. The quote is from, *FM 100-23*, Washington DC, (1994), 12.

practical and may prove counter productive.<sup>28</sup> It is generally accepted that the peacekeeping force in Lebanon (UNIFIL) is based on the traditional peacekeeping model, and that the UNITAF and UNOSOM II missions in Somalia may be categorised as peace enforcement operations.

The semantic confusion is not helped by the application of the term peace enforcement to a large-scale international military operation such as the Gulf war.<sup>29</sup> Portraying operations involving enforcement measures by a group of states in such superficial 'sound bite' terms merely undermines the credibility of the genuine attempts by the UN to keep or enforce the peace as the case may be. One of the few situations to which the description peace enforcement can accurately be applied is that of the NATO led force (IFOR) in the former Yugoslavia following the Dayton Accords, and the more recently deployed KFOR in Kosovo. The notion of consent also marks an important distinction between peacekeeping and related humanitarian aid missions on the one hand and humanitarian intervention on the other.<sup>30</sup> Humanitarian intervention is generally understood to mean intervention by a third party in the affairs of another without that country's consent in order to protect serious human rights violations of the local citizens.<sup>31</sup>

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<sup>28</sup> See S. Duke, 'The United Nations and Intra-state Conflict', *1 (4) International Peacekeeping (F. Cass)*, (Winter 1994), 375-93.

<sup>29</sup> The term is often used by UN officials, see for example the comments by D. Shagra, Legal Officer, Office of Legal Affairs, and R. Zacklin, Director and Deputy to the Under Secretary-General, Office of Legal Affairs, 'The Applicability of International Humanitarian Law to United Nations Peace-keeping Operations: Conceptual, Legal and Practical Issues', *Symposium on Humanitarian Action and Peacekeeping Operations Report*, Geneva: ICRC,(1994), 40 and *passim*. Talk given by Prof. F. Halliday, LSE, UN Training School, Military College, Ireland, October 1995.

<sup>30</sup> S. L. Turley, 'Keeping the Peace: Do the Laws of War Apply?' *73 Texas Law Review*, (1994), 139-176 at p.151. See also A. C. Arend & R. J. Beck, 'Humanitarian Intervention', in *International Law and the Use of Force*, New York: Routledge, (1993), 112-137 and C. Greenwood, 'Is there a right of Humanitarian Intervention?', *49(2) World Today*, (1993), 34-40.

<sup>31</sup> See S. D. Murphy, *Humanitarian Intervention*, University of Pennsylvania, (1996), 8-20. T. Weiss, 'Intervention: Whither the United Nations?', *17 (1) The Washington Quarterly*, (Winter 1994), 109-128 at 110-111; R. B. Lillich, 'Humanitarian Interventions through the United Nations: Towards the Development of

## Collective security and the role of the Security Council<sup>32</sup>

While the Security Council has 'primary' responsibility for the maintenance of international peace and security, it does not possess an exclusive competence in this area.<sup>33</sup> Peace was to be maintained by international co-operation, as embodied in the UN Organization itself, rather than through some kind of new world governmental system. However, the collective security provisions were seriously flawed as the basic premise of major power consensus in international affairs did not materialise and the provisions upon which so much depended were inoperable from the beginning.<sup>34</sup> In this way, the former allies became classical victims of their own propaganda.

In hindsight, it is difficult to see how the drafters of the Charter could have expected this system to work. The so called 'big powers' had a right of veto in the Security Council rendering collective security unenforceable against them, yet it was they that posed the greatest potential threat to international peace. In spite of the fact that this created a ruling oligarchy within the Security Council that was to some extent imposed on the smaller states, the UN did not confer power where it did not in fact already exist. It merely reflected the reality of post World War II economic and political power. Unfortunately, peoples and nations not part of the formal state system were not represented at all. However, in examining the

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Criteria', 53 (2) *Hiedelberg Journal of International Law*, (1993), 556-575 at 559; J. Donnelly, 'Human Rights, humanitarian crisis, and humanitarian intervention, 48 (4) *International Journal*, (1993), 607-640, esp. 608; K. Pease and D. Forsythe, 'Humanitarian Intervention and International Law,' 45 *Austrian Journal of Public and International Law*, (1993), 1-20; and more generally J. Harris (ed.), *The Politics of Humanitarian Intervention*, Pinter, (1995), P. Malanczuk, *Humanitarian Intervention and the Legitimacy of the Use of Force*, The Hague: Martinus Nijhoff, (1993); and A. Eknes & A. McDermott(eds.), *Sovereignty, Humanitarian Intervention and the Military*, Oslo: Norwegian Institute of International Affairs, (1996).

<sup>32</sup> See generally Rikhye, *op. cit.*, 1-28.

<sup>33</sup> See Goodrich, Hambro and Simons, *op. cit.*, 257-343; S. D. Bailey and S. Daws, *The Procedure of the United Nations Security Council*, (3<sup>rd</sup>. Edn.), Oxford: Clarendon, (1998), esp. 353-377; and *The UN Security Council and Human Rights*, London: Macmillan, (1994); R. Hiscocks, *The Security Council*, London: Longmans, (1974), 24-81. See also H. McCoubrey, 'International Law and National Contingents in UN Forces', 12 *International Relations*, (1994), 39-50.

<sup>34</sup> See generally J.G. Ruggie, 'The UN and the Collective Use of Force: Whither or Wheter?', in M. Pugh, (ed.), *op. cit.*, 1-20.

collective security provisions of the Charter, it is important to bear in mind that peace depends more upon international co-operation than on the mechanisms contained in the Charter. While the threat or actual use of the veto may prevent the UN taking action, the real problem is a lack of consensus among the major powers, and the veto merely reflects the reality of the international political system.<sup>35</sup>

Since no formal agreement under the Charter for the provisions of troops to the UN has yet been concluded, member states are under no legal obligation to supply the Security Council with armed forces except on a voluntary basis. In recent years stand-by arrangements and other 'offers' have been made by states, and it is on this basis, in contrast to what was intended for enforcement measures, that states usually provide the necessary troops to make up a peacekeeping force.<sup>36</sup> The course of UN peacekeeping has not always run smoothly and the crisis that occurred during the operation in the Congo threatened the existence of the whole Organization for a time.<sup>37</sup>

### **Peace support operations and current conflicts<sup>38</sup>**

Since its establishment, the UN has been kept on a tight rein and prevented from developing its full potential. During the cold war both sides used the threat of veto in the Security Council to good effect, and both shared a common interest in hindering the General Assembly from developing its full capacity.

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<sup>35</sup> See generally B. Fassbender, *UN Security Council Reform and the Right of Veto: A Constitutional Perspective*, Hague: Kluwer, (1998), esp. Chapters 8 and 9; and D. Malone, *Decision Making in the UN Security Council: The Case of Haiti, 1990-1997*, Oxford: Clarendon Press, (1998), esp. 7-36.

<sup>36</sup> Personal interview, Mr. J.C. Aime, UN Secretariat, New York, July 1988. Up to relatively recently, these were usually small and middle powers to the exclusion of the 'big five'.

<sup>37</sup> See R. Higgins, *op. cit.*; E. W. Lefever, *Crisis in the Congo, A United Nations Force in Action*, Washington DC: Brookings Institute, (1965), and H. McCoubrey and N. White, *op. cit.*, 177-178 and *passim*.

<sup>38</sup> For a good overview of many key issues, see A. Roberts, *Humanitarian Action in War*, Adelphi Paper 305, Oxford: Oxford University Press, (1996), esp. 10-

The collapse of the Soviet Union and the end of the cold war has given rise to a situation where there is in effect one world superpower, the United States. The 'new world order' was intended to unlock the UN mechanism for the maintenance of international peace, and exploit opportunities for peacekeeping and nation building. Instead, there is a perception and fear in the countries of the developing South that the UN is being exploited to police a world order based on the interests of the powerful few.<sup>39</sup> This fear is linked to the lack of success in reforming the Security Council and making it more representative of, and accountable to, the membership of the UN as a whole.<sup>40</sup> However, one of the biggest problems confronting the UN remains one of its most banal, i.e. lack of finance.<sup>41</sup> This problem more often than not reflected political division among members, rather than financial difficulty.

In June 1992, the UN Secretary-General Boutros Boutros-Ghali, published *An Agenda for Peace*.<sup>42</sup> This was an important report that stimulated a major international debate about the role of the UN, and the international community, in securing and maintaining peace in the post cold war era. The report expressed the optimism and confidence of the time, but these were to be very short lived. Recent events have highlighted the deficiencies in the UN system, in particular the controversy over UN action and policy in Somalia and Rwanda, and the failure to secure peace and protect Bosnia in the former Yugoslavia. Despite the noble aspirations of the Charter, for many millions the world is still a dangerous and

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<sup>39</sup> See J. Ciechanski, 'Enforcement Measures under Chapter VII of the UN Charter: UN Practice after the Cold War', in M. Pugh, (ed.), *op. cit.*, 82-104, esp. 97-99, and I. Johnstone, *Aftermath of the Gulf War: An Assessment of UN Action*, International Peace Academy, Occasional Paper Series, Boulder and London: Lynne Rienner, (1994), 10 and 43-45.

<sup>40</sup> See generally M. Reisman, 'The Constitutional Crises in the United Nations', *87 (1) American Journal of International Law*, (January 1993), 85-86; and O. Otunnu, 'Maintaining Broad Legitimacy for United Nations Action', in J. Roper, M. Nishihara, O. Otunnu, and E. Schoettle, *op. cit.*, 67-83.

<sup>41</sup> See 'Financing Peacekeeping' in *The Preparedness Gap: Making Peace Operations Work in the 21 st Century*, A Policy Report of the United Nations Association of the United States of America, (2001), 33-37.

<sup>42</sup> UN document: A/47/277 - S/24111, (June 1992).

miserable place in which to exist. War, famine, pestilence, and disease continue to ravage the peoples of this planet, especially those subsisting in the abject poverty prevalent in most states of the developing South. These exacerbate pre-existing cultural, ethnic and political tensions. The end of the cold war has witnessed a resurgence of conflict, especially within states, as old enmities come to the fore.

The UN and the international system seemed unprepared and ill-equipped about the potential consequences. Not surprisingly, the UN has come in for considerable criticism, much of which is merited. However, the criticism is sometimes misplaced in that it fails to identify the real problems of the Organization as a whole and to recognise its many achievements. In addition, there is sometimes a failure to distinguish between the UN as a whole, and its separate organs, especially the Security Council

The end of the cold war has also heralded a significant increase in the UN's willingness to pursue its role in the maintenance of international peace and security by the adoption of military solutions. The importance attached to the Security Council's power to order military measures did not stem from expectations that it would often be necessary to do so.<sup>43</sup> It was thought that the threat of military action would be sufficient to deter aggression and to induce states to comply with measures deemed appropriate by the Security Council to maintain or restore international peace and security. However, the reality is that although the military agreements envisioned under Article 43 of the Charter did not materialise, the UN has had a significant involvement in military operations of one kind or another since the first major UN authorized operation during the Korean conflict in 1950.

The adoption by the UN of resolutions under Chapter VII of the Charter involving enforcement measures has been one of its most controversial actions in recent years. The real problem is not the legality of such action, but the question of which states decide when it is appropriate and what are the criteria used? In fact, the practice of the Security Council of authorising states to use armed force does not correspond to the express text of Chapter VII of the Charter.<sup>44</sup> The

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<sup>43</sup> Goodrich, Hambro and Simons, *op. cit.*, 291.

current practice allows the permanent members of the Council to determine and decide the agenda, thus facilitating a very selective, secretive and undemocratic response to international crises. The situation is made worse by the ambiguity surrounding the extent to which peaceful settlement procedures, including diplomatic efforts and diplomatic sanctions must be exhausted before military sanctions are applied.<sup>45</sup>

Co-operation with regional bodies and coalitions of the willing is a characteristic of contemporary UN approved operations, a situation which has been brought about by a number of factors, not least the lack of finance.<sup>46</sup> Substantial co-operation between NATO and the UN was forced by the necessity to respond to the Yugoslav crisis.<sup>47</sup> The complex nature of many contemporary conflicts require significantly larger and more heavily equipped forces, and this in turn has led to greater participation by the permanent members of the Security Council. The distinction between peacekeeping and enforcement action remains crucial. Nonetheless, this distinction has become blurred in the grey area that exists between peacekeeping and so called 'peace enforcement', and by the number and complexity of peace support operations in the post cold war era. Prior to 1990, the UN had authorized two enforcement missions, that against North Korea in 1950 and the Congo in 1960 (ONUC).<sup>48</sup> It has since approved a number

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<sup>44</sup> See L. Heffernan 'Military Action Under the Auspices of the United Nations', *Irish Law Times*, (March 1993), 59-62; N. D. White, 'The UN Charter and Peacekeeping Forces: Constitutional Issues', in M. Pugh, (ed.), *op. cit.*, 43-63. and M. Howard, 'The United Nations and International Security' in A. Roberts & B. Kingsbury (ed.), *United Nations, Divided World: The UN's Role in International Relations*, 31-45, Oxford: Clarendon Press, (1988).

<sup>45</sup> This was a source of controversy and debate before the adoption of Resolution 678 (1991), which authorized collective measures against Iraq and led to Operation Desert Storm. See O. Schacter, '*United Nations in the Gulf Conflict*' 85 *American Journal of International Law*, (1991), 452 and L.C. Green, 'Iraq, the U.N. and the Law', *Alberta Law Review* (1991), 560.

<sup>46</sup> Though costs are minuscule compared to the national defence budgets, see E. Schoettle, 'Financing Peacekeeping', in J. Roper, M. Nishihara, O. Otunnu, and E. Schoettle, *op cit.*, 17-48 at 20.

<sup>47</sup> See generally M. Nordquist, *What Color Helmet?: Reforming Security Council Peacekeeping Mandates*, Newport RI: Naval War College, Center for Naval Warfare Studies, (1997), esp. 46-50.

of major operations with similar characteristics, in Kuwait, Somalia, the former Yugoslavia, Kosovo, East Timor, Albania<sup>49</sup>, the Central African Republic and Sierra Leone. However, some of these are UN mandated forces, while others are merely authorized 'coalitions of the willing'.<sup>50</sup>

The end of the cold war has not brought the realisation of the early optimism associated with that event, and the ambitions for the UN and the Security Council reflected in the Secretary-General's *Agenda for Peace*, did not materialise. The Secretary-General sought to give legitimacy to the concept of peace enforcement by formally proposing the establishment of such units. However, the concept of peace enforcement can prove to be a contradiction in terms, and it was disastrous when attempted in Somalia. Ultimately, it merely served to discredit UN activities in the maintenance of international peace and security. A more sobering and reflective sequel to this was published a short time later in which the Secretary-General acknowledged certain limitations.<sup>51</sup>

In order to respond to the problem of intrastate conflict, there is need for reform of doctrinal foundations and structures in the UN system. Military

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<sup>48</sup> ONUC amounted to at least *de facto* enforcement action, see N. D. White, 'The UN Charter and Peacekeeping Forces: Constitutional Issues', in M. Pugh (ed.), *op. cit.*, 43-63 at 53. Cf. *Certain Expenses of the UN - Article 17(2)*, Advisory Opinion, July 20, 1962, International Court of Justice Reports, 1962, 177, where the I.C.J. said the 'the operation did not involve "preventative or enforcement measures" against any state under Chapter VII'.

<sup>49</sup> Though Albania had elements of traditional peacekeeping and peace enforcement combined in one mandate, see D. Kritsiotis, 'Security Council Resolution 1101 (1997) and the Multi-national Protection Force of Operation Alba in Albania', *12 Leiden Journal of International Law*, (1999), 511-547.

<sup>50</sup> It is best to view the action by NATO forces in Kosovo during 1999 as *sui generis*, see B. Simma, 'NATO, the UN and the Use of Force: Legal Aspects', *10 European Journal of International Law*, (1999) 1-22; K. Ambos, 'NATO, the UN and the Use of Force: Legal Aspects. A comment on Simma and Cassese', *2 Humanitäres Völkerrecht, Deutsches Rotes Kreuz*, (1999), 114-115; A. Cassese, 'Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?' *10 European Journal of International Law*, (1999), 23-30 and C. Guicherd, 'International Law and the War in Kosovo', *41(2) Survival*, (Summer, 1999), 19-34. See also 'The Kosovo crisis and international humanitarian law', *International Review of the Red Cross*, No. 837, (2000), in which the whole edition is devoted to contributions on the topic.

<sup>51</sup> *Supplement to An Agenda for Peace*, New York: United Nations, (1995). See M. Reisman, 'Peacemaking', *18 Yale Journal of International Law*, (1993), 415.

intervention in any internal conflict is fraught with uncertainty and danger. There is a growing consensus that much greater emphasis must be placed on preventive measures, as opposed to reactive corrective strategies that are more often than not too little and too late. In particular, the limited ability of the Security Council and office of the Secretary-General, to deploy, direct, command and control enforcement operations in response to threats to the peace, breaches of the peace or acts of aggression. The consequences of this are well known, but worth restating. International and internal armed conflicts have continued to flare around the globe, and one of the ironies of the end of the cold war is that local or internal conflicts have increased.<sup>52</sup> With the UN's inability to respond effectively to these crises, the Security Council has left the establishment and management of international forces to individual member states, in particular the United States. In some of these cases e.g. the UN has divested itself explicitly of its competence in leading enforcement actions and has instead 'authorized' member states to undertake enforcement measures by use of force. Some have described the action by the Security Council as a form of abdication of responsibility, with little or no command and control by the UN, and no strategic direction either.<sup>53</sup>

### **The structure of the thesis**

The thesis examines two important peace support operations, the traditional peacekeeping operation established in Lebanon in 1978 (UNIFIL), and what is arguably one of the most significant peace enforcement operations of the last decade, UNOSOM II in Somalia. These were chosen as representative of the types of military operations undertaken by the UN, and of reflecting the problems that are associated with their establishment, deployment, and command.

Adopting criteria to determine the success of an operation is

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<sup>52</sup> See D. Smith, *The State of War and Peace Atlas*, International Peace Research Institute, Oslo, London: Penguin, (1997).

<sup>53</sup> See N. White, *Keeping the Peace*, *op. cit.*, 115-128 esp. 117-118.

problematic, as no internationally accepted criteria exist at present.<sup>54</sup> Despite this, most commentators still need to find some formula for evaluating the performance of peacekeeping and related operations. This dilemma is usually solved by using a variety of criteria based on the extent to which the mandate or objectives of the mission were fulfilled, and/or the extent to which the operation limited armed conflict, or promoted relative peace and security in the area.<sup>55</sup> There is also a need to be aware of the time frame used to determine 'success' or 'failure'.<sup>56</sup> Were the short term efforts to feed the starving success, and what then of the long term strategy and eventual withdrawal? Most of the systematic studies of UN peacekeeping have been of the case study and comparative nature.<sup>57</sup> Such studies often focus on particular dimensions of peacekeeping in the context of a selected mission or

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<sup>54</sup> Paul Diehl identified two criteria for evaluating a traditional peacekeeping operation i.e. the extent to which it limited armed conflict and promoted conflict resolution, P. Diehl, *op. cit.*, 3, 34. However, this theoretical framework has serious flaws, see review by R. C. Johansen in the 38 *Mershon International Studies Review* (1994) 307-310. For an excellent but now somewhat dated analysis of this question with respect to the entire UN, see K. Stiles and M. MacDonald, 'After Consensus, What?: Performance Criteria for the UN in the Post Cold war Era,' 29 *Journal of Peace Research*, (1992), 299-311. See also D. Jett, *Why Peacekeeping Fails*, London: Macmillan, (2000), esp. 1-20.

<sup>55</sup> Brown identified three criteria for determining success: Was the mandate fulfilled, as specified by the appropriate Security Council resolution? Did the operation lead to a resolution of the underlying disputes of the conflict? Did the presence of the operation contribute to the maintenance of international peace and security by reducing or eliminating conflict in the area of operation? M. A. Brown, 'A., United Nations Peacekeeping: Historical Overview and Current Issues', *Report for Congress*, Washington DC, Congressional Research Service, 1993. See also D. Bratt, 'Assessing the Success of UN Peacekeeping Operations', in M. Pugh (ed.), *op. cit.*, 64-81. Rikhye emphasizes the importance of the mechanics and logistical dimensions of peacekeeping, in particular the role of 'command and control' and the role of the superpowers in a peacekeeping operations success, I. J. Rikhye, *op. cit.*, 81-82.

<sup>56</sup> See T. Weiss, *op. cit.*, 207-228, at 215.

<sup>57</sup> See for example, E. Lefever, *Uncertain Mandate: Politics of the UN Congo Operation*, Chicago: University of Chicago Press, (1967); A. James, *op. cit.*; J. Hirsch and R. Oakley, *Somalia and Operation Restore Hope*, Washington: US Institute of Peace, (1995), 18; W. Clarke and J. Herbst, *op. cit.*; R. I. Rotberg (ed.), *Namibia, Political and Economic Prospects*, Lexington, (1983); S. Ratner, *op. cit.*, B. Skjomo, *UNIFIL, Peacekeeping in Lebanon*, Boulder: Lynne Rienner, (1989); R. Thakur, *International Peacekeeping in Lebanon: United Nations and Multilateral Force*, Boulder: Westview, (1987).

missions,<sup>58</sup> and this is the model adopted in this thesis. Many studies have also tended to place too much emphasis on what is theoretically desirable, rather than politically and practically possible. In truth, it is probable that there are no definitive criteria to determine the ultimate success of any UN military operation absolutely, and the more complex second generation multi-dimensional operations are even more problematic in this regard than the generally more straight forward traditional peacekeeping operations.<sup>59</sup> In the latter case, it may be possible to evaluate the extent to which a cease-fire was maintained, but multi-dimensional operations require analysis from a number of perspectives.

Nevertheless, a useful means of providing a framework to evaluate the performance of a force is to apply factors identified as essential for its success. In his first report to the Security Council on UNIFIL, the Secretary-General outlined the three essential conditions that needed to be met for the Force to be effective. First, it must have at all times the full confidence and backing of the Security Council. Secondly, it must operate with the full co-operation of all the parties concerned. Thirdly, it must be able to function as an integrated and efficient military unit.<sup>60</sup> In 1983, the now retired Under Secretary-General of the UN with special responsibility for peacekeeping operations, Mr. Brian Urquhart, elaborated upon this when writing about the Multi National Force in Beirut and stated that successful peacekeeping depends, *inter alia*, on a sound political base, a well defined mandate and objectives, and the co-operation of the parties concerned.<sup>61</sup> The requirement of a well defined mandate and objectives was a somewhat glaring omission from the Secretary-General's otherwise pragmatic report. Using these factors as criteria, chapter 6 focuses on the establishment and deployment of the UN forces in Lebanon and Somalia. Its purpose is to explain how the background influenced the outcome of the

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<sup>58</sup> For example, legal questions, the organization aspects, political and military aspects or how the operations fits into the larger security regime.

<sup>59</sup> Ratner, *op. cit.*, 189/190.

<sup>60</sup> Document S/12611, 19 March 1978, para 3.

<sup>61</sup> *The New York Times*, 19 December 1983.

operations, and the central role played by the United States throughout, the primary contention being that the lack of support from the permanent members of the Security Council, especially the United States, undermined the political base and viability of the operations from the beginning.

The research focus of the thesis relates to Ireland, a small militarily neutral state but one with a long tradition of contributing to peacekeeping operations. Despite its significant contribution to peace support operations to date, there is little research on the past and future implications of this for Ireland. This thesis seeks to address some of the key legal and political issues confronting Ireland, and to provide a unique perspective on the dilemmas and problems confronting many small states of the UN in the new international order.

Membership of the UN has been a cornerstone and determiner of Irish foreign policy since 1955. The key issue relating to UN peace support operations and Irish foreign policy at present is the focus on maintaining military neutrality while fostering a security role within Europe. The participation in UN led and sponsored operations is not a controversial issue, but the growing trend of recent years to contract out peace support operations to regional organizations such as the North Atlantic Treaty Organization (NATO) may present problems for a country that has up to now shied away from difficult or controversial decisions on security and defence issues. Important questions, however, remain unanswered. The Gulf War and more recent events in Somalia, Rwanda, and the former Yugoslavia place a responsibility on Ireland to re-define its role, especially in regard to UN peace support operations. Ireland needs to examine whether military neutrality is appropriate or even relevant in the post cold war era. Chapter 2 seeks to explore these themes and the implications for Ireland of recent developments in international peace support operations. It looks at the role of the Irish Defence Forces that, in the absence of external conflict, have been defined by the role in support of the civil power and as peacekeepers for the UN.

In 1993, Ireland revised and updated the municipal legal basis for troop participation in UN operations to allow it to contribute soldiers to UNOSOM II in Somalia. This brought about a fundamental change in policy, after which participation in peacekeeping forces not specifically of a police nature was

permitted. Nevertheless, serious deficiencies exist in the municipal legal framework governing participation in peace support operations, especially in relation to the command of Defence Force personnel. These are addressed in Chapter 3, where a comparative analysis is made with that of the municipal legal basis governing Canadian participation in such operations, while Chapter 4 examines the constitutional implications of Irish membership of the UN.

The question of command and control of UN and other multi-national operations is a fundamental issue confronting the formation of international forces. The problems encountered at international level often have their origins in the national policy of contributing states. In theory, the command structure of such forces is straightforward, but in reality it is fraught with difficulties arising from subjective human factors, and objective legal constraints. Unless the Security Council has specifically delegated command to a particular country, any one government should not effectively control a UN operation. Revision of the legal framework governing UN peace support operations is long overdue. Chapter 5 examines these and related issues in the context of Canadian and Irish participation in UN operations.

As previously noted, Chapter 6 analyses the political and diplomatic background to the establishment of the UN mandated military forces in Lebanon and Somalia. In the case of Lebanon, the mandate adopted was controversial and it was considered to be deficient in a number of respects. While UNIFIL was deployed with undue haste against the advice of many commentators at the time, its survival should not be seen as a reflection on the appropriateness of the mandate. The UN operations in Somalia were more ambitious in comparison, and they involved significantly more resources. Initially at least, they were also less controversial. The consensus and enthusiasm for involvement in Somalia changed quickly as 'mission creep' set in and doubts were expressed about the efficacy of UN policy there.

The most controversial aspect of recent UN operations has been the policy with regard to the use of force, which is a fundamental determiner of the nature of any peace support operation. Chapter 7 examines the use of force and the experience of UNIFIL and UNOSOM II. The premise of the analysis is that strict adherence to the principle in self defence is the only option available

in traditional peacekeeping operations, and that the nature of the UNOSOM II mission meant that the coercive enforcement measures adopted inevitably led to its role as third party UN force being converted to that of factional participant.

Chapter 8 examines the applicability and relevance of international humanitarian law (humanitarian law) to all types of military action undertaken by or on behalf of the UN. Owing to the controversy surrounding action by UNOSOM forces in Somalia, the question of respect for the principles of humanitarian law by UN forces has been the subject of controversy and debate. The less controversial traditional peacekeeping missions can also involve important issues of humanitarian law, especially when the situation that UNIFIL found itself in after the Israeli invasion of 1982 is considered.

The UN system was designed carefully to make war illegal and unnecessary,<sup>62</sup> and nowhere in Chapter VII, and Article 42 in particular, is 'war' mentioned.<sup>63</sup> The obvious implication of this is that military action taken by the UN is not to be regarded as 'war', and this was the commonly accepted view of the UN action in Korea.<sup>64</sup> While there appears to be no record of the UN ever claiming that humanitarian law does not apply to operations authorized by or undertaken on behalf of the Organization, the issues raised are complex and the policy of the UN remains ambivalent. The thesis examines the problems associated with the application of humanitarian law to UN peace support operations. It looks in particular at how to address infringements of humanitarian law by UN forces, and whether a duty exists to protect the rights of third parties against violations of applicable international law in areas where UN troops are deployed.

These are real issues confronting today's peacekeepers, but especially those participating in the so-called 'robust' peacekeeping operations similar to that of UNOSOM II in Somalia. While none of the existing Conventions or

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<sup>62</sup> See T. M. Franck and F. Patel, 'Agora: The Gulf Crisis in International and Foreign Relations Law: UN Police Action in Lieu of War: 'The Old Order Changeth,' 85 *American Journal of International Law*, (1991), at 63.

<sup>63</sup> See generally, C. Greenwood, 'The Concept of War in Modern International Law', 36 *International and Comparative Law Quarterly*, (1987), 283-306.

Protocols address the specific issue of UN forces, or forces acting on the authority of the UN, in situations of armed conflict, it could be said that this situation leaves military forces acting under the control of the UN in somewhat of a limbo. Human rights are a key issue in guaranteeing consistent and effective peacekeeping.<sup>65</sup> Recent UN operations have involved authorized and mandated missions being mounted in situations of conflict where clashes involving UN soldiers were inevitable. Many combatants are not soldiers of regular armies but militias or groups of armed civilians with little discipline and an ill-defined command structure.<sup>66</sup> Fighters of this nature do not always fit easily into the matrix of humanitarian law combatant status.

Despite the dangers involved, the international community and the UN has a responsibility not to shy away from complex and dangerous situations. Esoteric debates on legal principles have a value, but they should not be allowed to detract from the establishment and deployment of peace support operations as facilitators of conflict resolution. Apart from deciding on an appropriate and authoritative mandate, the real issue is who will decide when these forces will be deployed and their subsequent command and control. In this regard the role of the Security Council is vital, especially for middle and small powers like Ireland. The recently published *Report of the Panel on UN Peacekeeping Operations (Brahimi Report)* called for more robust rules of engagement (ROE) in operations involving intra-state/transnational conflicts.<sup>67</sup> While the report acknowledged that this would involve 'bigger forces, better equipped and more costly', it did not seem to take full cognisance of the fact that the use of force must be accompanied by political will, a willingness to accept casualties (UN personnel,

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<sup>64</sup> Bowett, *op. cit.*, 53.

<sup>65</sup> See D. Garcia-Sayan, 'Human Rights and Peace-Keeping Operations', 29 *University of Richmond Law Review*, (1995), 41-65 at 45. This article deals primarily with the UN mission to El Salvador (ONUSAL). See also D. Forsythe, 'Human Rights and International Security: United Nations Field Operations Redux', in Castermans, van Hoof and Smith (eds.), *The Role of the Nation State in the 21<sup>st</sup> Century*, Dordrecht: Kluwer, (1998), 265-276.

<sup>66</sup> *The Blue Helmets, op. cit.*, 4.

<sup>67</sup> See the *Report of the Panel on UN Peacekeeping Operations*, UN, 23 August 2000 (*Brahimi Report*, A/55/305-S/2000/809 available from <<http://www.un.org>>).

civilians and others), and a need for an effective command and control mechanism to ensure cohesion and uniform application. It also failed to address the issues raised by regional peacekeepers or coalitions of the willing acting under the authority of the UN. Somalia shows that robust ROE and increased size are not enough, and while it is imperative not to employ an emasculated UN force, the UN operations in Somalia and Lebanon show that it is essential to have a clear military and political strategy agreed at the outset.

## Chapter 2

### IRELAND, PEACEKEEPING AND DEFENCE POLICY: CHALLENGES AND OPPORTUNITIES

#### Introduction

Membership of the United Nations (UN) has been a cornerstone and determiner of Irish foreign policy since 1955.<sup>1</sup> For many years, prior to accession to the European Community, the UN was the only forum where Ireland could express its concerns across a wide range of international issues. The building and maintenance of a strong and effective UN, especially in the area of conflict prevention, forms a key objective of Irish foreign policy within which peacekeeping operations have come to play a central role.<sup>2</sup> As a small country, Ireland had a vested interest in the promotion of multilateral diplomacy and collective security. Despite the deficiencies in the UN Charter and the general framework of the UN, the advantage to a small 'middle power' of having a voice among the states of the world was apparent from the beginning. Eager to participate fully in every aspect of the Organization, Ireland was not hesitant about committing its defence forces to UN command in far flung lands largely unknown to most Irish people at the time.

Today participation by Defence Forces and Gardai (police) in a range of UN sponsored activities is commonplace.<sup>3</sup> This involvement has become a

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<sup>1</sup> Department of Foreign Affairs, *Challenges and Opportunities Abroad, White Paper on Foreign Policy*, Dublin, (1996), 149-167, and Department of Defence, *White Paper on Defence*, Dublin, (February, 2000), 59 - 70.

<sup>2</sup> *Ibid.*

<sup>3</sup> See Department of Defence, *Defence Forces Annual Report*, Dublin, (1999), 32-38 and Department of Justice, Equality and Law Reform, *Ireland's Involvement in International Police Missions – A Discussion Paper*, Dublin, (November, 1999). See also J. P. Duggan, *A History of the Irish Army*, Dublin: Gill and Macmillan, (1991), 249-278 and *An Cosantoir – The Defence Forces Magazine*, UN Anniversary Edition, (October 1995). For a list of the missions to which the Defence Forces have contributed, see Appendix D.

significant element of Irish foreign policy, and a concrete manifestation of commitment to the UN and the maintenance of world peace.<sup>4</sup> A tradition of active membership of both the League of Nations and the UN has assisted in establishing a peacekeeping tradition.<sup>5</sup> Furthermore, the effects of Ireland's policies over a range of issues including decolonisation, disarmament, human rights, and its history under colonial rule and non-membership of a military alliance, combined to make it acceptable as a contributor to peacekeeping and related activities.<sup>6</sup>

Despite the ongoing involvement in peace support operations, there is surprisingly little debate on the issue in Ireland. There seems to be a general acceptance that such activities are good for the Defence Forces and the international community. In spite of the fact that this may be correct, it is not something that should be just assumed. In 1993, Ireland revised and updated the municipal legal basis for troop participation in UN operations to allow Ireland to contribute soldiers to UNOSOM II in Somalia. This brought about a fundamental change in policy, after which participation in peacekeeping forces not specifically of a police nature was permitted.<sup>7</sup> This did generate some debate

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<sup>4</sup> See for example the statement to this effect by the Tánaiste (Deputy Prime Minister) and Minister for Foreign Affairs, Mr. Dick Spring, in *The Irish Times*, 6 May 1997; and J. Morrison Skelly, *Irish Diplomacy at the United Nations, 1945-65*, Dublin: Irish Academic Press, (1997).

<sup>5</sup> Skelly, *op. cit.* and Michael J. Kennedy, *Ireland and the League of Nations*, Dublin: Irish Academic Press, (1996). See also Norman J.D. McQueen, 'Irish Neutrality : the United Nations and the Peacekeeping Experience 1945-1969', D. Phil. thesis, New University of Ulster, 1981, esp. the Introduction 1-13. Nina Heathcote, 'Ireland and the United Nations Operation in the Congo', 111 *International Relations*, (May 1971), 880. Patrick Keatinge, *The Formulation of Irish Foreign Policy*: Dublin, Institute of Public Administration, (1973), 7 and 83-86; and *A Place Among the Nations*: Dublin, Institute of Public Administration, (1978), 158-161.

<sup>6</sup> *Ibid.*

<sup>7</sup> The Defence (Amendment) Act, 1993 amended and extended the Defence (Amendment)(No. 2) Act, 1960 in significant respects. The principle amendment is contained in Section 1, which by defining an 'International United Nations Force' as an international force or body established by the Security Council or General Assembly, goes beyond the previous definition which limited participation to peacekeeping or police type forces. See R. Murphy, 'Ireland: Legal issues arising from participation in

as to whether Ireland should contribute forces to new kinds of military action by the UN.

The most significant political development in recent years was the publication of the Government White Paper on Foreign Policy, and a White Paper on Defence.<sup>8</sup> The White Paper on Foreign Policy was strong on ideals, but weak in identifying Ireland's interests and the practical implications of foreign policy decisions. Likewise, the White Paper on Defence was dominated by bland descriptive passages, mixed with cost cutting suggestions disguised as expenditure analysis, and an especially glib assumption regarding the domestic security situation following the Good Friday Agreement.<sup>9</sup> The Paper lacked policy analysis and vision.<sup>10</sup> The surprise decision to reduce the Defence Forces even further to around 10,500 sparked off the most serious public dispute ever between the Department of Defence and the Defence Forces.<sup>11</sup> This had the unfortunate consequence of detracting attention from other defence and security issues discussed in the White Paper. Although both the Foreign Policy and Defence Forces White Papers were vague in many respects, the chapters dealing with overseas peace support operations did set out the background to Irish involvement, and the factors that will inform the government's consideration of requests for troops were enunciated in clear terms. They also spelled out the guiding principles the government should consider in deciding whether or not to participate in enforcement operations in the post Somalia era.

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United Nations operations', 1 *International Peacekeeping* (Kluwer), No.2, (March-May 1994), 61-64.

<sup>8</sup> *Supra*, n. 1.

<sup>9</sup> See *White Paper on Defence, op. cit.*, 12.

<sup>10</sup> See criticisms by Mr. T. Murray, a former government consultant who reviewed the Defence Forces, *The Irish Times*, 4 March 2000, 10. He was especially critical of the treatment of the Naval Service and Air Corps. For the view of the Minister for Defence, M. Smith, see *The Irish Times*, 26 April 2000, 16.

<sup>11</sup> See for example, Jim Cusack, *The Irish Times*, 9 February, 2000, 3, where a former Chief of Staff asked the Taoiseach to intervene in the dispute.

While these criteria were mere guiding principles that leave considerable discretion to the government of the day, they are significant given the Irish governments reluctance to fetter its discretion in foreign policy matters. The publication of the criteria should have facilitated democratic accountability and informed parliamentary debate. This does not seem to have been the case. What is most surprising about the criteria and guidelines is how little reference is actually made to them in the Dáil (Irish Parliament) debates seeking approval for participation.<sup>12</sup> Part of the problem may be the need to respond quickly to humanitarian emergencies. The key issue relating to peacekeeping and Irish foreign policy arising from the White Paper on Foreign Policy was the focus on maintaining military neutrality while fostering a security role within Europe.<sup>13</sup> The security role within Europe was expanded upon in the White Paper on Defence with a commitment to pledge troops to the European Rapid Reaction Force.<sup>14</sup> The participation in UN led and sponsored operations is not a controversial issue, but the growing trend of recent years to contract out peace support operations to regional organizations such as the North Atlantic Treaty Organization (NATO) may present problems for a country that has up to now shied away from difficult or controversial decisions on security and defence issues.

The debate stimulated by the publication of the White Paper on Foreign Policy was a welcome attempt to engage the Irish public in the formulation of foreign

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<sup>12</sup> See for example the debate on participation in KFOR, Dáil Debates 507, (852-869), 1 July 1999.

<sup>13</sup> *White Paper on Foreign Policy, op. cit.*, 191-205. In considering the constitutional implications of a policy of neutrality, the *Report of the Constitution Review Group* stated that neutrality has 'always been a policy as distinct from a fundamental law or principle, and the Review Group sees no reason to propose a change in this position,' *Report of the Constitution Review Group*, May 1996, Dublin: Government Publications, 93.

<sup>14</sup> *White Paper on Defence, op. cit.*, 15-18, *The Irish Times*, 31 October and 1 November 2000, 16, 17. At the Helsinki EU Summit of December 1999, it was agreed that by 2003, the EU would be in a position to deploy a 60,000 military force, see

policy, and it has assisted in identifying and clarifying some key issues. The importance of maintaining a clear distinction between traditional peacekeeping and operations involving some degree of enforcement action is not just important for the UN, but also contributing states like Ireland. The intra state conflicts of today present complex and dangerous situations for all peacekeepers, and while there is general support from the Irish public for participation in such operations, they are not prepared to accept any significant casualties or unnecessary exposure to risk. Politicians in Ireland are not unlike their counterparts elsewhere, they will respond to public opinion and may even succumb to a media driven agenda. The real risks are not well understood, although Ireland contributed to UNIFIL for over twenty years, there was still a large degree of ignorance among the Irish general public of the dangers and general situation prevailing there for UN peacekeepers.<sup>15</sup> For this reason it is useful to consider the implications of Irish participation, and how these were perceived historically.

### **The implications of UN membership for Ireland**

In spite of the fact that Ireland was not admitted to membership of the UN until December 1955, the possibility of Irish participation in enforcement operations was discussed at length in the Dáil in July 1946 when the debate regarding membership took place. The proposal to join the UN was controversial at the time, but it is evident that it was a decision taken in full knowledge of the fact that the UN Charter, unlike that of the League of Nations, contained coercive military provisions binding on all member states by the decision of the Security Council.<sup>16</sup> Indeed, the origins of the UN in 1945 can be seen as an extension into peacetime of the wartime alliance against the 'Axis powers'. In fact, the

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*Presidency Conclusions Helsinki European Council Annex IV*, Brussels, European Council 1999, and P. Gillespie, *The Irish Times*, 20 May 2000.

<sup>15</sup> See the comments by Pat Kenny and others on 'Kenny Live', 25 April 1998. The two hour RTE television show was exclusively devoted to the Defence Forces and UN peacekeeping.

<sup>16</sup>Department of Foreign Affairs, *Ireland and the Partnership for Peace*, an explanatory guide, Dublin, (1999), 9.

term 'United Nations' originally dates from the Atlantic Charter of 1941. In the course of the debate, many deputies present displayed a keen awareness of the commitments involved and with considerable foresight, drew attention to the inherent weakness in the collective security provisions of the Charter that were intended to be the cornerstone of UN policy in the maintenance of international peace and security.<sup>17</sup>

The then Taoiseach (Prime Minister), Mr. de Valera, was initially unenthusiastic about membership. This was not surprising given what he saw as the failure of the major powers to support its predecessor, the League of Nations, and the distribution of power and responsibilities within the new Organization. The UN was premised upon the maintenance of a consensus among the major powers and former wartime allies:

in all these organizations being projected...for the maintenance of international peace, there is a tendency to give the great powers an overwhelming influence, which generally means, in the long run that if they keep together all goes well, but, when they want to quarrel, then the whole purpose for which the League [sic] was established goes to pieces.<sup>18</sup>

De Valera's extensive experience with the League of Nations meant it was obvious to him that the collective security provisions of the UN were not designed to deal with the ideological divisions of the post war period. What was not evident then, however, was that the military and other commitments under the Charter would not materialise as planned. Consequently, when de Valera did decide that Ireland should apply for membership, he went to great lengths to point out the 'serious obligation contained in Article 25 of the Charter,' and the

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<sup>17</sup> See, for example, comments by Mr. Norton, leader of the minority Labour party at the time Dáil Debates ,102 (1343), 24 July 1946.

<sup>18</sup> Dáil Debates, 97 (2779-2881), 19 July 1945.

military significance of the Articles contained in Chapter VII.<sup>19</sup> Even at that early stage the problems associated with the veto were apparent.<sup>20</sup> While the implications for Irish neutrality were a source of some confusion in the Dáil, certain deputies did consider that membership would have serious consequences.<sup>21</sup> In contrast to that of Switzerland, it is noteworthy that de Valera, the person most associated with Ireland's policy of neutrality during World War II, did not consider that membership of the UN would present any significant problem for Irish foreign policy. However, he did share the concern of other deputies regarding the military obligations imposed by admission 'as there was no indication whatsoever as to what contribution they might expect from us'.<sup>22</sup>

Not all of the debate was so well informed or incisive in analysis. There were consistent attempts to raise the question of the partition of Ireland, and submissions such as those from Mr. Cosgrave, leader of the opposition, that they consider for a moment the 'grave factor.... that up to the present the Vatican had not been invited to participate in the framing of the Charter',<sup>23</sup> while another Deputy seemed concerned by the absence of any reference to 'the Supreme Being'.<sup>24</sup> Nonetheless, when the motion was passed, those present for the debate would have been well aware of the potential for Irish military involvement in UN enforcement action under the provisions of the Charter. At that time even

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<sup>19</sup> Dáil Debates, 102 (1315-1325), 24 July 1946.

<sup>20</sup> *Ibid.* According to de Valera, 'the balance of argument would be in favour of getting rid of the veto and of trying to get larger states to accept the rule of law.'

<sup>21</sup> See the contributions from Mr John Costello, a leading member of the main opposition party and future Taoiseach, and others, in Dáil Debates, 102 (354-1355 and 1374), 24 July 1946.

<sup>22</sup> *Ibid.* Dáil Debates, 102 (1403-1408), 24 July 1946. See generally E. O'Halpin, *Defending Ireland*, Oxford: Oxford University Press, (1999), 270-271.

<sup>23</sup> Dáil Debates, 102 (1460), 25 July 1946.

<sup>24</sup> Dáil Debates, 102(1336), 24 July 1946.

the most imaginative observers had not considered the concept of preventive diplomacy or peacekeeping.

Despite de Valera's reservations, it was probably a fear of Ireland being isolated and denied a role on the world stage that finally prompted him to opt for membership. In this way, the decision was based on pragmatic considerations, rather than any idealistic or similar commitment to the UN itself.<sup>25</sup> There are interesting parallels with the debate regarding membership of the NATO sponsored Partnership for Peace and Irish participation in the UN mandated but NATO commanded Stabilisation Force (SFOR) and Kosovo Force (KFOR) missions in the former Yugoslavia. There was a very real fear among officials in the Department of Foreign Affairs and the military that if Ireland did not join the Partnership for Peace programme, it would be isolated and out of touch with international developments in peacekeeping.<sup>26</sup> Those fears echoed similar concerns expressed by de Valera some fifty years earlier in relation to membership of the UN.<sup>27</sup>

When the Dáil approved the motion to apply for membership on 26 July 1946, the government did not hesitate to exercise its mandate. It was somewhat ironic then, that after protracted debate and consideration of the issue, the actual application to join was vetoed by the Soviet Union.<sup>28</sup> The prospect of this

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<sup>25</sup> 'We in the Government have balanced the pros and cons [of membership]. In our circumstances, although it is impossible to be enthusiastic, I think we have a duty as member of the world community to do our share in trying to bring about general conditions which will make for the maintenance of peace', Dáil Debates, 102 (1325), 24 July 1946.

<sup>26</sup> Personal interview, senior Department of Foreign Affairs official, Department of Foreign Affairs, Dublin, May 1997; and personal interview, senior serving Defence Forces officer, Department of Defence, Dublin, May 1997. See also the article by Lt. Gen. G. McMahon, retired Chief of Staff, in *The Irish Times*, 8 October 1998, 16 and the statements by the General Secretary of the Department of Foreign Affairs, Mr. P. MacKernan, quoted in *The Irish Times*, 29 October 1998, 9.

<sup>27</sup> Ireland's willingness to participate in SFOR, despite reservations, was also based upon pragmatic considerations and a desire to play as full a role as possible in world affairs for a country of its size and resources, see Dáil Debates 479 (514-539), 14 May 1997.

<sup>28</sup> In its *Advisory Opinion on Conditions of Admission of a State*, the majority of the International Court of Justice considered it illegal to render the admission of a state

happening does not appear to have occurred to anyone in Ireland at that time. The reason given for vetoing the application was that Ireland did not have any bilateral diplomatic relations with the Soviet Union.<sup>29</sup> This was a dubious justification for a policy primarily based on cold war rivalry. At that time the General Assembly was dominated by pro-Western countries, the so-called Afro-Asian group had not yet emerged on the international stage as the decolonisation of the 1950's and 1960's had yet to take place. A clue to Soviet reasoning may also lie in the history of the League of Nations, as Ireland was one of only three countries that opposed Soviet admission in 1934.<sup>30</sup> The 'package deal' under which Ireland's application for membership was accepted finally had been put together carefully by the United States and the Soviet Union to increase the size of the General Assembly, without changing significantly the balance of cold war forces within it.<sup>31</sup> This arrangement was so delicately balanced that Ireland's membership was in doubt almost up to the last moment.<sup>32</sup> It is unlikely the Soviet Union monitored the Dáil debate on the matter, but had it done so, it

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dependent upon conditions other than those referred to in Article 4 (1) of the UN Charter (membership and admission), in particular upon the condition of the admissibility of another state. The Court, however, went on to point out the elastic nature of the criteria contained in Article 4 (1), which provided a wide scope for their application. From this the Court concluded that 'Article 4 does not forbid the taking into account of any factor which it is possible reasonably and in good faith to connect with the conditions laid down in that Article... no relevant political factor-that is to say, none connected with the conditions of admission-is excluded' - *Conditions of Admission*, ICJ Reports (1948), 56, 63. See L. Goodrich, E. Hambro and A. Simmons, *Charter of the United Nations*, (3rd. ed.), London: Columbia University Press, (1969), 85-96 and B. Simma (ed.), *The Charter of the United Nations - A Commentary*, Oxford: Oxford University Press, (1995), 158-175, L. M. Goodrich, *The United Nations*, London: Stevens, (1960), 83-103 and I. L. Jnr. Claude, *Swords into Ploughshares*, New York: Random House, (1964), 72-92.

29 Keatinge, *op. cit.* and Norman J. McQueen, 'Ireland's entry into the United Nations, 1946-1956', in T. Gallagher and J. O'Connell (eds), *Contemporary Irish Studies*, Manchester: Manchester University Press, (1983), 65-77.

30 Andre Fontaine, *History of the Cold War*, New York: Vintage Books, (1970), 84.

31 McQueen, *op. cit.* 69.

32 *The Irish Times*, 9-16 December 1955.

would have confirmed the suspicion that Ireland was unambiguously aligned with the pro-Western group of states then dominant within the UN.

Ireland did eventually gain admission in December 1955. By this time the advent of the cold war made the potential for collective security and enforcement action under the Charter appear redundant. It was replaced by the UN policy of 'political military control of local conflict by politically impartial essentially non-coercive methods'.<sup>33</sup> The then Taoiseach, Mr. Costello, resisted attempts to have the issue debated again, pointing out that in real terms the obligations were less onerous than they had been in 1946.<sup>34</sup> Once the hurdle of admission was over, the immediate issue confronting the government was the formulation of a coherent foreign policy that would represent an individual perspective on international affairs. As Ireland had largely shunned any real involvement in international affairs over the previous fifteen years, it had not been necessary to express precisely any strict definition of its foreign policy for that period. Mr. Cosgrave, the then Minister for External Affairs, was quick to realise that UN policy would require 'nothing less than the basic principle on which our policy towards the outside world and its problems is based'.<sup>35</sup>

Cosgrave led the Irish delegation to its first UN General Assembly session in the autumn of 1956. By this time he had formulated three broad principles upon which Irish participation would be based.<sup>36</sup> These represented as

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<sup>33</sup> The definition of peacekeeping or preventive diplomacy is taken from Larry Fabian, *Soldiers Without Enemies*, Washington DC: The Brookings Institute, (1971), 16.

<sup>34</sup> Dáil Debates, 153 (160-1608), 15 December 1955.

<sup>35</sup> Dáil Debates, 159 (139), 3 July 1956.

<sup>36</sup> These principles were as follows: support for the principles and obligations of the UN Charter; to try to maintain a position of independence; and, 'to do whatever we can to as a member of the UN to preserve the Christian civilisation of which we are a part, and with that end in view to support wherever possible those powers principally responsible for the defence of the free world in their resistance to the spread of communist power and influence...we belong to the great community of states, made up of the United States of America, Canada and Western Europe'. *Ibid.* (127-146).

clear and unambivalent a statement of Ireland's pro-Western anti-Communist policy as can be found and it appeared to vindicate Soviet reservations about Irish membership. Even the question of partition was relegated to avoid giving the impression that 'we have no interest in matter of international policy save that of partition alone'.<sup>37</sup> There was still no mention of peacekeeping or related activities, but Cosgrave did add a significant rider in acknowledging that Ireland would have certain sympathy with peoples seeking self-determination.<sup>38</sup> Although this may appear as something of an afterthought, it was an important distinguishing feature in Irish foreign policy. It could, if adhered to, provide Ireland with an opportunity to adopt an independent policy in relation to de-colonisation and self-determination in the decade ahead. It was not surprising then that Ireland was expected to vote along similar lines to that of the United States, and in the course of attending its first session of the General Assembly, the Irish delegation did nothing to disappoint these expectations, the thrust of Irish policy being 'unequivocally pro-Western and unremittingly anti-Soviet'.<sup>39</sup>

Although Cosgrave did not get an opportunity to oversee the implementation of his principles, as the coalition government of which he was a member was defeated at a general election within a year, they nevertheless proved to be influential.<sup>40</sup> Cosgrave was succeeded by Mr. Frank Aiken,<sup>41</sup> an experienced

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<sup>37</sup> *Ibid.* (137). At the time, neither de Valera nor Aiken of the main opposition party, Fianna Fail, raised any opposition to the relegation of this issue in Ireland's foreign policy. This was important as the 'national question' had tended to dominate foreign policy discussions to the detriment of the consideration of more internationally significant issues

<sup>38</sup> Conor Cruise O'Brien, 'Ireland in International Affairs', Dudley-Edwards, *Conor Cruise O'Brien Introduces Ireland*, London: Dutsch, (1969), 104-134, esp. 129-132.

<sup>39</sup> McQueen, in Gallagher and O'Connell (eds), *op. cit.* n.22.

<sup>40</sup> Mr. Frederick H. Boland, Secretary of the then Department of External Affairs in 1955, was designated as Ireland's first permanent representative at the UN. While Mr. Cosgrave's tenure was of short duration, Mr. Boland remained as Ireland's permanent representative for five years. He and his successor, Mr. C.C. Cremin, were known to approve and support the "three principles" expounded by Mr. Cosgrave. A recent study, however, has challenged the view that the three principles were so influential, Skelly, *op. cit.* n.4.

politician who aspired to play a similar role in the UN as that played by de Valera in the League of Nations. On account of this, a stronger emphasis was placed on Cosgrave's second principle, that of 'independence'. This was not surprising as Aiken had been critical of the contradictions apparent between the first two principles enunciated by Cosgrave, and that of the third.<sup>42</sup>

Aikin's period in office spanned a number of significant international developments, some of which did test the mettle of Ireland's espoused independence in relation to foreign policy issues.<sup>43</sup> In hindsight, these may not seem very significant, however, in the context of the time they did indicate a willingness by Aiken to take an independent stance on certain issues.<sup>44</sup> On account of this, 'the Irish delegation carried rather more weight in the Assembly, during this period, than what might have been expected from the size and importance of the country it represented.'<sup>45</sup>

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<sup>41</sup> Mr. Aiken was Minister for External Affairs on two separate occasions, for three years from 1951 to 1954, and for twelve years from 1957 to 1969. See Keatinge, *The Formulation of Irish Foreign Policy*, *op. cit.*, 84-89 and 32-34.

<sup>42</sup> Dáil Debates 159 (148), 3 July 1956.

<sup>43</sup> Despite strong opposition from the US and the Catholic church, Aiken supported and Ireland voted in favour of the discussion of the representation of the People's Republic of China at the UN. Aiken also put forward plans for military disengagement in Central Europe and general disarmament, which were opposed by the US. These were part of general efforts by him to reduce tensions between the Soviet Union and the West during the cold war. In addition, Aiken supported some of the small non-aligned new members of the UN, and adopted an independent policy during the Algerian crises. See generally Skelly, *op. cit.* n.4.

<sup>44</sup> For some interesting background to the pressure put upon the Irish Government and the Irish delegation at the UN by the Catholic church and the United States, see Conor Cruise O'Brien, *To Katanga and Back-a UN Case History*, New York: Grosset and Dunlap, (1962), 21-25.

<sup>45</sup> O'Brien, *op. cit.* n.37 at 130.

## Ireland and middle power status

Ireland's history as a former colony, and Aiken's reputation for independence at the UN, combined with non-membership of any military alliance, went a long way towards Ireland acquiring 'middle power' status. The term 'middle power' is common in the language of peacekeeping. It has never been defined clearly and can have different connotations depending on the context in which it is used. Hammarskjöld reverted to the term frequently when discussing peacekeeping.<sup>46</sup>

Nevertheless, it would be a mistake to consider Ireland a 'middle power' in terms of voting patterns at the UN. A study of Irish voting there between 1956 and 1970 found it more clearly aligned to that of the Western block.<sup>47</sup> But, the basic nature of the Irish position was demonstrated by the consistently high degree of similarity with Sweden.<sup>48</sup> Similarly, another commentator concluded that Ireland has been a consistent supporter of the United States policies at the

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<sup>46</sup> Larry Fabian has examined the semantic confusion surrounding its usage and he drew the following conclusion: 'the term middle power acquired in the United Nations context, a variety of connotations. At first it was used in an objective sense to identify those member states with comparatively medium level resources, measured in terms of geography, wealth or military capabilities. It later took on a second meaning according to which middle power endowments were seen as circumstantial and perhaps temporary.....this description was given to countries occupying a political middle on given issues.....A member state could be classified as a middle power for some purposes but not for others.....Middle power membership has thus not taken identical forms in peacekeeping, in debates on colonial or racial rights questions, in disarmament negotiations, or in economic matters - although a Canada, a Sweden, an Austria, or an Ireland has repeatedly acted out the middle power role on a range of problems'. Fabian, *op.cit.*, 88.

<sup>47</sup> McQueen, D. Phil. thesis, *op. cit.*, Cpt. 6, esp.199-200. The study indicates that Irish voting behaviour in relation to other states compared showed a gradual move towards greater co-operation with Western countries. However, the evidence indicated that this process did not begin in 1961, the date usually assigned to the modification of Ireland's 'independent' stance at the UN. The study found that the process appeared to begin around 1959 at the Fourteenth Session of the General Assembly and to reach an extreme in the 1961 at the Sixteenth Session. After that, co-operation with the US in plenary votes remained more or less steady throughout the 1960's.

<sup>48</sup> *Ibid.* This close affinity was detectable throughout the period under examination and it appears to be little affected by the supposed right shift in Irish policy after 1961. In fact, the conclusion drawn was that voting behaviour in terms of co-operation with block leaders, does not offer convincing support for the comment that UN policy underwent a process of deradicalisation after 1961

UN during the period 1957 to 1961.<sup>49</sup> It was also observed that Ireland headed the list of those states, which because of their voting record were 'pro- United States'.<sup>50</sup> Ireland, in fact, was found to have voted more often with the United States than did three members of NATO-Denmark, Norway and Greece.

By the time Ireland did gain membership of the UN, the concept of collective security and enforcement action under the Charter had been largely relegated by the cold war.<sup>51</sup> While Ireland could not claim to have played any significant part in this transformation, the changed situation did offer a new and important role as 'peacekeeper' or 'middle power' policeman. It was against this background that peacekeeping became a central feature of Irish foreign policy in the early nineteen sixties. Despite this, Ireland's contributions to the Special Committee on Peacekeeping Operations are unremarkable.<sup>52</sup> This has not been helped by the policy of European Union member states of making common submissions on behalf of all members.<sup>53</sup> While it may be argued that Irish

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<sup>49</sup> D. Driscoll, 'Is Ireland really "Neutral"?', 1(3) *Irish Studies in International Affairs*, (1980), 55-61.

<sup>50</sup> M.R. Singer, *Weak States in a World of Powers: The Dynamics of International Relations*, New York: The Free Press, (1972), 327-328. The Singer and Sensing study of voting on cold war issues in the General Assembly from 1955 to 1959 shows that Ireland was a consistent supporter of the United States on such issues. The same was not the case in respect of the states considered truly non-aligned in the international system

<sup>51</sup> The action in Korea should be seen as *sui generis*, as the Security Council had merely recommended that states provide assistance to South Korea on the basis of Article 51, see L. Goodrich, E. Hambro and A. Simmons, *op. cit.*, 314-317 and B. Simma, *op. cit.*, 630, L. M. Goodrich, *op. cit.*, 159-189 and I. L. Jnr. Claude, *op. cit.*, Cpt. 12.

<sup>52</sup> See for example, UN General Assembly, Document A/AC. 121/37, 29 March 1990, 13-15; A/AC.121/36/Add.1, 4 April 1989, 4-9, and A/AC. 121/5, 5 August 1965, 4-6.

<sup>53</sup> See for example, UN General Assembly, Document A/AC. 121/36, 21 March 1989, submission by Spain, 30 -34; and A/AC.121/41, 16 March 1994, submission by Greece, 6-8. The 1989 submission was mostly concerned with financial implications and efficiency measures. The 1994 submission, on the other hand, made reference to the need for proper command and control mechanisms, planning, civilian personnel, and stand-by forces.

foreign policy has been largely no more than declaratory without consequential action, Ireland, in terms of its size and resources, has made a substantial contribution to peacekeeping operations that continues to the present day.

The establishment of the United Nations Emergency Force (UNEF) in 1956 was the first practical application of Hammarskjöld's concept of preventive diplomacy.<sup>54</sup> The actual contributors to this Force were not the so called great powers, but rather small and middle power intermediaries like Ireland, drawn from sources acceptable to the parties involved. Though Ireland was not called upon to contribute troops to this force, the government had agreed in principle to do so if called upon by the Secretary-General.<sup>55</sup> The success of this force laid down foundations and precedents with regard to future peacekeeping forces and the principle of non-coercive moral authority was also used in the setting up of smaller observation and verification missions.

### **The Defence Forces and the peacekeeping tradition**

Although peace support operations are generally associated with the UN, in reality Ireland has contributed to operations under the auspices of NATO, the Organization for Security and Co-operation in Europe and the European Union for some years.<sup>56</sup> While the single most important contribution is currently to UNIFIL in Lebanon, peace support operations involve around one thousand military

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<sup>54</sup> See D. W. Bowett, *United Nations Forces*, London: Stevens, (1964), esp. 99-103; N. D. White., *Keeping the Peace*, (2 nd. Ed.), Manchester: Manchester University Press, (1997), 253, and A. James, *Peacekeeping in International Politics*: London: Macmillan, (1990), 210 –223.

<sup>55</sup> Skelly, *op. cit.* 268-269.

<sup>56</sup> For a list of the missions to which the Defence Forces have contributed, see Appendix D. Full details are contained in Department of Defence, *Defence Forces Annual Report 1999*, Dublin, (2000), 32-38. See also Department of Defence, *Department of Defence and Defence Forces Strategy Statements 1997-1999*, Dublin, (1997), 8. When the term Defence Forces is used, it refers to the Permanent Defence Forces established under Section 18(a) of the Defence Act, 1954, and includes army, navy and air corps.

personnel in a range of countries and in future will include the UN Stand By Arrangements System, which the government agreed to support in 1996.<sup>57</sup> The Defence Forces have been traditionally a small and well-integrated force in Irish society. In recent times, most of the duties performed have been in aid to the civil power, or as a stand-by force to maintain essential services during serious industrial disputes. They do not possess any heavy support weapons usually associated with the modern armies of larger states and they are accustomed to operating without such equipment.<sup>58</sup> Despite its conventional structure, the real role of the Defence Forces has been closer in nature to that of a garrison based 'gendarmarie' than a modern army.<sup>59</sup> In this way the defence of Ireland was seen by many as 'a joke', requiring little more than a small paramilitary force to quell civil disorder.<sup>60</sup> These factors, together with the emphasis on adaptability and ability to operate independently of large scale supporting forces, combined to make them suitable for traditional peacekeeping missions. However, they also contributed to an ambiguity surrounding the role of the Defence Forces in modern Ireland.

The first indication of Ireland's potential suitability as a UN troop contributor state came in 1958, when officers participated in an observer mission in Lebanon. However, Ireland's first major involvement in peacekeeping came two years later when Irish troops departed for the Congo in July 1960.<sup>61</sup> This was one

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<sup>57</sup> *Ibid.*

<sup>58</sup>As far back as 1986, the then Chief of Staff commented publicly that much of the equipment was either obsolete or obsolescent, see interview, Lt. Gen. T. O'Neill, *The Irish Press*, 1 April, 1986. For a more current analysis, see J. Cusack, *The Irish Times*, 9 October 1999, 11.

<sup>59</sup> The Chief of Staff, Lt. Gen. C. Mangan, recently described the Forces as 'moving from a garrison-based organization, dominated by ATCP (aid to the civil power) and security duties, to having a significant part of the Defence Forces prepared to deploy with a rapid reaction force for European operations', reported in *The Irish Times*, 15 November 2000, 9.

<sup>60</sup> This description would not be accepted by many serving Defence Forces personnel, personal interview, *op. cit.*, n. 26.

<sup>61</sup> *The Irish Times*, 18 July 1960 and Duggan, *op. cit.*, p. 250.

of the most important decisions made by any Irish government in relation to the UN and foreign policy, and it was certainly the most significant decision taken in the context of defence and security matters since the foundation of the state. It was in a very real sense a baptism of fire for Irish peacekeepers that demonstrated Ireland's commitment to the principles of the UN Charter.<sup>62</sup> It is very much to the credit of the soldiers involved, and the Irish government of the day, that neither wavered in their support for the UN at a time when it was undergoing its most serious crisis to date. In many ways the Congo crisis marked the high point in Irish involvement with the UN.<sup>63</sup> The precedent for Irish participation in peacekeeping was thereby established, and an Irish contingent was still in the Congo when a request was received for another unit to participate in the peacekeeping Force in Cyprus.<sup>64</sup>

In October 1973, the UN decided to send a peacekeeping force to the Sinai desert to monitor the cease-fire between Israel and Egypt following the Yom Kippur War.<sup>65</sup> Almost simultaneously with agreement being reached on the establishment of the United Nations Emergency Force II (UNEF II), the 25 Infantry Group from Ireland was arriving for a tour of duty with the UN force in Cyprus. Following a request by the Secretary-General, and Dáil approval, this unit spent just one week in Cyprus when it was transferred to UNEF II in the Sinai.<sup>66</sup>

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<sup>62</sup> In all 6,197 Irish personnel served with the peacekeeping force in the Congo and twenty six of these lost their lives

<sup>63</sup> There was a substantial military commitment to ONUC; Ireland was a permanent member of the Congo Advisory Committee; an Irishman, Frederick Boland, became President of the General Assembly; another, Lt. Gen. Sean McKeown, became Force Commander for a time, and Conor Cruise O'Brien became the Secretary-General's special representative in the Congo. See Skelly, *op. cit.*, 266-283.

<sup>64</sup> Between April 1964 and October 1973 over 9,000 Irish personnel served with this Force. At one stage there were over 1,000 troops in Cyprus while the strength of the Army was less than 8,000 personnel.

<sup>65</sup> Security Council Resolution 340, 25 October 1973.

<sup>66</sup> Dáil Debates 268 (797-830), 30 October 1973. The Group was later augmented by another infantry company (130 men approx.) and it crossed the Suez canal on 9 November 1973. It was replaced by the 26 Infantry Group on 26 April 1974.

However, in early 1974 following the Dublin and Monaghan bombings, the government withdrew the Irish contingent.<sup>67</sup> The decision did not come as a surprise to the Irish military authorities.<sup>68</sup> In hindsight, it can be said that the threat to the security of the state was not as great as that perceived by the government at the time. Although the decision may have damaged temporarily Ireland's standing with the UN as a reliable troop contributor to peacekeeping operations, the adverse consequences of the decision have long since faded into insignificance.<sup>69</sup>

The Secretary-General again requested that Ireland contribute a unit to form part of the United Nations Interim Force in Lebanon (UNIFIL) in 1978.<sup>70</sup> Despite the difficult and quite often dangerous nature of the mission, up to recently the government has generally expressed its continued support for the UN force in the area.<sup>71</sup> This again underscores Ireland's commitment to UN peacekeeping and the high price that participation in such operations entails. It is not surprising then

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<sup>67</sup> See statement by Minister for Foreign Affairs, Dr. Fitzgerald, Dáil Debates 273 (692-693), 6 June 1974, see also the statement by the Minister for Defence, Dáil Debates 273 (1715-1716), 27 June 1974.

<sup>68</sup> When the motion to approve the despatch of the contingent to UNEF II was being debated in the Dáil, the Minister for Defence and others had emphasised the need to recruit more volunteers for the army, due to the security situation in the country. Dr Fitzgerald said at the time that 'it was not without careful thought' that the Government agreed, see Dáil Debates 268, (797-830), 30 October 1973.

<sup>69</sup> Personal interview, UN Department of Peacekeeping Operations official, Pisa, Italy, June 1997.

<sup>70</sup> Dáil Debates, 306, (595-613), 9 May 1978. In July 1977, the UN requested that Ireland contribute a full contingent once again to UNFICYP in Cyprus. However, owing to a later decision to reduce the overall size of the force, the request was not maintained. There have been forty-five Irish casualties with this peacekeeping Force, this figure includes Private Kevin Joyce who was taken captive on 27 April 1981. He is still categorised as missing in action.

<sup>71</sup> See Dáil Debates 361, (1088-1091), 5 November 1985 and 357, (428-434); and *The Irish Times*, 11 June 1985. However, in October 1985, the then Taoiseach, Mr Fitzgerald, warned that the participation of Irish troops in UNIFIL could be put in jeopardy if Israeli forces continued to prevent them fulfilling their mandate, *The Irish Times*, 21 October 1985, 1 and *The Sunday Tribune*, 20 October 1985, 1.

that fulsome tributes to Irish UN personnel are commonplace.<sup>72</sup> Among the disadvantages of participation is the fact that it added to the difficulties of under strength units at home, and must have prompted the question in some quarters, if all these officers and personnel can be permanently abroad, did the Defence Forces need them in the first place? It also allowed the Department of Foreign Affairs a significant influence on matters essentially military in nature<sup>73</sup>, although most times this did not matter, as it was supportive of involvement in UN operations when civil servants in the Departments of Defence and Finance opposed participation.

Although the Irish commitment to the UN forces in Somalia (UNOSOM II) was quite small and numbered around one hundred and eighty personnel, the decision to participate had significant political and military implications.<sup>74</sup> It was the first time Irish soldiers participated in a Chapter VII peace enforcement operation of this kind and it set a precedent that helped pave the way for the current participation in the Stabilisation Force in the former Yugoslavia.<sup>75</sup> It marked a watershed in Irish involvement in peacekeeping activities, and a realisation that Ireland could be left behind in the changing nature of the international security environment unless it too adapted to events. Though the UN operation in the Congo (ONUC) in the 1960's did involve a degree of enforcement action to which the Irish contingent was a party, the recent decisions to participate in SFOR,

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<sup>72</sup> See, for example, reports by Kieran Fagan, *The Irish Times*, 21 September 1998, p.10, J. Cusack, 16 July 1994 and 24 October 1995; Kevin Myers, 25 November 1995 in the same paper, and J. Marcus, 'Irish Defence Policy: Debate on Neutrality', *Janes Defence Weekly*, (4 August 1984), 152-154.

<sup>73</sup> O'Halpin, *op. cit.*, 272.

<sup>74</sup> Figures supplied by Military Archives, Dept. of Defence, Dublin, August 1997.

<sup>75</sup> This is not to deny that the ONUC operation in the Congo did involve a number of mandate changes and enforcement operations on the ground. See Roselyn Higgins, *The United Nations Operation in the Congo (ONUC) 1960-1964*, London: Royal Institute of International Affairs, (1980); Ernest W. Lefever, *Crisis in the Congo*, Washington: The Brookings Institute, (1965) and Alan James, 'The Congo Controversies', 1 (1) *International Peacekeeping (Kluwer)*, (Spring 1994), 44-58.

KFOR, UNAMET (East Timor) and UNOSOM II were conscious decisions made in response to the changed international environment. In the case of SFOR, KFOR and UNAMET, the government has also agreed to pay all the expenses associated with Irish participation. More significantly, the participation in the NATO led, albeit UN mandated operations, placed Irish troops under the *de facto* command of NATO for the first time.<sup>76</sup> There are significant legal and constitutional difficulties involved in command and/or control of Irish forces by non-defence force personnel, but successive governments to date have quietly ignored these.<sup>77</sup> Despite this, Irish military and other personnel have adapted successfully to such missions, but there remains an ongoing need to keep up to date in training, and to ensure equipment levels and standards complement this.

In 1994, a leaked confidential report by the Price Waterhouse consultants described the Defence Forces as, *inter alia*, 'badly structured, too old, poorly trained, and inappropriately equipped'.<sup>78</sup> Though this was controversial at the time, the Defence Forces Review Implementation Plan later accepted and adopted the conclusions.<sup>79</sup> After neglect over many years by successive governments, most of the deficiencies in structures, training and equipment identified were self evident to

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<sup>76</sup> See generally R. Murphy, 'Legal Framework of UN Forces and Issues of Command and Control of Canadian and Irish Forces', 4 *Journal of Armed Conflict Law*, (June 1999), 41-73; and R. Murphy, 'Ireland: Legal issues arising from participation in United Nations operations', 1(2) *International Peacekeeping* (Kluwer), (March-May 1994), 61-64.

<sup>77</sup> *Ibid.*

<sup>78</sup> *The Irish Times*, 10 August 1994 and the *Irish Independent*, 6 August 1994. In 1984, the Defence Forces were described by one commentator as 'a small but highly professional Defence Force', and he went on to say that Ireland 'faces the essential dilemma of all small nations seeking to provide their own security with limited resources', while at the same time 'Irish troops have served with distinction in the Congo, Cyprus and the Middle East in UN sponsored peacekeeping activities' J. Marcus, 'Irish Defence Policy: Debate on Neutrality', *Janes Defence Weekly*, 4 August 1984, 152-154.

<sup>79</sup> Department of Defence, *Defence Forces Review Implementation Plan*, Dublin, February, (1996).

members of the Defence Forces.<sup>80</sup> However, others were not, and the Price Waterhouse analysis offered a serious indictment of the levels of collective training and management structures, which they rightly identified as the key to operational capability in the Defence Forces.<sup>81</sup> This had important implications for participation on UN operations, as deficiencies in training would also undermine operational capability on the ground. As a result, the government committed itself to reorganise the Defence Forces as an 'all arms conventional force.'<sup>82</sup>

This raises the question, how have Irish soldiers been so successful at conflict resolution and peacekeeping duties in general, despite the deficiencies identified? While the Defence Forces were supposedly organised and trained to fulfil a primary role in the defence of the state against aggression, their most important function evolved to that of providing military assistance to the civil power.<sup>83</sup> Internal security tasks expanded due primarily to the conflict in Northern Ireland and became the major operational involvement of the Defence Forces. In this way much of the work of the army over the past twenty-seven years has in fact been the performance of duties of a police nature. This is one of the reasons why Irish troops adapted so successfully to a UN peacekeeping role where the duties performed up to recently have also, for the most part, been of a police character. Other important reasons were evident in a recent analysis of the strengths and weaknesses of the Defence forces, namely the 'can do' and professional approach of military personnel at all levels which has meant that the roles assigned by

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<sup>80</sup> Personal interviews, Defence Forces personnel during 1996 and 1997. In addition, the *Report of the Commission on Remuneration and Conditions of Service in the Defence Forces*, Government Publications/Stationary Office, Dublin, (31 July 1990), was a damning indictment of not just pay and conditions, but bureaucratic and ineffective structures, and a remarkably militarily ineffective organization.

<sup>81</sup> Defence Forces Review Implementation Plan, *op cit.*, 105-106.

<sup>82</sup> *Ibid.*, Executive Summary, i and ii. The reorganization of the Defence Forces was to be based on a three brigade structure, with a manpower level of 11,500. See also Department of Defence, *Department of Defence and Defence Forces Strategy Statements 1997-1999*, Dublin, (1996), 37-41.

<sup>83</sup> Personal interview, *op. cit.* n.26, see also *Department of Defence and Defence Forces Strategy Statements 1997-1999, op. cit.*, 5-9.

government have been carried out despite impediments to operational effectiveness; and the extent to which conventional military skills have been retained within the system notwithstanding the many barriers preventing implementation of an optimum training programme.<sup>84</sup> The difficulty with the 'can do' work ethos is that in the long run it can be counter productive if it perpetuates the illusion that all is well, when this in fact is not the case. This was one of the reasons identified as contributing to the debacle of Canadian involvement in the UN operation in Somalia.<sup>85</sup> In this regard the deficiencies identified in the recent review would indicate that matters were anything but satisfactory.

### **The implications of participation in peacekeeping operations**

There has been considerable research into the characteristics of peacekeeping forces and one distinguished sociologist proposed the 'constabulary' concept in relation to conventional military forces participating in peacekeeping operations.<sup>86</sup> The military establishment becomes a 'constabulary' force when it is continuously prepared to act, committed to the minimum use of force, and seeks international relations rather than victory.<sup>87</sup> He suggested that the military would look upon such police-type work as less important and prestigious than traditional military operations. While this may have been true in the past among the armed forces of

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<sup>84</sup> Defence Strategy Statements, *op. cit.*, 13.

<sup>85</sup> See *Dishonoured Legacy, Report of the Commission of Enquiry into the Deployment of Canadian Forces to Somalia*, Canadian Government Publishing, Ottawa, 1997, also available at <<http://www.dnd.ca/somaliae.htm>> (english version).

<sup>86</sup> M. Janowitz, *The Professional Soldier*: New York: Free Press, (1960). The term 'constabulary' was probably an unfortunate choice of word as it conjures up an image of the unarmed British 'bobby' keeping the peace along his beat.

<sup>87</sup> *Ibid.* See also C. Dandeker and J. Gow, 'Military Culture and Strategic Planning', in E. Schmidl, *Peace Operations Between War and Peace*, London: Frank Cass, (2000), 58-79.

the larger powers, it was never the case with the Defence Forces.<sup>88</sup> Later, four characteristics in particular that renders a military force suitable for peacekeeping missions were identified.<sup>89</sup> The first is an emphasis on a high degree of adaptability in the military sector, including an ability to operate independently of large scale supporting forces; a major emphasis on the differentiation of skills and the development of initiative in professional training; a distinctly non-political role, and finally, a high degree of discipline. The Defence Forces at present satisfies all of these requirements. The first two requirements are straight-forward and could be said to be necessary characteristics of any small viable military force. Furthermore, since the end of the Irish Civil War and the establishment of the modern Irish state, the army has avoided any involvement in politics. There has never been a suggestion of partiality by the army made by any deputy in the course of Defence and other debates.

The success of the army's participation in peacekeeping forces is evidence that it has a sufficiently high level of discipline. Further evidence is provided by the manner that the army carries out the many and varied roles that it is called upon to fulfil. The soldiers are drawn from all sections of Irish society. The majority of these personnel live in homes alongside their civilian counterparts and not in barracks or on military bases, a factor that has assisted the integration of the army in Irish society.

The Defence Forces' involvement in UN operations has been considerable. When one considers the small size of the Forces and the fact they were generally several thousand personnel below authorised strength, the contribution has been enormous. Even in absolute terms the contribution is impressive - in 1986 the Irish battalion was the second largest in UNIFIL. One of the consequences of the low strength and organization is that it has nearly always

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<sup>88</sup> D. R. Segal and M. Wechsler Segal, *Peacekeepers and their Wives*: London: Greenwood Press, 1993, 9. This view of the Defence Forces is from sixteen years service therein, and extensive interviews and conversations with Irish military personnel. Furthermore, the participation in UN missions in the cause of peace has been part of the stated mission of the Defence Forces since the 1960's.

<sup>89</sup> J. A. Jackson, 'The Irish Army and the Development of the Constabulary Concept' in J. Van Doorn (ed.), *Armed Forces and Society*, Sociological Essays, The Hague, (1968).

proved necessary to establish the units that serve with peacekeeping forces from the Defence Forces as a whole. Although this has obvious disadvantages, experience shows that any problems that arise in practice are resolved easily and the unit adopts an identity of its own very quickly. The organization of an infantry battalion serving with UNIFIL is significantly different from that at home. In fact, the so-called infantry battalion in Lebanon comprises infantry, artillery, cavalry, signals, engineer, supply and transport, ordnance and medical corps personnel. For this reason it is self sufficient, and tailor made for the tasks it performs.<sup>90</sup>

It is difficult to access in general terms the impact that this involvement has had on the Defence Forces. As a matter of policy, military service abroad is voluntary, and for the most part, there are more places than volunteers available.<sup>91</sup> Nonetheless, it is evident from conversations with serving and former personnel of the army that what is generally referred to in Irish military circles as 'overseas service' has always been viewed as a welcome respite from the day to day barrack routine at home.<sup>92</sup> It has also boosted morale, especially in the early 1960's when the government first agreed to contribute large numbers of troops to the peacekeeping operation in the Congo. UN service has increased the wages and salaries of serving personnel by way of overseas allowances, a factor not to be

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<sup>90</sup> Plans are now in place to change this, and it is planned to send smaller composite units to more missions, similar to that of UNAMET in East Timor, interview, senior officer, November, 2000.

<sup>91</sup> Although from time to time the Defence Forces have encountered difficulty filling places in the UNIFIL battalion, personal interview, *op. cit.* n.26. In 2001, around thirty technical staff have been detailed for service with UNIFIL owing to the need to complete work arising from the redeployment following the Israeli withdrawal. In October 1984, an army medical doctor instituted proceedings in the High Court to restrain the Minister for Defence from sending him to Lebanon as part of the Irish contingent with UNIFIL. He claimed his health would be damaged by such service. His action was unsuccessful. *The Irish Times*, 26 October 1984. However, this was an exceptional case.

<sup>92</sup> This fact was acknowledged to some extent by the Minister for Defence, Mr Paddy Donegan, in 1974 when announcing the withdrawal of Irish troops from UNEF II. He said he wanted 'our troops to know it was only a temporary measure', as he knew the opportunity to serve abroad is a considerable incentive for young people to join the army. See Dáil Debates 273, (1715-1716), 27 June 1974.

overlooked when considering the number of volunteers of all ranks for service with the UN.<sup>93</sup> However, it was the new sense of purpose, which the army felt in the 1960's that provided the most significant boost to morale. *The Irish Times* in 1963 summed up the effect:

there had been created a better public image of the army. This had been achieved by much mention in the speeches of politicians at home and abroad. The national newspapers have given it much publicity albeit somewhat dramatic and hysterical at times ...there was the enormous benefit in experience that active service gives ...(and) ...Irish troops did at last receive adequate pay in terms of overseas allowances.<sup>94</sup>

More importantly, from a military point of view, peacekeeping operations provide an ideal training ground for an army of Ireland's size and resources. This is especially true in southern Lebanon today, owing to the general operational environment of the UN Force there. The training and exercising of at least two battalions for UN service annually is probably the most obvious non-monetary benefit the present level of commitment to UNIFIL. Contributions to other missions allow officers in particular to hold command and staff appointments in international forces that would otherwise not be open to them.<sup>95</sup> This experience, though difficult to quantify and evaluate, is recognised as being of immeasurable benefit to the training and other standards associated with professional armies.

Despite the current deficiencies in training and equipment, these and other military aspects of Irish involvement with the UN today compare favourably with

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<sup>93</sup> See survey results of troops serving with UNIFIL, see Appendix C.

<sup>94</sup> *The Irish Times*, 29 July 1963.

<sup>95</sup> Given the relatively small size of the Defence Forces, a large number of officers have also served in senior Command and Staff appointments with UN missions. See the article by Lt. Col. M. Shannon, 'Thirty Years of Peacekeeping, A Perspective on Staff Appointments', *An Cosantoir*, April 1989. †

that of the early 1960's.<sup>96</sup> In keeping with the long-standing tradition of participation in UN activities, and in an effort to harness the extensive experience accumulated to date, the Defence Forces opened a UN Training School in 1993.<sup>97</sup> However, the first army battalions that formed up for UN duty in the Congo were not well equipped for the mission ahead, and nor were they well informed politically of the situation there. One retired senior officer recalled how the Irish soldiers arrived to the sweltering heat of Central Africa in heavy bulls wool uniforms and with bolt-action rifles.<sup>98</sup> In military terms, they were responsible for a huge area and they had at their disposal a mere sixteen jeeps, no helicopters and no armoured cars.<sup>99</sup> He compared the strength of the army then at around eight thousand, to the period during World War II when the strength was about fifty thousand, and remarked that most of the men were absorbed doing routine duty. As a result, the standard of basic training was poor and almost non-existent in some instances. Ironically, the fact that Irish troops are accustomed to working without heavy support weapons has worked to their favour on traditional peacekeeping operations. While the basic infantry soldier is well equipped and supported at that level, on an overall basis the army does not possess expensive military hardware. As weapons and equipment of this nature are not permitted in a traditional peacekeeping role, the Irish soldier adapted particularly well to peacekeeping duties, as he or she is unaccustomed to depending upon this type of equipment anyway. The army's role within the state is also such that few soldiers experience

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<sup>96</sup> Defence Forces Review Implementation Plan, *op. cit.*, 105-106.

<sup>97</sup> See Lt. Col. O. McDonald, 'Peacekeeping Lessons Learned: An Irish Perspective', *4 International Peacekeeping* (Kluwer), (Autumn 1997), 94-103. The School provides general and mission specific national and international courses and training for peacekeeping duties. It is also responsible for keeping abreast of developments in the field and the development of a peacekeeping doctrine.

<sup>98</sup> Personal interview, Col. R. Bunworth, Dublin, February 1985. Col. Bunworth was the Officer Commanding Southern Command and also Assistant Chief of Staff of the defence Forces prior to his retirement. He had extensive experience with the UN in the Middle East and he was chairman of the Israeli Syrian Mixed Armistice Committee in 1967, and Chief of Staff of UNTSO during 1973 and 1974.

<sup>99</sup> At a late stage the Irish battalions with ONUC were supplied with helicopters, and armoured cars were dispatched from Ireland.

live combat situations and most incidents involving Irish soldiers on UN service are more in the nature of skirmishes than full-scale battles.<sup>100</sup> This generally means that the army is unaccustomed to offensive military operations and resorting to the use of force. As a result of this, they can be very adept at resolving confrontations by negotiation and mediation, qualities useful in any mission that seeks to establish a degree of peace and security in an area by deploying an international UN force. It is, however, noteworthy that the Defence Forces have not had any difficulty adapting to peace enforcement missions either.

The primary role of the Defence Forces is to defend the state against aggression. However, the capacity to fulfil this mission is hampered by the lack of adequate resources. In such a situation it may well be asked why the state maintains a standing army at all? The answer probably lies in the historical background to the foundation of the Irish state. The perceived threat to the democratically elected government and the institutions of the state has always been greater from within the state than from any potential foreign aggressor, except for a period during World War II. This may account in part for the disproportionate strength of the army with the Defence Force establishment. The independent state of Ireland has never been invaded and its soldiers have not participated in any foreign wars. Security and defence matters are seldom topics of public debate, and when they do arise it is usually in the context of European integration and neutrality. Unlike most other European countries, the ministerial portfolio of Defence is regarded as a minor cabinet post. Successive Ministers for Defence from different political backgrounds have not been known for their political dynamism or significant contribution to public debate on security or defence.<sup>101</sup>

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<sup>100</sup> That is not to say that certain incidents, especially in the Congo, did not amount to prolonged fir- fights to seize or defend strategic locations. These incidents, such as the 'siege of Jadoville' and 'the tunnel', or the battle for At-Tiri in Lebanon had all the ingredients of a full-scale military operation. However, they were nonetheless exceptions to the general rule that confrontations were usually of short duration and in most cases the UN troops managed to contain them by means of restraint and forbearance in what often amounted to extreme provocation.

<sup>101</sup> In February 1986, the Defence portfolio was relegated even further when the Minister, Mr Paddy O'Toole, was given responsibility for the Dept. of An Gaeltacht in addition. The present Minister for Defence is also responsible for the Dept. of the Marine.

The Department of Defence and the Irish military authorities have been equally reticent over the years. The lack of policy and debate on defence issues reflected a general lack of ideas and interest at all levels. In recent years, the formation of representative associations and the publication of Strategy Statements, Annual reports, and the White Paper has improved this situation, but the overall level of public debate and knowledge remains abysmally low.

Since World War II the Irish army has suffered from a lack of purpose and a certain ambiguity regarding its role. Ireland's initial refusal to join NATO, largely on account of partition, and the adoption of a policy of military neutrality meant that the army was denied any international role.<sup>102</sup> This decision had serious implications for national defence.<sup>103</sup> A policy of neutrality meant that the state should maintain a credible military deterrent. However, up until recently a country of Ireland's size and resources could not afford the required investment in its armed forces organised along conventional military lines. As a result, the Defence Forces became run down in the 1950s and early 1960s.<sup>104</sup>

The most important function fulfilled by the Defence Forces is currently in aid to the civil power. Such a role is not dissimilar in certain respects from that performed on traditional peacekeeping operations. This means that the experience gained by all ranks is of direct benefit to the maintenance of internal security in Ireland. As the operational basis of the Defence Forces both at home and on UN

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<sup>102</sup> In 1949, the Minister for External Affairs, Mr Sean McBride, when answering a question in the Dáil regarding NATO membership stated: 'As long as partition lasts, any military alliance or commitment involving joint military action with the State responsible for partition must be quite out of the question', Dáil Debates 114 (323-326), 23 February 1949. See also Owen Dudley Edwards (ed.), *op. cit.*, 118-127, Keatinge, *A Place Among the Nations*, *op.cit.*, 93-99.

<sup>103</sup> O'Halpin, *op. cit.*, 261.

<sup>104</sup> The situation the army found itself in during this period has been succinctly stated by one commentator as follows: 'Much (of the army's) equipment became increasingly outdated, and although some items, such as small arms and uniforms were renewed, this was done without any clear idea of the army's mission. More seriously, opportunities for training were limited and career prospects were restricted. Only in the early nineteen sixties did large scale participation in UN peacekeeping operations lift professional morale out of the routine rut of state ceremonials, guard duty, civilian emergencies and horse shows', Keatinge, *A Place Among the Nations*, *op.cit.*, 93.

service is the use of minimum force only, there is no question of having to retrain personnel on their return from service abroad. This can occur in the case of larger contributor states such as France and Britain.<sup>105</sup> In this way participation in UN peace support operations has enhanced the image of the Defence Forces as a disciplined and well-integrated military force both at home and abroad. Although it is difficult to assess the impact UN service has had in general, soldiers of all ranks are unanimous in their belief that it has improved considerably both training and morale in the Defence Forces.<sup>106</sup>

At one time there was controversy regarding Irish participation in UN peacekeeping owing to the backlog in reimbursement of expenses from the UN.<sup>107</sup> Reports gave the impression that Ireland was losing considerable sums of money, especially in Lebanon.<sup>108</sup> The financial implications are not as simple as might appear at first glance, and it can be argued that, far from being a loss making exercise, UN operations can be a net contributor to the Irish exchequer, especially as commitments were met from within existing resources.<sup>109</sup> In contrast, recent UN approved operations in Bosnia, Kosovo and East Timor are paid for entirely from the states own resources, and it is intended to finance the European Rapid

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<sup>105</sup> Personal interview, senior French officer, Naquora, September 1998.

<sup>106</sup> For certain disadvantages associated with participation, see R. Murphy, 'Ireland and Future Participation in Peacekeeping Operations', 5 *International Peacekeeping* (F. Cass), No.1, (1998), 22-45 at 37.

<sup>107</sup> See comments by Ireland to the Special Committee on Peacekeeping Operations, UN General Assembly, Document A/AC.121/36/Add.1, 4 April 1989, 4-9.

<sup>108</sup> See *The Irish Times*, 15 April 1993, and 15 and 17 May 1993.

<sup>109</sup> This was especially evident in 1986 when a former Secretary of the Department of Defence informed the Committee of Public Account that Ireland had made some five million pounds profit from its involvement in UNIFIL, and would at that time have made a further net gain of nearly sixteen million if defaulting nations had paid their dues at the UN. This was confirmed by the Secretary of the Department of Foreign Affairs who said: 'There has been no additional cost to the Irish taxpayer for keeping troops stationed in Lebanon over and above what it would have cost to keep them in Ireland', see *The Irish Times*, 10 September 1986.

Deployment Force along similar lines.<sup>110</sup> The current trend is towards delegation of by the Security Council of its powers to establish peace support operations to 'coalitions of the willing'.<sup>111</sup> However, this is dependent on a powerful state agreeing to take the lead, and others agreeing to contribute. It is when states are unwilling to form such coalitions that the UN often falls back on peacekeeping or peace enforcement operations under Chapter VII, in the latter case, not always successfully. Participation in 'coalition of the willing' can have serious political implications and raises policy issues for countries like Ireland that to date have eschewed participation in formal military alliances. The matter of who actually commands and controls such forces also presents practical and legal difficulties.<sup>112</sup>

### **Guidelines for future participation**

The Irish government has committed itself to supporting the unique role and authority of the UN in the field of conflict resolution and peacekeeping. However, in view of the number, size and complexity of current peace support operations, it was deemed necessary to develop a selective response to future requests from the UN based on certain factors.<sup>113</sup> These factors are so broad and imprecise that it

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<sup>110</sup> Training and re-equipment for this is planned to be completed by 2003, see speech by Lt. Gen. C. Mangan, Chief of Staff, reported in *The Irish Times*, 15 November 2000, 9.

<sup>111</sup> See generally D. Sarooshi, *The United Nations and the Development of Collective Security*, Oxford: Clarendon Press, (1999), esp. Chapters 6 and 7.

<sup>112</sup> See Chapter 5 *infra*.

<sup>113</sup> The factors that will inform consideration of such requests will include:-

an assessment of whether a peacekeeping operation is the most appropriate response to the situation; consideration of how the mission relates to the priorities of Irish foreign policy; the degree of risk involved; the extent to which the particular skills or characteristics required relate to Irish capabilities; the existence of realistic objectives and a clear mandate which has the potential to contribute to a political solution; whether the operation is adequately resourced; and the level of existing commitment to peacekeeping operations and security requirements at home; see *White Paper on Defence*, *op. cit.*, p. 63 and *White Paper on Foreign Policy*, *op. cit.*, pp.194-195. The *White Paper on Defence* outlined additional factors for consideration, including ongoing developments in UN peace support operations, the evolution of European security structures, and the resource implications for the defence budget.

could be said that all peacekeeping forces established will fall foul of at least one or more of them, and they could thus be used to avoid participation in, or even to deny the legitimacy or *raison d'être* of certain operations. This, however, is too cynical a view, and the factors are just what they are stated to be i.e. matters relating to an operation which will be taken into account when deciding whether or not it is appropriate to participate. It can also be claimed that if these were rigidly applied in the past, Ireland would not be in Lebanon today, and we would not have participated in any UN peacekeeping mission mounted to date. In this regard they are somewhat unrealistic, and they do not reflect precedent or practice to date. Nonetheless, they are potentially useful guidelines in assessing the nature and extent of what Ireland's support should be for any UN peace support operation.

Some of the factors, if interpreted and applied in a wise and flexible manner, might even provide a yardstick by which to measure the likely success of the operation, with or without Irish participation. Others reflect very subjective considerations, such as consistency with broader foreign policy objectives, and the extent of other similar commitments. These are legitimate factors for any sovereign state to take into account, and each request must be considered on its own merits. What should not be taken for granted though, is that the very complexity and evolving nature of peacekeeping may diminish the role of the Defence Forces, and the White Paper on Foreign Policy is somewhat unrealistic in this regard. It appeared to assume that Ireland would always be in demand as a contributor to peacekeeping operations. This is not necessarily the case. If Ireland wants to stay in what has been described as the 'premier league' of peacekeepers, then it must ensure that it is in a position to do so.<sup>114</sup>

There will always be a need for traditional peacekeeping, but there may not always be need for Irish personnel to form part of such operations. The support from Ireland for the inclusion of the so called Petersburg tasks of peacekeeping and similar humanitarian tasks into the Amsterdam Treaty on Europe indicated a growing awareness of the need to respond to the changing international security

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<sup>114</sup> Comdt. B. O Keeffe, spokesperson for the commissioned officers (RACO), RTE 9 O Clock News, 11 May 1998.

environment.<sup>115</sup> The White Paper on Defence also recognised the changing trends in international peace support operations, while at the same time the government has consistently stressed that participation in UN approved European peace support initiatives does not change Ireland's traditional policy on military neutrality.<sup>116</sup> This may well be official government policy, but it is hard to reconcile with the fact of participation with other European states in military operations of whatever nature, and the increasing co-operation envisaged for European Union states under the common foreign and security provisions of the Nice treaty.<sup>117</sup>

Although Ireland was not tarnished by the policies pursued by other contributors to the UN operation in Somalia, participation in any enforcement mission is risky. Apart from the obvious physical danger, there are other more fundamental issues to be considered. The real agenda of the larger powers may not be apparent at first, and small or middle powers run the risk of being dragged unwittingly into an intervention that owes little to the noble aspirations of the UN Charter. Humanitarian intervention and international law are not always high on the priorities of those states whose motives and policies are determined by the '*realpolitik*' of international relations and domestic concerns.

Taking into account of the experience of Somalia, the Irish government's approach to participation in future enforcement operations will be guided by certain criteria.<sup>118</sup> There is nothing radical or innovative about the criteria, and they are

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<sup>115</sup> See *The Irish Times*, 11 May 1998.

<sup>116</sup> *White Paper on Defence, op. cit.*, 61. See articles by B. Cowan, Minister for Foreign Affairs, *The Irish Times*, 18 November 2000, 9, and *The Examiner*, 14 July 2000, 15.

<sup>117</sup> See the *Nice Treaty White Paper*, Dublin: Government Publications, March 2001, 62-63; and *The Irish Times*, 29 March 2001, 8. See also J. Maguire, *Defending Peace - For an Alternative to NATO/PfP and a Militarised Europe*, Afri, Dublin, (1999); and Afri Position Paper No. 2, *Towards Real Security - A Contribution to the Debate on Irish Defence and Security Planning*, Dublin, (1999), and Cómhlanh, *Focus*, Issue 62, Dublin, (Aug/Sep 2000), 16-24.

<sup>118</sup> The criteria are as follows: that the operation derives its legitimacy from decisions of the Security Council; that the objectives are clear and unambiguous and of sufficiency and urgency and importance to justify the use of force; that all other reasonable means of achieving the objectives have tried and failed; that the duration of

broadly similar to those adopted by Canada.<sup>119</sup> However, the level of public knowledge and debate has been increased by their publication. They also set down the factors to be taken into account before a decision is made to participate, and they allow for the political and military implications of individual missions to be assessed and evaluated on an ongoing basis. Then, an informed decision can be taken on the basis of all the facts. This may lead to accusations of naiveté, especially as Ireland must now compete with other states to participate in such operations.<sup>120</sup> The end of the cold war has witnessed the industrial-military complex of both camps searching for a new identity and *raison d'être*. The recent UN sponsored military operations have provided a means for armed forces to resist pressure to rationalise and reduce their capacity. Proposals from smaller states indicate that this is not simply a concern of the larger powers.<sup>121</sup> Nonetheless, Ireland should not be afraid to decline to participate in any UN operation when this is the right course of action to take.

The guidelines were applied for the first time in 1996, when the Irish government decided to contribute troops to the proposed Canadian led UN

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the operation be the minimum necessary to achieve the stated objectives; that diplomatic efforts to resolve the underlying disputes should be resumed at the earliest possible moment; that the command and control arrangements for the operation are in conformity with the relevant decisions of the Security Council and that the Security Council is kept fully informed of the implementation of its decision. *White Paper on Foreign Policy, op. cit.*, 199-200.

<sup>119</sup> Lt. Col. Ernest Reumiller, 'Canadian Perspectives and Experiences with Peacekeeping' paper delivered to seminar on Conflict Resolution and Peacemaking/Peacekeeping: the Irish and Canadian Experiences, Dublin, Association of Canadian Studies in Ireland, May 1997.

<sup>120</sup> See reported warning by Defence Forces Chief of Staff that Irish peacekeepers are facing competition, *The Irish Times*, 5 October 1995; and the Defence Strategy Statements, *op. cit.* 15.

<sup>121</sup> The Irish Defence forces established a UN Training School in 1993, and agreed to participate in UN Stand-By forces in 1996. See also 'Improving the UN's Rapid Deployment Capability: A Canadian Study', February 1995; 'A UN Rapid Deployment Brigade: the Netherlands Paper', January 1995; and 'A Multifunctional UN Stand By Forces High Readiness Brigade: Chief of Defence, Denmark', 25 January 1995.

intervention force planned for Central Africa.<sup>122</sup> In the event, the troops were not required. When the matter of contributing troops to the NATO led SFOR and KFOR was being considered, the guidelines were applied again. There was general support for the proposal from the main political parties.<sup>123</sup> The Defence Forces and the Department of Foreign Affairs were strong advocates of the proposal.<sup>124</sup> In July 1999, Ireland agreed to send a transport company to Kosovo as part of KFOR. There was nothing radical or new in this decision, and their role is very similar to that performed by the Irish contingent with UNOSOM II.<sup>125</sup> Nonetheless, Irish involvement in SFOR and KFOR sets the scene for a longer-term re-orientation of Irish participation in international peace support operations. If the Defence Forces are to retain the skills and reputation acquired to date in the new context of European security, then it may be necessary to participate in the organizations where best contemporary practice is developed. This is all the more so with the UN move from traditional peacekeeping to more complex peace support operations conducted by regional organizations with UN approval. This was a significant development for Ireland that should assist in ensuring that the prominent role played by the Defence Forces to date in peacekeeping operations is not diminished in the future. This is an important consideration as some of Ireland's attributes for traditional peacekeeping, namely the non-membership of NATO and the small armed forces, could be barriers to participation in future UN but NATO led regional operations.

There is, however, a positive dimension to Ireland's situation. Peacekeeping was confined usually to small and middle powers, whereas

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<sup>122</sup> Personal interview, Department of Foreign Affairs official, *op. cit.* n.26. See also *Dáil Debates* 472 (701-725), 4 December 1996 and *The Irish Times*, 22 and 28 November 1996.

<sup>123</sup> *Dáil Debates* 479 (514-539), 14 May 1997 and *The Irish Times*, 23 January, 28 April and 8 May 1997.

<sup>124</sup> Personal Interviews, *op. cit.* n. 26. See also Department of Foreign Affairs, *Ireland and the Partnership for Peace*, an explanatory guide, Dublin, 1999. It had been hoped to send a company strength contingent to SFOR, but some fifty personnel in a military police capacity was ultimately agreed.

enforcement operations are dominated by the larger powers. With the UN in financial crisis, there may be little alternative but to hand over enforcement operations to regional bodies such as NATO. This has serious implications not just for the UN, but for smaller states like Ireland that are not part of any formal military or regional alliance. Nonetheless, Ireland's military neutrality and history, the very factors that excluded it from such alliances, make Irish soldiers especially acceptable as traditional peacekeepers. The need for contributors to such operations will continue, and Ireland is well placed to support and contribute to the myriad of tasks that such missions involve.

### **Conclusion.**

The decision to allow Irish troops participate in the UN enforcement mission in Somalia was one of the most significant developments in Irish defence and foreign policy in recent years. The need to pass enabling legislation in Ireland arose from the dualist nature of Ireland's legal system, rather than any new obligation undertaken by the state in relation to UN membership.<sup>126</sup> The high standard of officer training within the Defence Forces, the internal security role performed in aid to the civil power, and the 'can do' professional working ethos of all personnel, render the Defence Forces especially suitable for all UN operations. This, however, is something that should not be taken for granted. Despite all the reports of recent years, defence policy still lacks a coherent strategy. The Defence Forces must be given the resources to maintain the capacity to respond to requests to contribute to peace support operations, when appropriate. There is a very real danger that this could be undermined by current 'reforms', combined with government lack of vision. The current strength of the Defence Forces is inadequate for the tasks it is intended to fulfil. This situation is all the more critical when it is taken into account that for every battalion or unit on UN or similar service, there should be another in preparatory training, and another standing down.

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<sup>125</sup> Dáil Debates, 507, (852-86), 1 July 1999. See also *The Irish Times*, 31 August 1999 and 1 and 2 July 1999.

<sup>126</sup> The Defence (Amendment) Act, 1993, for background and analysis see Chapter 4.

It will not be possible to meet the commitment to the UN Stand By force arrangement, and the European Rapid Reaction Force, at the same time.<sup>127</sup> Nor is it clear that the Defence Forces will be prepared for the security implications of a breakdown or serious para-military threat to the Northern Ireland peace process. Despite protestations to the contrary by the Minister for Defence and Minister for Foreign Affairs, the numbers just do not add up.<sup>128</sup>

Successive governments have been neither honest nor realistic in their designation of the role of the Defence Forces, and what is being signalled now is a clear move away from traditional UN operations in favour of the post cold war model of 'tendered out' or delegated peace support operations. This may well be the way of the future, but what is missing is an honest and clear policy from the government on where Ireland stands on this and related issues.<sup>129</sup> As one recent author put it, 'as the Mother Teresa of the international community'<sup>130</sup>, Ireland is uncomfortable with the truth and the dilemmas of the post cold war era. For many years the real mission of the Defence Forces was to defend the state from a perceived internal threat, while external security was guaranteed by slipping under the NATO umbrella.<sup>131</sup> When this was combined with an underlying distrust of the military by the political establishment, the consequences for the Defence Forces was that of a policy of deliberate neglect.

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<sup>127</sup> See reports by J. Cusack, *The Irish Times*, 5 February 2000, 3, and N. Murray, *The Examiner*, 14 July 2000, 1, and article by Lt. Gen. G. McMahon, former Chief of Staff, *The Irish Times*, 26 July 2000, 16. For an alternative view, see J. McConnell, Press Officer, Dept. of Defence, letter, *The Irish Times*, 1 August 2000, 13.

<sup>128</sup> See speech by Brian Cowan, Minister for Foreign Affairs, to the UN General Assembly, Department of Foreign Affairs, Dublin, September 2000, and D. de Breadún, *The Irish Times*, 16 September 2000, 13, and the denial of the reduction in UN role by the Minister for Defence reported in B. Roche, *The Irish Times*, 2 August 2000, 4.

<sup>129</sup> See generally J. Maguire, *op. cit.*, and Afri Position Paper No. 2, *op. cit.*, and Comhlámh, *Focus*, Issue 62, Dublin, (Aug/Sep 2000), 16-24.

<sup>130</sup> O'Halpin, *op cit.*, 353.

<sup>131</sup> See A. J. English, 'The Irish Republic – Odd Man Out of European Defence', *Jane's Military Review*, London: Jane's Publishing, (1987), 31 and B. Mac Sweeney, 'Irish Defence in the Context of Irish Foreign Policy', *Irish Studies*, (Spring 1998), 51.

Ireland has moved on significantly from its statement to the Special Committee on Peacekeeping Operations a decade ago that '[w]e would underline again that UN peacekeeping derives its strength from its collective character and its resulting impartiality. The financing, command and composition of these forces must be consistent with this'.<sup>132</sup> The controversial decision to join the NATO sponsored Partnership for Peace programme, and the commitments under the European Common Foreign and Security Policy have important implications for Ireland.<sup>133</sup> To a large extent the debate over membership of the Partnership for Peace programme took place among political elites and certain interest groups. However, the development of co-operative military relations and compatibility with the Western European Union and NATO in particular, albeit for peacekeeping/humanitarian purposes, raises important issues for Ireland. The Defence Forces could benefit from, and contribute to, the stated objectives of the Partnership for Peace.<sup>134</sup> Its focus is declared to be on co-operation, training and joint exercises, and its framework document entails participation on a voluntary basis only.<sup>135</sup> It includes most of the other 'neutral' European states, and former Warsaw Pact members. However, because of its association with NATO, membership of the Partnership for Peace may dilute Ireland's independent middle

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<sup>132</sup> See comments by Ireland to the Special Committee on Peacekeeping Operations, UN General Assembly, Document A/AC.121/37, 29 March 1990, 13-15 at 14.

<sup>133</sup> Ireland formally joined the Partnership for Peace programme in December 1999, see *The Irish Times*, 2 December 1999, 3. See also R. Doherty, 'Partnership for Peace: the *sine qua non* for Irish Participation in Regional Peacekeeping', 7 *International Peacekeeping* (F. Cass), No., 2, (Summer 2000), 63-82; and Challenges and Opportunities Abroad, *op. cit.*, 128-140, Defence Strategy Statements, *op. cit.*, pp.7-9, and Afri, *Towards Real Security*, *op. cit.*, 2-7 and P. Gillespie, *The Irish Times*, 30 September 2000, 13.

<sup>134</sup> It is difficult to take issue with the first three stated objectives of the Partnership for Peace, namely, transparency in defence planning, ensuring democratic control of defence forces, maintenance of capability and readiness to contribute to UN and the Organization for Security and Co-operation in Europe (OSCE) operations.

<sup>135</sup> Challenges and Opportunities Abroad, *op. cit.*, 129-131.

power identity even more than has already occurred, and it may make forging and maintaining links with the countries of the developing South more difficult.

The issues are complex, and the dilemmas confronting Ireland were evident in the debate about participation in the multinational force in the former Yugoslavia.<sup>136</sup> The government policy of military neutrality, however, did not preclude Irish participation in this force, when it was deemed appropriate to do so. In reality, both SFOR and KFOR are NATO forces, albeit operating with the authority of a UN Chapter VII resolution and with non-NATO member contributors. In military terms, Ireland does not possess the capacity to make any significant contribution to such large-scale operations. Irish involvement in these forces sets the scene for a longer-term re-orientation of Irish international peacekeeping. If Ireland is to retain its skills and reputation in the field of peacekeeping, it is necessary to adapt and to participate in the organizations where best contemporary practice is developed. But in doing so, is Ireland contributing to the demise of the UN at the behest of the United States and other permanent members of the Security Council? At the same time, there are some issues that Ireland should not remain neutral in respect of - the genocide, ethnic cleansing, mass rapes, and other crimes against humanity perpetrated in the former Yugoslavia are but one example. The reality is that it has taken a NATO led force to impose some measure of peace, and prevent the seemingly endless slaughter of so many innocent civilians in the former Yugoslavia. But why have the same NATO powers left the UN strapped for cash and unable to act? The unilateral NATO response to the Kosovo crises may provide a more accurate insight into the true nature and purpose of these forces.<sup>137</sup>

The Kosovo crisis occurred at a time when Irish foreign policy was preoccupied with other matters, notably Northern Ireland and East Timor.<sup>138</sup> The

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<sup>136</sup> For an examination of the security issues, see P. Keatinge, *European Security-Ireland's Choices*, Dublin: Institute of European Affairs, (1996).

<sup>137</sup> See R. Murphy 'Kosovo: Reflections on the legal aspects of the conflict and its outcome', 11 *Irish Studies in International Affairs*, (2000), 7-30; and J. Maguire, *op. cit.*, at 60-64.

<sup>138</sup> See N. Rees, 'The Kosovo Crisis, the International Response and Ireland', 11 *Irish Studies in International Affairs*, (2000), 55-70, esp.67-68.

images of violence shocked the Irish public, but it remained divided over NATO action. The government's initial reaction mirrored this ambivalence, and as a result it neither supported nor condemned NATO action.<sup>139</sup> It is noteworthy that this changed and later Ireland supported a joint European Union foreign minister's statement that the bombing was 'necessary and warranted'.<sup>140</sup> This was a significant change in policy and it probably reflected a desire to maintain European solidarity.

The neutral states tradition of involvement in international peace support operations is confirmed once again by the agreement of European neutrals to send soldiers to serve with the UN mandated but NATO commanded KFOR.<sup>141</sup> This participation raises the issue of the compatibility of a policy of political and/or military neutrality with such operations<sup>142</sup> Ireland is almost unique among the European neutrals in that the Defence (Amendment) Act, 1993, permits the participation of Defence Forces personnel in any kind of UN military operation.<sup>143</sup> It may be that other states will follow this example, but the experience of Switzerland indicates that nothing should be taken for granted. The situation with regard to Switzerland highlights the difficulties that can arise for genuinely neutral countries. Although not a member of the UN, Switzerland has participated in a number of UN operations.<sup>144</sup> In order to formalise and expedite the process of

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<sup>139</sup> *Ibid.*

<sup>140</sup> The original draft statement said it was 'justified', but the Irish Foreign Minister Andrews and other neutrals opposed this on the grounds that it implied it was legally justified; see *The Irish Times*, 15 April 1999.

<sup>141</sup> For example, KFOR includes non- NATO contingents from, *inter alia*, Sweden, Switzerland, Finland, and Austria. See [www.kforonline.com](http://www.kforonline.com).

<sup>142</sup> See S. Dragon, 'Permanent Neutrality and Peacekeeping', 5 *International Peacekeeping* (Kluwer), Nos. 1-2, (1999), 37-40.

<sup>143</sup> See R. Murphy, 'A Comparative Analysis of the Municipal Legal Basis for Canadian and Irish Participation in United Nations Forces', 38 *Revue de Droit Militaire et de Droit de la Guerre/The Military Law and the Law of War Review*, (1999), 163-208, and *Infra*. Cpt. 3.

participation, the Swiss Federal Council enacted a statute in 1993 establishing a standby military force. Like Ireland, peacekeeping is deemed to be an important aspect of Swiss foreign policy. However, the statute was rejected by referendum because the population, among other reasons, considered participation in UN missions a threat to the neutrality of Switzerland.<sup>145</sup> It may be that Irish political leaders had this in mind when they decided not to hold a referendum on Irish membership of Partnership for Peace.<sup>146</sup> The Swiss experience shows that the general public there are wary of the extended parameters of recent UN military operations, and that the threat to neutrality is perceived as very real. The blurring of the distinction between peacekeeping, peace enforcement and enforcement action missions does not help this either.

The risks of involvement for Ireland are not insignificant, as they were during the Congo crisis nearly forty years ago, but the duty to act as responsible member of the international community remains and is compelling, in particular, given the shameful record of Ireland and other European countries throughout the Yugoslav conflict. However, NATO makes for an unpredictable bedfellow. Once it gave the UN full co-operation as part of peacekeeping and enforcement missions in Bosnia-Herzegovina. Now it seems to be competing with the UN and to have taken its place in the European area. This may suit the cash strapped UN in the short term, but what of NATO's plans outside its own area of operations and without UN authorisation? Where does Ireland's interests lie in such a scenario? The lessons of history are clear, Ireland's interests as a small state lie with the UN, collective security and international law.

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<sup>144</sup> . Switzerland participated in many operations, for example, UNEF, ONUC and UNFICYP. A Swiss military medical unit was first sent to Namibia in 1988. Since then Switzerland has regularly contributed to peacekeeping operations through such units.

<sup>145</sup> Dragon, *op. cit.*, 38.

<sup>146</sup> See *The Irish Times*, 2 December 1999, 3. A major source of controversy arose from the fact that one of the Government parties, Fianna Fáil, had promised before gaining power that it would hold a referendum on the issue. It changed its mind in government. For the terms of Irish membership, see *The Irish Times*, 6 October 1999, 6 and 2 December 1999, 3.

## Chapter 3

### CONSTITUTIONAL ISSUES ARISING FROM IRELAND'S MEMBERSHIP OF THE UN

#### Introduction

Ireland has been a member of the UN since 1955, and apart from when the issue of membership was first debated in 1946, there has been no serious consideration of the full implications of belonging to an international organization which is charged with, *inter alia*, the maintenance of international peace and security. Participation in UN peacekeeping operations has been a cornerstone of Irish foreign policy since the late 1950's.<sup>1</sup> While traditional peacekeeping remains an integral part of the United Nation's machinery for the maintenance of international peace and security, in recent years there has been a shift in emphasis from the traditional operation based on consent to a more robust or 'second generation' UN military operation. In addition, the UN has been forced to adopt a decentralised military option as opposed to the original Charter scheme that was based on a more centralised collective system.<sup>2</sup> Ireland has participated in the UN enforcement operation in Somalia and is currently part of the UN sanctioned but NATO led Stabilisation Force in the former Yugoslavia. This and participation in other UN military and multi-dimensional operations is a direct result of membership of the UN. Moreover, membership has provided an opportunity for Ireland to play a role in the most important international organization of this century that is far in excess of Ireland's relative political, economic or military significance.<sup>3</sup>

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<sup>1</sup> *Supra.*, Chapter 2, and *Challenges and Opportunities Abroad, White Paper on Foreign Policy*, Dublin: Department of Foreign Affairs, (1996), 191-206 and *passim*.

<sup>2</sup> See N. D. White and O. Ulgen, 'The Security Council and the Decentralised Military Option: Constitutionality and Function', XLIV (3) *Netherlands International Law Review*, (1997), 378-413 at 380.

<sup>3</sup> See Chapter 2, *supra*.

The most controversial period of Irish participation in peacekeeping operations occurred during the Congo (ONUC) operation in the 1960's.<sup>4</sup> Even then, however, actual membership of the UN Organization itself was not questioned seriously. Despite the history of significant Irish involvement of peacekeeping, it is ironic that it was the Gulf conflict of 1990-91 that gave rise to the most sustained debate in recent times concerning Ireland's obligations arising from membership of the UN. Prior to that, participation in peacekeeping and similar operations, even those established under Chapter VII of the UN Charter, had always been undertaken on a voluntary basis and with the approval of Dáil Eireann (Irish Parliament).<sup>5</sup> Though these did give rise to debates, these usually centred on the issue of participation and were mission specific in nature. The more general legal obligations arising from Ireland's commitment to multilateralism and collective security within the UN system were not given due consideration. Yet such a debate is crucial to Irish participation in peacekeeping and similar operations, as these arise within the framework of the Charter, in particular those provisions dealing with the maintenance of international peace and security. The Gulf conflict raised matters regarding Ireland's obligations under the Charter that had neither arisen nor been considered significant issues before then. In particular, the compatibility between provisions in the Irish Constitution dealing with international relations and associated matters, and the obligations imposed by the UN Charter, came in for scrutiny. These are fundamental questions that impinge upon Ireland's participation in the UN at all levels, but especially in military operations of a peacekeeping or other nature. It was following a Supreme Court decision in 1986 that serious questions were raised concerning the constitutionality of Ireland's membership of the UN.<sup>6</sup> In order to consider these issues it is necessary to examine the constitutional provisions governing international relations and agreements entered into by the State, and what action Ireland may be obliged to take as a member of the UN.

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<sup>4</sup> See for example 184 Dáil Debates, (734, 1018, 1284) 9,16 and 17 December 1960, and 185 (864-865, 1090-1091) 7 and 14 December 1960.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Crotty v. An Taoiseach* [1987] Irish Reports 713.

## Constitutional considerations

In the first instance, Article 29.5.2 of the Constitution provides:

The State shall not be bound by any international agreement involving a charge upon public funds unless the terms of the agreement shall have been approved by Dáil Eireann.<sup>7</sup>

The practice has been that the government of the day first seeks the approval of the Dáil for any international agreement or convention involving a charge upon public funds in advance of ratification or signature, if binding. This is the most obvious constitutional requirement resulting from Article 29.5.2 and it was a constitutional imperative before Irish membership of the UN could be undertaken. Arising from this, the then Taoiseach (Prime Minister), Mr. de Valera, moved the following motion in the Dáil on 24 July 1946, and it was passed unanimously the following day:

That Dáil Eireann, being willing to assent to acceptance of the obligations contained in the Charter.....recommends the government to take steps with a view to Ireland's admission to membership of the United Nations Organization as soon as they consider it opportune to do so.<sup>8</sup>

The background to Ireland's application has already been dealt with, but it was December 1955 before Ireland was permitted to join.<sup>9</sup> By this time the government had changed, and despite misgivings by de Valera, reliance was placed on the motion of 1946 as being sufficient to satisfy the constitutional

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<sup>7</sup> See J.M. Kelly, *The Irish Constitution*, 3rd. ed. (G. Hogan and G. White, eds.), Dublin: Butterworths, (1994), 295-300; J. Casey, *Constitutional Law in Ireland*, 3rd ed., Dublin: Round Hall/Sweet and Maxwell, (2000), 215-220, 231-232, 299.

<sup>8</sup> 102 Dáil Debates, (1308). Mr. de Valera was also Minister for External Affairs at the time.

<sup>9</sup> *Supra*, Chapter 2.

requirements under Article 29.<sup>10</sup> The problem with this was that the perceived and *de facto* requirements of UN membership had changed somewhat in the intervening period, and the question could validly be asked whether the terms of the Charter in 1955 were identical to that of 1946. The then Taoiseach, Mr. Costello, commented that the only difference between the position regarding the obligations as set out during the Dáil debate of 1946 and then, was the experience of the Korean conflict which demonstrated that the obligations envisaged under Article 43 of the Charter and the making available of armed forces were not mandatory. In this way, the obligations were less onerous than anticipated and any military commitments under Article 43 were, according to Mr. Costello, 'entirely within our own control'.<sup>11</sup> This was not quite correct as Ireland was still bound by the terms of the Charter as a whole, and as there were no formal amendments during those years, the potential for agreement under Article 43 still remained.

Not surprisingly, the emphasis during the early debate had been on the military obligations arising from Article 43.<sup>12</sup> Those commitments envisaged had not in fact materialised. After the Korean conflict, the anticipated requirements of the Charter were indeed somewhat different, but the advent of the cold war and the changing international environment made it difficult to predict what military commitments might arise in the future. Within a year following Ireland's accession, UNEF was established, setting a precedent for one of the most significant but unforeseen developments in the maintenance of international peace and security by the UN.<sup>13</sup>

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<sup>10</sup> 153 Dáil Debates, (1603,1605 and 1606) 15 December 1955.

<sup>11</sup> *Ibid.*, (1602).

<sup>12</sup> See L. Goodrich, E. Hambro and A. Simmons, *Charter of the United Nations*, (3rd. ed.), London: Columbia University Press, (1969), 317-326 and B. Simma (ed.), *The Charter of the United Nations - A Commentary*, Oxford: Oxford University Press, (1995), 636-639.

## The UN and the use of military force.

The UN Charter envisages a central executive role for the Security Council in the maintenance of international peace and security.<sup>14</sup> The members of the UN, including Ireland, have agreed in Article 25 of the Charter to ‘accept and carry out’ the ‘decisions’ of the Security Council. It follows that decisions taken under Chapter VII of the Charter, to the extent that they come within Article 25, create legally binding international obligations for member states. There are no definitive criteria for determining whether a resolution of the Security Council is either a decision or a recommendation.<sup>15</sup> In its *Advisory Opinion on Namibia*, the International Court of Justice provided the following guidelines:

The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussion leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.<sup>16</sup>

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<sup>13</sup> See D.W. Bowett, *United Nations Forces*, London: Stevens, (1964), 90-151 and *The Blue Helmets*, (3rd ed.), New York: UN, (1996), 15-32.

<sup>14</sup> See generally N.D. White, *Keeping the Peace-The United Nations and the Maintenance of International Peace and Security*, 2nd. ed., Manchester: Manchester University Press, (1997), 3 and 80-128 and R. Hiscocks, *The Security Council-A Study in Adolescence*, London: Longman, (1973), 51-81.

<sup>15</sup> The actual language of the resolution may be relevant, and the use of phrases such as ‘recommends’ or ‘decides’, or of specific mention of Article 25 itself may be taken into account.

<sup>16</sup> *Advisory Opinion on the Legal Consequences of the Continued Presence of South Africa in Namibia* [1971], I.C.J. Rep. 16. See R. Higgins, ‘The Advisory Opinion on Namibia: which UN resolutions are binding under Article 25 of the Charter?’, *21 International Comparative Law Quarterly*, (1972), 270-86, and S. D.Bailey and S. Daws, *The Procedure of the United Nations Security Council*, (3rd Ed.), Oxford: Clarendon Press, (1998), 4 and 263-273.

The capacity of the Security Council to order the use of armed force is provided for in Chapter VII of the Charter. The failure of states to conclude agreements under Article 43 has meant that the express provisions of Article 42 regarding the 'taking of action by land, sea and air forces' proved inoperable during the cold war.<sup>17</sup> But this did not prevent the adoption of enforcement measure by the Security Council in accordance with what were presumably determined to be implied powers under Chapter VII in general, and Article 39 in particular. In effect, the failure to implement the obligatory arrangements envisaged in Article 43 was circumvented by a 'recommendation' to all the individual members.<sup>18</sup>

The first occasion when the Security Council adopted military sanctions was in the case of the North Korean invasion of the South in 1950. This was especially significant for Ireland as it occurred before membership took place, and it was not anticipated in the debates preceding the application for admission in 1946. The Security Council quickly found a breach of the peace, and called for the immediate cessation of hostilities and the withdrawal of North Korean forces. This call was also ignored and was backed up by the Council recommending military action against North Korea.<sup>19</sup> The Council called on all members to refrain from rendering any assistance to North Korea and it recommended that members furnish such assistance to South Korea 'as may be necessary to repel the armed attack and to restore international peace and security in the area.'<sup>20</sup>

The Secretary-General wanted some form of central control of this force, but this was unacceptable to the United States.<sup>21</sup> Instead, Resolution 84 (1950) was adopted and this 'recommended that all members providing military forces...make such force available to a unified command under the United States.'<sup>22</sup> The use of the UN flag was also authorised. The action was explained

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<sup>17</sup> N.D. White, *op. cit.*, 117.

<sup>18</sup> R. Higgins, *The Development of International Law through the Organs of the United Nations*, London: Oxford University Press, (1963), 227.

<sup>19</sup> S/1501, Resolution 83 of 27 June 1950.

<sup>20</sup> *Ibid.* See also White, *op. cit.*, pp.106 and 121-122; and D.W. Bowett, *op.cit.*, 29-31.

<sup>21</sup> T. Lie, *In the Cause of Peace*, New York: Macmillan, (1954), 334.

as coming under Article 39 of the Charter on the basis that in the absence of agreements made under Article 43, the Council could not 'decide' upon military action within the terms of Article 42, but could call on states to volunteer help.<sup>23</sup> This arrangement seems to come within the implied powers of the Council, but it involved a degree of delegation to a single member state never envisaged under the Charter. Furthermore, those volunteering forces were given *carte blanche* to pursue their own agenda with little or no accountability to the UN or the international community as a whole. Resolution 84(1950) appeared to go further than just delegation, in effect it abdicated responsibility to the United States, which supplied ninety per cent of the forces.<sup>24</sup> Although the force was obliged to make regular reports to the Security Council, the United States exercised effective command and control.

Military sanctions were again invoked in response to the Rhodesian crises in 1965.<sup>25</sup> On that occasion the Security Council ultimately adopted Resolution 221(1965) after the United Kingdom had sought clarification and further authorisation to implement an earlier resolution which had called upon states to break all economic relations with Southern Rhodesia, to refrain from the supply of military aid, and to impose an embargo on oil and petroleum products.<sup>26</sup> Resolution 221(1965) called upon 'the Government of the United Kingdom to prevent by the use of force if necessary the arrival at Beira of vessels reasonably believed to be carrying oil destined for Rhodesia'.<sup>27</sup> This contained stronger language than that of the Korean resolution, but the objectives were limited and the measures were considered to be in the nature of a

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<sup>22</sup> 7 July 1950. See D.J. Harris, *Cases and Materials on International Law*, (5th ed.), London: Sweet and Maxwell, (1998), 951-955.

<sup>23</sup> White, *op. cit.* p.121-122. For an analysis of Articles 39, 42 and 43, see L. Goodrich, E. Hambro and A. Simmons, *op. cit.*, pp. 293-302, and 314-326; and B. Simma, *op. cit.*, pp.605-616 and 628-639.

<sup>24</sup> *Ibid.*

<sup>25</sup> See A. James, *Peacekeeping in International Politics*, London: Macmillan, (1990), 177.

<sup>26</sup> Resolution 217(1965). See D. J. Harris, *op. cit.*, 887

<sup>27</sup> Resolution 221(1965), para. 5.

recommendation.<sup>28</sup> The exact parameters and circumstances where the use of force might be resorted to were not set down. But it was clear that it was to be used only if necessary, and then to prevent oil supplies arriving at the port of Beira. Ultimately, it was the United Kingdom that would decide if force was appropriate. The delegation of such decisions to a single state authorised to use force that was otherwise unlawful, was not envisaged in the Charter. Although very different than the situation in the Gulf conflict, the precedent of bestowing such power and discretion on a state or group of states authorised to act on behalf of the international community was followed in more dramatic fashion after the invasion of Kuwait in 1990.

### **The Gulf conflict 1990/91**

Arising from the Iraqi invasion of Kuwait in 1990, both economic and military sanctions were imposed on Iraq. The situation thus created had the affect of opening up the debate in Ireland regarding the obligations arising from membership of the UN.<sup>29</sup> As in the case of Korea, the United States determined that it was necessary to have the backing of the Security Council in order to make any military operation acceptable to the international community. On the day of the actual invasion, the Council adopted Resolution 660(1990), determining the existence of a breach of international peace and security.<sup>30</sup> When there was apparently no response to this, the Council adopted a further resolution which, *inter alia*, and acting under Chapter VII, called upon all states, including non members of the UN, 'to act in strict accordance with the provisions of the present

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<sup>28</sup> N. D. White, *op. cit.*, 107.

<sup>29</sup> See L. Heffernan & A. Whelan, 'Ireland, the United Nations and the Gulf Conflict: Legal Aspects', 3 (3) *Irish Studies in International Affairs*, (1991), 115-145, esp. 128-137.

<sup>30</sup> 2 August 1990. See *International Legal Materials* (1990), 1325. Purporting to act under Article 39 and 40, it condemned the invasion, demanded the unconditional and immediate withdrawal of Iraqi forces, and called upon the two states to commence intensive negotiations' for a resolution of their differences. See also *Kuwait Airways Corporation v. Iraq Airways Co.* [2001] 1 Ll. L.Rep. 161 at 202 – 204.

resolution.<sup>31</sup> Wide ranging economic embargoes in all but humanitarian circumstances were imposed. The significance of this for Ireland was that it was a decision of the Security Council that constituted a legally binding obligation. In addition to the economic sanctions, all states were called upon to take appropriate measures to protect assets of the legitimate government of Kuwait and its agencies, and not to recognise any regime established by Iraq. Later resolutions were of a similar vein and when states co-operating with Kuwait and deploying maritime forces in the area concluded that the measures required the use of force in order to enforce sanctions, Resolution 665(1990) was adopted. This permitted them to 'use such measures commensurate to the specific circumstances as may be necessary.'<sup>32</sup>

The somewhat ambiguous terminology of Resolution 665(1990) did not lend itself to precise interpretation. This ambiguity was even more apparent in the text of Resolution 678(1990) that provided the authority for launching 'Operation Desert Storm'. This authorised military action in the following terms:

The Security Council,... acting under Chapter VII of the Charter of the United Nations,

1. demands that Iraq comply fully with Resolution 660(1990) and all subsequent relevant resolutions and decides, while maintaining all its decisions, to allow Iraq one final opportunity, as a pause of goodwill, to do so;
2. authorises Member States co-operating with the government of Kuwait, unless Iraq on or before 15 January 1991 fully implements, as set forth in paragraph one above, the foregoing resolutions, to use all necessary means to uphold and implement Security Council Resolution 660(1990) and all subsequent relevant resolutions and to restore international peace and security in the area;
3. request all States to provide appropriate support for the actions undertaken in pursuance of paragraph 2 of this resolution;

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<sup>31</sup> Resolution 661, 6 August 1990.

<sup>32</sup> Resolution 665, 25 August 1990.

4. requests the States concerned to keep the Council regularly informed on the progress of actions undertaken pursuant to paragraphs 2 and 3 of this resolution;
5. decides to remain seized of the matter.<sup>33</sup>

The authorisation for states to 'use all necessary means' to implement the UN objective would appear to be based on Article 39 of the Charter and on a general reading of Chapter VII.<sup>34</sup> The actual wording of the resolution is remarkably vague in this respect. Paragraph 2 is addressed to any member state co-operating with the government of Kuwait, without calling on states to do so or outlining what such 'co-operation' actually entailed. As in the case of the Korean crisis, Articles 42 and 43 were circumvented by the formulation of a request and recommendation. In contrast to Resolution 84(1950),<sup>35</sup> although some measure of unified command is implied, there is no mention of a UN force nor is the multinational volunteer force placed under United States command. The authorisation to use all necessary means is a typical UN euphemism for the use of force. Despite this, it is still not clear what it means in practice, and whether an individual state or group of states, as opposed to the Security Council, can decide on the measure of force deemed appropriate. While any action must respect international law, including international humanitarian law and international norms for the conduct of military operations, there seemed to be no other constraints set down. A great deal of authority seems to have been delegated to very few to act on behalf of the international community in a way that required little or no accountability. One of the consequences of the language used was that it led to uncertainty regarding the UN objectives under the resolution. A more detailed resolution with clearer aims and objectives, setting down definite

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<sup>33</sup> Resolution 678, 29 November 1990. See generally I. Johnstone, *Aftermath of the Gulf War: An Assessment of UN Action*, International Peace Academy, Occasional Paper Series, Boulder and London: Lynne Rienner, (1994), esp. 10 and 43-45.

<sup>34</sup> For a discussion of Chapter VII and Article 39, see generally L. Goodrich, E. Hambro and A. Simmons, *op. cit.*, 290-353 esp. 293-302, and B. Simma, *op. cit.*, 605-678.

<sup>35</sup> Adopted 7 July 1950.

parameters for the use of force, and clarifying the nature and extent of United States command, would have been preferable.

Two objectives can be discerned from the resolution; in the first place to uphold and implement Resolution 660(1990) and all subsequent relevant resolutions; and, secondly, to restore international peace and security in the region. There are clear limitations to the former i.e. the legitimising of the use of force to achieve the specific objective of securing an Iraqi withdrawal from all of Kuwait. In contrast, the latter objective of restoring international peace and security in the region is extremely vague and open to different interpretations. Did it mean the removal by forceful means of the regime in Iraq, or intervention on behalf of the Kurds in the north, or 'Marsh Arabs' in the south of Iraq, and what were the precise geographical limitations of the 'region'? These questions remain unanswered, but objectives could have been created on the pretence that they were consistent with the overall mandate. In December 1998, the United States and Great Britain launched air strikes against selected targets in Iraq as a result of what they perceived to be Iraqi intransigence on disarmament. One of the main legal justifications put forward was based on the continuing validity of Resolution 678 (1990), in particular the mandate to restore 'international peace and security to the area.'<sup>36</sup> The February 2001 air strikes were also justified on a similar imprecise basis.<sup>37</sup>

Paragraphs 4 and 5 of the resolution are also significant elements of the overall package. The subsequent execution of operation 'Desert Storm' raised serious questions about the role of the Security Council in the initiation and control of enforcement action. The request to keep the Council informed and the decision that it shall remain seized of the matter seemed to count for little in the commencement and conduct of the operation. This is a matter of serious concern, as the Charter does not provide for the authorisation and then abdication of

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<sup>36</sup> D. A. Leurdijk and R.C.R. Siekmann, 'The Legal Basis for Military Action Against Iraq,' 4 (3-4) *International Peacekeeping* (Kluwer), (January-April 1998), 71-76; and Statement by the President, the White House, Office of the Press Secretary, December 16, 1998 and Press Remarks on Military Attack on Iraq by Secretary of State, December 17, 1998, US Department of State. Both press statements are more remarkable for their lack of precise legal justification.

<sup>37</sup> See M. White and R. Norton-Taylor, 'Doubts over Iraq air strikes', *The Guardian*, 19 February 2001.

responsibility for enforcement action. It is the most important of the powers possessed by the Council, and it has been said that the rights and powers in respect of the use of force should be exercised with circumspection.<sup>38</sup>

The effective hegemony of the five permanent members of the Security Council is sufficient to cause disquiet among member states and prompt calls for reform.<sup>39</sup> But having authorised the use of force, if it was not actually necessary under international law, it was at the least desirable that the Security Council remain seized of the matter and that it be seen to be so by the international community. Member states have entrusted what amounts to an oligarchy comprising the permanent members of the Security Council with the authority and power to authorise sanctions and military action. A corresponding responsibility rests with the Council not only to specify the nature and extent of the use of force permitted, but also to ensure that those tasked with this responsibility do not exceed the objectives and parameters for the use of force.

As Ireland fell outside the category of states actively 'co-operating with Kuwait' under the terms of Resolution 678(1990), it was requested to provide 'appropriate support' for the actions undertaken in pursuance of paragraph 2. It would appear from an analysis of the resolution that military action was not mandatory. In this regard it is similar to the decisive resolutions in respect of Korea and Southern Rhodesia in that a significant measure of discretion was left in the hands of members addressed directly under the resolution. It is more difficult to classify the legal character of resolutions that are permissive in contrast to mandatory, as states are licensed rather than obliged to take military action. In any event, it does seem that non-belligerent states are not under a legal obligation to provide the 'appropriate support' requested and some commentators have said that Ireland was not in fact obliged to take or refrain from any particular course of action.<sup>40</sup> Nevertheless, there was an onus on all states to consider the request, and

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<sup>38</sup> I. Brownlie, *International Law and the Use of Force by States*, Oxford: Oxford University Press, (1963), 335.

<sup>39</sup> See statement by Mr. Dick Spring, Tánaiste (Deputy Prime Minister) and Minister for Foreign Affairs of Ireland during the general debate at the forty-ninth session of the General Assembly, Press Release, Permanent Mission of Ireland to the UN, 24 September 1994 and *The Irish Times*, 29 September 1994.

<sup>40</sup> Heffernan and Whelan, *op. cit.*, 126.

in the case of states members of the UN, there was an additional obligation to exercise its discretion in a manner compatible with that membership.

The question of immediate concern to Ireland was what constituted 'appropriate support' and did the terms of Resolution 678(1990) impose any legal obligations on Ireland? Ireland was requested to afford landing and over flight facilities to United States aircraft on route to the Gulf region. As a member of the UN, Ireland is obliged to take cognisance of Article 49 of the Charter, which provides that members 'shall join in affording mutual assistance in carrying out the measure decided by the Security Council.'<sup>41</sup> While it may be argued that the wording suggests that this obligation exists only in respect of decisions, as opposed to recommendations of the Security Council, Article 2(5) may be invoked to solicit support for UN measures which members are not strictly speaking legally bound by Charter provisions to support.<sup>42</sup> This provides that all members will give every assistance to the UN in any action taken in accordance with the Charter and to refrain from giving assistance to any state against which the UN is taking preventive or enforcement action. Arising from this commitment and the vagueness of Resolution 678(1990), it is difficult to determine what appropriate support Ireland should have rendered in the circumstances. At the very least it was obliged to refrain from actions that might frustrate or impede action taken on the basis of a Security Council resolution. In the event, Ireland acceded to the request, and stopover and refuelling facilities were provided. If Ireland had refused these facilities, could that have been construed as frustrating or impeding military action by the multinational force and indirectly that of the Security Council?

It can be argued that a refusal to facilitate the stop-over flights as requested would have been a violation of Article 2(5) of the Charter. However, it is worth asking if Ireland would have been bound to facilitate the stopover flights even if not a member of the UN? The relevant paragraph of Resolution 678(1990) was addressed to all states, not just member states, and Article 2(6) of the Charter provides that the Organization will ensure that states which are not

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<sup>41</sup> L. Goodrich, E. Hambro and A. Simmons, *op. cit.*, 337-340 and B. Simma, *op. cit.*, pp. 656-658.

<sup>42</sup> *Ibid.* 58 and 129-130 respectively.

members act in accordance with the principles so far as may be necessary for the maintenance of international peace and security.<sup>43</sup> In this way, it may be argued that the obligations for non-belligerent states arising from the Gulf Conflict did not arise by virtue of UN membership alone. The request to all states is a reminder of the general obligations arising from Article 2(6) and the obligation under general international law not to recognise a situation of illegality.<sup>44</sup>

One of the reasons for objecting to facilitating the stopover flights was that it involved Irish participation, however indirect, in a 'war' and that it was incompatible with the policy of military neutrality.<sup>45</sup> Such an argument fails to take into account that Irish involvement arose from membership of an international organization and that enforcement action is taken on behalf of the international community. In this way it is a unique multilateral response to acts of aggression contrary to the Charter and the issue of neutrality simply does not arise. Membership of the UN precludes any other option and renders the classical neutral stance redundant. This is not to ignore the political and military realities of UN enforcement action in the Gulf conflict, and the perception in the countries of the developing South that it was a United States operation motivated by the economic and strategic interests of a few powerful Western states.<sup>46</sup> In addition, Resolution 678(1990) left a large degree of discretion in the hands of the United States and others in regard to the course of action adopted, and this was later exploited by the United States and Great Britain to give a dubious legitimacy to the December 1998 bombing of Iraq.<sup>47</sup> In such situations, national self-interest

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<sup>43</sup> *Ibid.* 58-60, and 131-139 respectively.

<sup>44</sup> See generally the Advisory Opinion on Namibia, *op. cit.*

<sup>45</sup> See the reported statements by politicians in *The Irish Times*, 16 and 19 January 1991. With regard to whether Article 28.3 of the Constitution should bind the state to a policy of neutrality, the *Report of the Constitution Review Group* stated that neutrality has 'always been a policy as distinct from a fundamental law or principle, and the Review Group sees no reason to propose a change in this position,' *Report of the Constitution Review Group*, May 1996, Dublin: Government Publications, 93.

<sup>46</sup> E. Childers(ed.), *Challenges to the United Nations*, London: St. Martins Press, (1994), 8-9.

<sup>47</sup> For some general background on the subsequent debates in the Security Council, see S. D. Bailey and S. Daws, *op. cit.*, 31-34 and 58-60. See also D. A. Leurdijk and R.C.R. Siekmann, *op. cit.*, 71-76; and Statement by the President, the

was bound to play a significant role. Had the action in the Gulf been taken on the basis of self defence, Ireland's options would have been different, and no obligation to facilitate the multinational force would have arisen under international law or the UN Charter.

### **Ireland's role during the 1990/91 Gulf conflict.**

As stated, the policy adopted by Ireland and the role played in facilitating United States forces on route to the Gulf region during the conflict there became a source of public controversy. Most of this controversy related to whether the provision by the State of landing and refuelling facilities for United States military personnel constituted participation in a war within the meaning of Article 28.3.1 of the Constitution.<sup>48</sup> This and related issues arose for consideration in an application before the High Court, an action which was ultimately overtaken by events and not pursued. The issues raised are nevertheless worthy of some consideration.

Article 28.3.1 of Bunreacht na hEireann provides:

War shall not be declared and the State shall not participate in any war save with the assent of Dáil Eireann.

While Resolution 660(1990) expressly invoked Articles 39 and 40 of the Charter, all other resolutions relating to the Gulf conflict were adopted pursuant to Chapter VII, which includes both Article 51 relating to the right of individual and collective self defence against armed attack, and Article 42 relating to enforcement action by air, land and sea forces. With regard to action taken pursuant to Article 42, the implication is that the Security Council will take responsibility for those forces at its disposal, under Article 43 or otherwise.

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White House, Office of the Press Secretary, December 16, 1998 and Press Remarks on Military Attack on Iraq by Secretary of State, December 17, 1998, US Department of State.

<sup>48</sup> For a discussion of the legal framework governing war and armed conflict in the United Kingdom, see Lord Hailsham of St. Marylebone (ed.), *Halsbury's Laws of England*, (4<sup>th</sup> ed.), Vol. 49, London: Butterworths, (1984), 'War and Armed Conflict', 13-76.

However, the reference to member states co-operating with the government of Kuwait implies the collective defence of Kuwait against armed attack. The principal member states involved were the United States, Great Britain and France. If deemed to be acting under collective self defence, those states would perceive themselves as being free to respond to the operational situation as it unfolded until such time as the Security Council could order appropriate measures.<sup>49</sup> A more benign interpretation is that the Security Council was relying on the totality of its powers under Chapter VII, both expressed and implied. The difference could have been of significance to the outcome of the action before the Irish High Court.

In the action entitled *O'Neill v. An Taoiseach*, the applicant sought, *inter alia*, a declaration that the provision of facilities requested by the UN under Resolution 678 (1990) for the UN coalition states led by the United States amounted to participation in war within the meaning of Article 28.3.1 and required prior Dáil consent.<sup>50</sup> A further declaration was sought to the effect that the State's provision of such facilities for the Gulf conflict constituted a voluntary rather than mandatory obligation on the State, having regard to the provisions of the UN Charter and the adherence of the State thereto and membership thereof, and having regard to the provisions of the Constitution. This latter issue has already been discussed, but an assessment of the nature of the conflict in the Gulf is crucial to answering the former.

The applicant also sought a declaration that the 'necessary means' authorised to be taken by member states co-operating with the Kuwaiti government in accordance with Resolution 678(1990) could not be construed as individual or collective self-defence within the meaning of Article 51 of the UN Charter.<sup>51</sup> Even if this were to be conceded, it was argued that the exercise of such a right had been superseded and made redundant by the measures taken

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<sup>49</sup> For an analysis of this and related issues see N. D. White and U. Ulgen, *op. cit.*

<sup>50</sup> Plenary Summons 1991 No. 637P issued January 16, 1991. The plaintiff was reported to be Ms. Lucia O'Neill, a Workers Party councillor, see the *Irish Independent*, 17 January 1991.

<sup>51</sup> *Ibid.* See also G. Humphreys and C. Craven, *Military Law in Ireland*, Dublin: Round Hall Sweet and Maxwell, (1997), 308-310.

pursuant to the previous resolutions, which imposed an economic embargo on Iraq. In any event, it was further argued that any such right of individual or collective self-defence would not extend to the threatened war between the UN coalition forces and Iraq, by reason of a breach of the principle of proportionality, which would prohibit the State from participating therein.

The applicant further sought a declaration that the provisions of Resolution 678(1990), even if they did constitute a mandatory obligation on the State, had not yet become operative to empower member states to embark upon the proposed armed conflict as a necessary means to uphold and implement Resolution 660(1990) and all subsequent resolutions, and to restore international peace and security in the area, given the absence of a decision of the Security Council that the measures provided for in Article 41 of the Charter, and resolved upon in the later economic sanctions, had proved inadequate within the meaning of Article 42.<sup>52</sup> It appeared to be the contention that this, therefore, would prohibit the State's participation. As a part of this, the plaintiff sought a declaration that the Security Council had not, either in fact or in accordance with its jurisdiction under the Charter, considered the measures provided for would be inadequate.

The case would have provided an interesting determination of the issues raised, especially if it had ended in the Supreme Court, which would almost certainly have transpired had the case proceeded as planned. An injunction to prevent the State's co-operation with the UN coalition forces without prior approval of the Dáil was the ultimate objective of the action. The halt in the United States led to a twenty-four hour advance after the commencement of ground operations rendered the application for an injunction academic, and the case was not pursued. Nevertheless, the issues raised were significant and worthy of deliberation. Had the application been successful on any grounds, it would have been very embarrassing for the government of the day, but it would also have forced an honest and open debate and constitutional referendum on the issue or issues at the centre of the debate regarding Irish membership to the UN. The prospect of an Irish Supreme Court decision to the effect that the Security Council had not acted in accordance with the Charter in authorising military action is an

interesting vista. Of much greater relevance to Ireland was the issue whether facilitating United States forces on route to the Gulf amounted to participation in a war within the meaning of Article 28.3.1 of the Constitution. At first the government appeared to rely on some vague obligation under international law, but later declared that the decision to facilitate the coalition forces was based on an assessment that the measures involved did not amount to 'participation in war.'<sup>53</sup>

The conflict in the Gulf was not an ordinary armed conflict arising from a dispute between states. The Security Council had imposed almost total economic sanctions and authorised states co-operating with Kuwait to use all necessary measures to expel Iraq from Kuwait and to restore international peace and security.<sup>54</sup> Furthermore, it had requested all states to support such action. It was a UN sanctioned military action by land, sea and air forces under the Charter and therefore within the parameters of international law. For this reason the United Kingdom denied it was engaged in a war with Iraq and contended it was in fact 'participating in an enforcement action on behalf of the UN pursuant to a Security Council resolution'.<sup>55</sup> While this may have seemed like a practical nonsense to some, it is submitted that it reflected a correct statement of the legal situation and the irrelevancy of the concept of war under contemporary international law.

Before a decision could be made that Ireland participate in any war, there are constitutional imperatives to be followed. In a dualist constitutional system not unlike Ireland, it has been argued, citing Article 1.8 (11) of the United States Constitution, 'that any enforcement action decided upon by the Security Council must be treated in United States law as if it were nothing but an invitation to go to war, requiring a traditional declaration of acceptance by Congress'.<sup>56</sup>

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<sup>52</sup> *Ibid.*

<sup>53</sup> 404a Dáil Debates, (633-771, at 646), 18 January 1991, and *The Irish Times*, 19 January 1991.

<sup>54</sup> Resolution 678, *op. cit.*, p.4.

<sup>55</sup> Statement by the Lord Chancellors department, quoted in S. Singleton in "War" in the Gulf, *Netherlands International Law Journal*, 141 (1991), 87.

Some commentators appeared to fail to appreciate the full significance of a dualist legal system when considering obligations arising from international treaties. The debate over the issue of domestic 'war powers' in conflicts of this nature and within a dualist system like the United States, has been described as irrelevant.<sup>57</sup> It is said to be contrary to common sense to accept that there is a constitutional requirement to obtain approval from a national legislature before complying with a Security Council resolution as this would make what was intended to be a legally binding decision a mere obligation to seek domestic approval or permission to comply.

This argument is flawed and while it may have some application with regard to action under Article 42 and pursuant to agreements under Article 43, it does not apply to situation such as arose in the Gulf conflict. The terms of the UN Participation Act suggest that the United States Congress, in approving a special agreement under Article 43, would thereby prospectively approve uses of that force that would not require subsequent re-approval, thus giving the Security Council relative freedom to use the military resources made available to it.<sup>58</sup> However, no agreements have been concluded pursuant to Article 43 and the action initiated in response to the Gulf crisis was *ad hoc* and vague in crucial respects.

Furthermore, it is easy to underestimate the consequence of a dualist system, which Ireland and the United States share. The existence of a right or obligation in international law does not automatically give rise to a corresponding right or obligation in municipal law. This position is accepted by other commentators and it has been said that the 'language [of] the UN Charter...clearly illustrates the neutrality of its obligations with respect to the internal distribution of the war making power'.<sup>59</sup>In relation to the Korean conflict it was said that: 'UN

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<sup>56</sup> T. M. Frank and F. Patel, 'UN police action in lieu of war: the old order changeth', 85 *American Journal of International Law*, (1991), 63-74, 64. See also B. Roth, 'Whatever Happened to Sovereignty? Reflections on International Law Methodology', C. Ku and T. Weiss, *Toward Understanding Global Governance*, ACUNS Reports and Papers (1998), No. 2, 69-108 esp. 89-93.

<sup>57</sup> *Ibid.* 64.

<sup>58</sup> M. Glennon, 'The Constitution and Chapter VII of the United Nations Charter', 85 *American Journal of International Law*, (1991), 74-88, 86.

resolutions ... justified American military action under international law, [but] they could not serve as a substitute for the congressional authorisation required in national law by the Constitution'.<sup>60</sup> Glennon, in response to other commentators, expresses it thus:

A hortatory resolution of the Council, or one authorising the use of force but not requiring it, can have no effect on the US domestic system of reallocating constitutionally assigned power; that a right exists under international law...says nothing about whether a power exists under domestic law to exercise that right. The allocation of domestic power is directed by the Constitution, not by international law.<sup>61</sup>

In this way, it is a consequence of dualism that international law and municipal law can ask in their separate spheres of application entirely different questions. In this regard Article 29.6 of the Irish Constitution sets out in clear terms what the position is:

No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas [legislature].

This provision distinguishes clearly between international and municipal law and on a number of occasions the Supreme Court has rejected the contention that certain domestic laws were unconstitutional on the basis that they were in contravention of, *inter alia*, the European Convention on the Protection of Human Rights and Fundamental Freedoms.<sup>62</sup> In this way, the UN Charter, as an international treaty, is not part of Irish municipal law and therefore it is not recognised in the Irish courts. Even if it was incorporated into Irish domestic law

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<sup>59</sup> Note, 'Congress, the President and the power to commit forces to combat,' 81 *Harvard Law Review*, (1968), 1771-1805, at 1800.

<sup>60</sup> A. Schlesinger, *The Imperial Presidency*, Boston: Houghton Mifflin, (1973), 134.

<sup>61</sup> Glennon, *op. cit.*, 81.

<sup>62</sup> See for example re *O Laighleis* [1960] Irish Reports 93; the decision was later expressly approved by the Supreme Court in *Application of Woods* [1970] I.R. 154,

as has occurred in respect of other international agreements, it still has the status only of ordinary legislation. The result of this then is that if the proposed action is such that it involves participation in war and requires Dáil approval in accordance with Article 29.3.1. of the Constitution, then any international instrument or obligation may not be invoked to dispense with this constitutional requirement.

Nor would there seem to be a way around this obligation by pleading Ireland's commitment to general principles of international law enshrined in Article 29.3 of the Constitution, which declares the State 'accepts the generally recognised principles of international law as its rule of conduct in its relations with other States'. This is more than an aspirational principle and in *Saorstát and Continental Steamship Co. v. De Las Morenas*,<sup>63</sup> the Supreme Court treated it as importing such generally recognised principles into Irish domestic law. These principles do not constitute an immutable code, they are capable of change in accordance with modification in the practice of states.<sup>64</sup> The precise status of this article has never been expressly adjudicated upon and it is still unclear whether the generally recognised principles of international law are imported into the legal system at the constitutional level, or at a lower level.<sup>65</sup> If they have constitutional status, they could not be abrogated by statute and a constitutional amendment would be required. The issue is currently the subject of conflicting opinions. In *State (Sumers Jennings) v. Furlong*,<sup>66</sup> Henchy J. said (p.190):

...section 3 of Article 29 of the Constitution was not enacted, and is not to be interpreted in these courts, as a statement of the absolute restriction of the legislative powers of the State by the generally recognised principles of international law. As the Irish version makes clear, the

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where reliance on the UN Declaration on Human Rights was ruled out on similar grounds. See also *Norris v. the Attorney General* [1984] Irish Reports 36.

<sup>63</sup> [1945] Irish Reports 291.

<sup>64</sup> Supreme Court decision in *Government of Canada v. Employment Appeals Tribunal* [1982] Irish Law Reports Monthly 325.

<sup>65</sup> Casey, *op. cit.*, 159. Customary international law was traditionally regarded as part of the common law, *The Paquete Habana* 175 US 677 (1900); *West Rand Central Mining Co. Ltd. v. The King* [1905] 2 KB 391.

<sup>66</sup> [1966] Irish Reports. 183 .

section merely provides that Ireland accepts the generally recognised principles of international law as a guide.....I would respectfully adopt the dictum of Davitt P. in the *O Laighleis* case (at page 103): ‘Where there is an irreconcilable conflict between a domestic statute and the general principles of international law or the provisions of an international convention, the courts administering the domestic law must give effect to the statute.

A different view of the law was put forward by three members of the Anglo-Irish Law Enforcement Commission, which reported in 1974.<sup>67</sup> The view of the members concerned, though not in any way establishing a precedent, is of some persuasive authority. If it were accepted that Article 29.3 gives constitutional status to the generally recognised principles of international law, this would have significant implications for the UN Charter in Irish law. It could then be argued that state practice and near universal adherence to the Charter created an obligation under customary international law to contribute to UN collective security arrangements incorporated into Irish constitutional and domestic law under Article 29.3. Even if UN obligations were given constitutional status, then they must not be interpreted in isolation, but construed in a manner that harmonises with other parts.<sup>68</sup> However, the few authorities that do exist do not support this argument, and other express provisions cast doubt on this thesis. In particular, Article 29.6 makes it clear that an international agreement can be incorporated into the domestic law of the State only by decision of the Oireachtas (legislature). This is normally done by legislation, though a strict reading of Article 29.6 indicates that a simple resolution is all that is necessary.<sup>69</sup> Even more significantly, the existence of State obligations at an international level cannot preclude the necessity of complying with Article 28.3.1 regarding the necessity to

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<sup>67</sup> *Report of the Law Enforcement Commission*, (1974; Prl. 3832)

<sup>68</sup> See *Dillane v. Ireland*, Supreme Court unrep. 31 July 1980; *State (DPP) v. Walsh* [1981] Irish Reports 412.

<sup>69</sup> *Casey*, *op.cit.*, 160.

obtain Dáil assent to declare or to participate in a war, where necessary, in order to fulfil them.<sup>70</sup>

The Gulf Conflict did not involve the dispatch of Irish troops to the region, and there appeared to be a consensus that the provision of troops in any capacity would have amounted to participation and thus required Dáil approval in accordance with Article 28.3.1 of the Constitution. Even though the conflict in the Gulf did not constitute a 'war' in the sense understood under international law, it was accepted as being such for the purposes of Article 28.3.1. In this way the constitutional provisions are somewhat out of date and an amendment to Article 28.3.1 to incorporate 'war or other armed conflict' would be more appropriate.<sup>71</sup> It would clarify the issue somewhat and prevent the government from agreeing to participate in an external conflict that did not come under the more restrictive and outmoded meaning of war under international law. The difference highlights the apparently contradictory views of the nature of the conflict under domestic and international law. Though the aim may be the same, the two systems have different concerns. The sole concern of Article 28.3.1 is to prevent Irish involvement in war or international hostilities without the prior approval of the Dáil. The lawfulness or otherwise of the conflict, though crucial to international law, is not a matter of direct concern under this Article.

There are in fact two matters to be determined in relation to this issue. The first is what constitutes 'war' for the purposes of Article 28.3.1, and when this is clarified, what constitutes participation for the same purposes.<sup>72</sup> Although there was no express determination to the effect that the test for what constitutes war or participation in war under Bunreacht na hÉireann is different than that which might be employed by the UN, statements at the time indicate that this was the accepted view of Irish parliamentarians. Unfortunately, there was no

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<sup>70</sup> Heffernan and Whelan, *op. cit.*, 131.

<sup>71</sup> *Report of the Constitution Review Group, op. cit.*, 93.

<sup>72</sup> On the concept of war, see Lord McNair and A. D. Watts, *The Legal Effects of War*, (4th ed.), 1966; I. Brownlie, *op. cit.*; L. C. Green, *The Contemporary Law of Armed Conflict*, Manchester, 1993; C. Greenwood, 'The Concept of War in Modern International Law,' 36 *International and Comparative Legal Quarterly*, 1987, 283. See also M.N. Shaw, *International Law*, (4th ed.), Cambridge, 1997, 777-823, D.J. Harris, *op. cit.*, pp.817-907 and Lauterpacht, *Oppenheims International Law*, Vol. 11, Disputes

agreement on the crucial issue of what this test should be. The then Taoiseach, Mr. Haughey, was of the view that the question was one of 'substance and degree'.<sup>73</sup> The parties to the left wished to adhere to the old law of neutrality, but strict adherence to this concept in the context of a UN enforcement mission does not seem apposite.<sup>74</sup> In any event, it is difficult to accept the government's view as expressed by Mr. Haughey, at face value. The provision of over flight and refuelling facilities was a significant act during the conflict, and under the classical rules on neutrality during war, it would have constituted a breach. But a breach did not automatically mean a neutral state became a belligerent, there too a sliding scale of substance and degree was employed.

The debate regarding participation became somewhat academic after the resolution passed by Dáil Eireann on 18 January 1991, though it still left the issues of what constitutes participation unanswered. In a resolution proposed by Mr. Haughey, Dáil Eireann noted the agreement of UN member states to carry out Security Council decisions, and expressed its regret that military force had become unavoidable to secure compliance with such decisions. It also noted Iraq's flouting of the relevant resolutions, and expressed the hope that the duration and casualties of the conflict would be kept to a minimum, and that diplomatic efforts would continue to try to ensure a diplomatic settlement and the restoration of Kuwait's sovereignty, independence and territorial integrity. The crucial element in the resolution was the third paragraph:

At this critical time, Dáil Eireann *declares its full support for the decisions of the Security Council* and notes that Resolution 678, *inter alia* 'requests all states to provide appropriate support for the actions undertaken in pursuance of paragraph 2 of the Resolution.'<sup>75</sup>

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War and Neutrality, (7th ed.) Longmans, 1955.

<sup>73</sup> See 404a Dáil Debates (645), 18 January 1991, and *The Irish Times*, 19 January 1991.

<sup>74</sup> See Lauterpacht, *op. cit.*, 647, and 652-657.

<sup>75</sup> 404a Dáil Debates (636), 18 January 1991, and the *Irish Times*, 19 January 1991.

This is an unambiguous statement of approval and support for the decisions of the Security Council. It has been argued that while a declaration of support for an obligation imposed in international law might constitute approval in municipal law of measures taken to comply with that obligation, a declaration in respect of what is in international law merely an authorisation to act in a certain fashion (otherwise unlawful) need not have the same effect.<sup>76</sup> There were no caveats or reservations expressed, and the Dáil resolution acknowledged with regret that the use of military force had become unavoidable to ensure compliance with such decisions. To argue that the resolution was not what it plainly purports to be seems absurd.

### **The implications of the *Crotty* judgement for membership of the UN.**

The decision in the *Crotty case*,<sup>77</sup> and in the later case of *McGimpsey v. Ireland*,<sup>78</sup> which concerned the Anglo-Irish Agreement of 1985, casts serious doubt over the compatibility of Irish membership of the UN and Article 29.4.1 of the Constitution. Article 29.4.1 provides:

The executive power of the State in or in connection with its external relations shall ... be exercised by or on the authority of the Government.

This involves the concept of the separation of powers and there is sometimes tension between the judicial arm of government and the government itself. This tension was evident in the *Crotty case*, but in the end the fundamental rule of government, the supremacy of the Constitution as interpreted and enforced by the Courts, was upheld.<sup>79</sup> While it may be argued that the obligations of UN membership were indeed less onerous than has been anticipated when Ireland first

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<sup>76</sup> Whelan and Heffernan, *op.cit.*, 137.

<sup>77</sup> [1987] Irish Reports 713; [1987] Irish Law Reports Monthly 400.

<sup>78</sup> High Court (1989) Irish Law Reports Monthly 209; Supreme Court [1990] Irish Reports 110.

<sup>79</sup> D.W. Morgan, *Constitutional Law of Ireland*, (2nd. ed.), Round Hall Press, Dublin, 1990, 264.

applied for membership, other developments took place that had not been foreseen and the Security Council as the principal organ of the UN still retained significant powers within the framework of the Charter. This was one of the issues that must be considered when examining the obligations imposed on Ireland by membership. Under Irish law it is possible to challenge the constitutionality of Ireland's binding signature or ratification of an international treaty once valid grounds exist for such a course of action, while at the same time the courts have indicated that they do not wish to usurp or interfere with the government's power and discretion in the conduct of foreign policy and international relations. This is evidenced by their reluctance to review, *ex post facto*, the exercise of the government's treaty making powers. Barrington J. expressed this as follows: 'if there is any area in which judicial restraint is necessary, this is it'.<sup>80</sup> Nevertheless, the Supreme Court decision in the *Crotty* case demonstrated little or no such restraint when it made what is arguably one of its most significant and controversial decisions to date, especially in the context of Ireland's international relations and relations with the European Community.

Crotty argued that without a constitutional amendment, which required a referendum by the people of Ireland, the State lacked power to ratify the Single European Act. The Single European Act was an amendment to the European Community treaties and consisted of a Preamble and four Titles, of which the most important were Titles 11 and 111. Title 11 amended the existing European treaties in a number of ways, while Title 111 introduced a new system of co-operation in the field of foreign policy.

As the Single European Act did involve a charge on public funds, it was formally approved by the Dáil in accordance with Article 29.5.2 of the Constitution in December 1986.<sup>81</sup> In accordance with the requirements of a dualist legal system, the European Communities (Amendment) Act, 1986, was enacted in order to make the Single European Act, though not Title 111 thereof, part of the domestic law of Ireland.<sup>82</sup> Just as the government was about to deposit

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<sup>80</sup> *McGimpsey v. Ireland*, High Court, [1989] Irish Law Reports Monthly 209 at 220.

<sup>81</sup> 370 Dáil Debates, (2365-2370) 10 December 1986.

the instrument of ratification with the Italian government, the plaintiff applied successfully for and interlocutory injunction to prevent ratification taking place. The matter eventually came before the Supreme Court, which rejected the plaintiff's claim insofar as it asserted the constitutional invalidity of the European Communities (Amendment) Act, 1986. However, the Court upheld his claim that Title 111 could not be amended without a referendum and subsequent constitutional amendment taking place. Needless to say the country and the European Community as a whole, were taken aback by the judgement, the legal niceties of which were probably not understood by many outside Ireland. The shock to the body politic was evidenced in the statements in the course of the Dáil debates on the subsequent Tenth Amendment to the Constitution Bill 1987. The then Taoiseach, Mr. Haughey said; '...the judgements in so far as they affect the boundaries between executive and judicial areas of responsibility have caused widespread surprise.'<sup>83</sup> The leader of the Labour Party, Mr. Spring commented that:

...the judgements of the majority of the Supreme Court in the *Crotty case* have exploded our traditional understanding [of Article 29.4.1]...' and later '...the decision establishes a new summit in judicial activism.....The traditional view of the Constitution whereby external relations were a matter for the Government subject to the supervision of the Dáil can no longer pass muster.'<sup>84</sup>

In order to determine the full significance of the judgement, it is worth examining briefly the content of Title 111 of the Single European Act. This provided, *inter alia*, that European Community member states 'shall endeavour jointly to formulate and implement a European foreign policy' (Article 30.1). It called for information and consultation on foreign policy matters of general interest, and for due consideration of the desirability of adopting and implementing common

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<sup>82</sup> See G. W. Hogan, 'The Supreme Court and the Single European Act', 21 *Irish Jurist*, (1987), 55-70.

<sup>83</sup> 371 Dáil Debates, (2195), 22 April 1987.

<sup>84</sup> *Ibid.* at 2240 and 2248.

European positions on such matters. In order to improve methods for reaching and formulating common positions and joint action, members states were to ‘..ensure that common principles and objectives are gradually developed and defined’(Article 30.2(c)). The Act also provided for the establishment of a permanent secretariat to support the arrangements for this formalised system of European political co-operation.

In the opinion of the majority of the Supreme Court, the Constitution enshrined full sovereignty in foreign affairs, and in the conduct of those affairs the government of the day was bound to respect this principle.<sup>85</sup> In this way, the government lacked authority to qualify or restrict that sovereignty in the manner envisaged by Title 111 and the State could not ratify the Single European Act without a constitutional amendment. The Court did not accept the argument that Title 111 did little more than formalise existing arrangements, it was a binding international treaty which was not static in its terms, and which went beyond existing arrangements.<sup>86</sup> In addressing the issue as to whether the courts could interfere with the government’s power to enter into international treaties or agreements, the majority of the court was of the view that intervention was permissible on account of the courts function in upholding the primacy of the Constitution.<sup>87</sup> It is not surprising then, that the majority of the Constitution Review Group was in favour of inserting a specific clause dealing with the State’s

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<sup>85</sup> Walsh, Henchy and Hederman JJ. emphasised Articles I and 5. Article 1 provides: ‘The Irish nation hereby affirms its inalienable, indefeasible, and sovereign right to choose its own form of Government, to determine its relations with other nations, ...’. Article 5 provides: ‘Ireland is a sovereign, independent and democratic state.’

<sup>86</sup> Finlay C.J. and Griffin J., in their dissenting judgements, denied that Title 111 required the State to cede any sovereignty or national interest in the conduct of foreign policy, or give other Member states a right of veto on Irish foreign policy decisions. Emphasis was place on the word ‘endeavour’, and it was their view that nothing ruled out arrangements, formal or otherwise, for foreign policy consultation and discussion.

<sup>87</sup> The Court distinguished an earlier decision in *Boland v. An Taoiseach* [1974] Irish Reports 338 , where the Supreme Court had refused to grant an injunction restraining the executive from implementing the Sunningdale Agreement of 1974, the ratio being that it was not an agreement or treaty, but merely a declaration of policy and hence not restrainable.

membership of the UN.<sup>88</sup> As well as having a certain symbolic value, it would remove any uncertainty concerning the validity of Irish membership.

## Conclusion.

The *Crotty* decision had far reaching political consequences, but its potential significance for Irish membership of the UN is of most concern here. A later challenge to the Anglo-Irish Agreement of 1985 on the basis of the *Crotty* judgement failed. The decision of the Supreme Court in *McGimpsey v. Ireland*<sup>89</sup> has delimited the significance of the *Crotty* judgement somewhat, but the former decision was based, *inter alia*, on narrow grounds to the effect that the Anglo-Irish Agreement of 1985 did not unconstitutionally fetter the executive in the conduct of international relations.<sup>90</sup> The Court found that the analogy drawn between the Agreement and the Single European Act was misconceived on the grounds that the latter could oblige the government in conducting foreign policy to subordinate the States national interests to those of other member states.

The *McGimpsey* judgement is nonetheless important in the context of any discussion of Ireland's membership of any supranational body like the UN.<sup>91</sup> One of the main arguments was based on the fact that the Agreement established an Intergovernmental Conference and Secretariat and committed each State to make 'determined efforts...through the Conference...to resolve any differences, on matters relating to Northern Ireland.' It was contended, based on the *Crotty* judgement, that such an obligation fettered the power of the Irish government to regulate its own external/foreign affairs and therefore contravened Article 29.4.1. However, Barrington J. distinguished *Crotty* and found against the plaintiff. The following extract from his judgement has particular relevance for Irish membership of the UN.

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<sup>88</sup> *Report of the Constitution Review Group, op. cit.*, 113.

<sup>89</sup> [1989] Irish Law Reports Monthly 209.

<sup>90</sup> [1990] 1 Irish Reports 110; [1989] Irish Law Reports Monthly 209.

<sup>91</sup> For a definition of the term supranational, see H. G. Schemers and N. M. Blokker, *International Institutional Law*, The Hague: Martinus Nijhoff, (3<sup>rd</sup> ed. 1995), 60-65.

We are not dealing in [*McGimpsey*] with a multilateral treaty conferring powers on supranational authorities. We are dealing with a bilateral treaty between two sovereign governments. The clear implication of Article 29, Section 5 is that the State is entitled to enter into international agreements. This means that the State may commit itself to deal with some aspect of foreign policy in such a way rather than another. But this is something quite different from purporting to transfer the conduct of foreign policy of the State to some supranational authority.....

...Article [2 of the Agreement] also provides that:

‘There is no derogation from sovereignty of either the Irish Government or the United Kingdom Government, and each retains responsibility for the decisions and administration of government within its own jurisdiction.’

Under these circumstances it appeared to me that the present case is totally different from the *Crotty* case and that it does not involve any constitutional fettering of the executive powers of government.<sup>92</sup>

In the *Crotty* case, the plaintiff argued successfully that since Article 29.4 vests the government with the power to conduct foreign affairs, it is not open to the State to fetter the Government’s authority by a treaty which would oblige it to make foreign policy with a greater measure of co-operation with the other states members of the European Community. The implications of the *Crotty* and *McGimpsey* judgements remain far-reaching. While the *McGimpsey* decision did delimit the implications of *Crotty* judgement to some extent, this is of no avail to those who would argue that Ireland’s membership of the UN is a result of general treaty making powers, rather than a commitment to a ‘multilateral treaty conferring powers on supranational authorities.’ Despite the ratio in *McGimpsey*, there is nothing in the *Crotty* judgement that limits its implications to such ‘supranational bodies.’ Nor can the reasoning and import of the majority judgement in *Crotty* be limited to the unique nature of the Single European Act, though it would have been preferable if such had been the case. The better view

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<sup>92</sup> *Ibid.* at 227. The High Court decision was confirmed by the Supreme Court, on substantially the same grounds, on 1 March 1990.

is to consider the Anglo-Irish Agreement as an international agreement that, unlike the Single European Act, did not fetter the sovereignty of the State in external or foreign policy. Doubt has now been cast over the government's general treaty making powers, and this includes multilateral agreements such as membership of the UN.

The matter is complicated by the change in the Security Council's role in the maintenance of international peace and security from that envisaged when Ireland applied for membership in 1946, in particular the adoption of a decentralised military option by the Council instead of a more centralised system conceived in the Charter.<sup>93</sup> The fact remains that Article 25 of the Charter provides that members accept and agree to carry out the decisions of the Security Council. This may range from the imposition of economic sanctions under Article 41, to the potential to order military action under Article 42. It is difficult to anticipate the consequences of a challenge to membership of the UN after over forty years of active participation at every level in the Organization. The foreign policy co-operation which was the determiner of the judgement in *Crotty* falls very far short of the binding commitments entailed by accession to the UN. Though the presumption of constitutionality applies to the State's foreign policy, as it does to all acts of the executive, none of the other provisions would seem to avail a court or government in avoiding reaching a conclusion that continued membership is inconsistent with the Constitution.<sup>94</sup> What then is the situation if a successful action is taken on constitutional grounds against membership of the UN? It is worth noting that in one case the Supreme Court invalidated a measure of domestic law based on an international agreement previously ratified by Ireland but not properly adopted in accordance with certain constitutional provisions.<sup>95</sup> In this context the terms of Article 46 of the Vienna Convention on the Law of Treaties are relevant. This allows a state to invoke a breach of its internal law regarding competence to conclude treaties in order to avoid treaty obligations only where the violation is manifest and concerns a rule of internal law of fundamental

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<sup>93</sup> N. D. White and O. Ulgen, *op. cit.*, 2.

<sup>94</sup> See Heffernan and Whelan, *op. cit.*, 140-145.

importance. Is a violation that has existed for over forty years ‘manifest’, even if it does concern an internal law of fundamental importance? Most likely not.

In the meantime the State remains bound by the Charter, and the question must be asked if a referendum should be put to the people of Ireland to determine the issue? From the point of view of a government, to do so might be seen as a relinquishment or surrender of its pivotal role in what would be referred to as essentially a political question in the United States. Nevertheless, there have been a number of referenda in recent years and it is likely that there will be more in the near future. Moreover, Ireland’s ongoing commitment to UN peace support operations now has a constitutional question mark hanging over it. This is in addition to the political and other legal complications arising from such participation and outlined elsewhere.<sup>96</sup> At a time when Ireland has taken a seat on the Security Council, it would be prudent to have this issue put to referendum at the next available opportunity.<sup>97</sup> This would remove any doubt regarding Ireland’s membership of the UN, while at the same time reaffirming its commitment to the ideals the Organization embodies.

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<sup>95</sup> *The State (Gilliland) v. Governor of Mountjoy Prison* [1987] Irish Reports 201; [1987] Irish Law Reports Monthly 287.

<sup>96</sup> See Chapter 2, and Chapters 4 and 5 respectively.

<sup>97</sup> See the statement by the General Secretary of the Department of Foreign Affairs regarding Ireland’s campaign to gain a seat on the Security Council reported in *The Irish Times*, 29 October 1998, p.9.

## Chapter 4

### A COMPARATIVE ANALYSIS OF THE MUNICIPAL LEGAL BASIS FOR CANADIAN AND IRISH PARTICIPATION IN UN FORCES.

#### Introduction

This Chapter explores the municipal legal bases for Irish and Canadian participation in UN operations. It aims to examine, *inter alia*, the laws governing the decision to participate in such operations, and further issues concerning the status under municipal law of members of the respective armed forces. In the next chapter, the issue of command and control of national contingents participating in international UN forces and related topics is explored. Canada and Ireland share a long tradition of involvement in peacekeeping operations. Although Canada is a larger and more influential country than Ireland, both states share a 'middle power' political image on the world stage. Since 1971, participation in peacekeeping has been identified as an integral and important part of Canada's defence policy. The legal system of each country is significantly different, and the municipal legal basis for participation in peacekeeping and related operations reflects this. Despite this, on analysis, the aim and effect of different provisions contained in the two respective legislative frameworks can be the same. In Ireland, the Defence Acts, 1954 to 1998 govern the operation and organisation of the Defence Forces. The operation of the Canadian Armed Forces is governed by a legislative enactment called the National Defence Act, which came into force in 1950 and is revised from time to time.

In Ireland, the Constitution of 1937 is the primary source of law and all acts or statutes enacted must be consistent with its provisions. Unlike Ireland, which is a unitary state, Canada is a country organised on a federal basis with areas of responsibility assigned to the federal or provincial governments in its Constitution.<sup>1</sup> Section 91 of Canada's Constitution Act

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<sup>1</sup> Lt. Col. K. Carter, 'The Legal Basis of Canada's participation in United Nations operations', *1 (4) International Peacekeeping* (Kluwer), (1994), 116-118.

gives the federal government exclusive authority over 'militia, military and naval service, and defence'.<sup>2</sup>

At first glance, the most striking similarity between the legislative framework governing the respective armed forces of Canada and Ireland is that in both jurisdictions there is no mention of the aims of defence or security policy, or the actual mission of the armed forces themselves. This has more to do with history than any other reason. Canada, a former British colony like Ireland, had a series of Militia Acts to govern the establishment and maintenance of the armed forces. Neither country has any real military tradition, and both states are relatively new members of the international club of recognised states. This is a politically expedient way to conduct defence matters, as each government can determine the priorities and mission of the state's armed forces. The problem with this, despite the fact that Canada and Ireland have well established and strong democratic institutions, is that it allows the ruling party of the day more discretion than is necessary in a parliamentary democracy. It also reduces the parliamentary control exercised over the armed forces. While it is true to state there is no serious threat to democratic institutions in either state, the maximum parliamentary control over all elements of defence and security issues is the hallmark of a healthy democracy. One of the many controversial issues surrounding the formation of a European Rapid Deployment Force and Irish participation, is the that of democratic control. Just who or what will command or control the force is not yet clear.<sup>3</sup>

There does not appear to be any definition of the term defence in any of the relevant legislation in either jurisdiction either, and one must look to Irish and Canadian government policy statements to determine what is included in the term. These are usually found in Canadian federal government 'White Papers', which are published from time to time, and parliamentary debates. Up

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<sup>2</sup> Section 91, The Constitution Act, 1867, (The British North America Act, 1867), 30 & 31 Victoria, c. 3.

<sup>3</sup> J. Eyal, 'Democratic accountability key to success of European defence force', *The Irish Times*, 21 November 2000, 16.

to recently, Ireland had a much less clear defence policy than that of Canada. This has now changed with the publication of a government White Paper on Defence and other reports.<sup>4</sup> Prior to this, reference had to be made to Dáil [Irish Parliament] debates and ministerial statements to determine, as best one could, what the policy was.

Despite the different juridical basis for participation in UN operations, the decision whether of not to participate in either the traditional peacekeeping operation or the more pro-active enforcement action missions of recent years, is an executive decision in both countries. Given the similar parliamentary democracy system prevailing in Canada and Ireland, the most important practical consideration is whether the party or parties in government have a sufficient majority in the parliament or Dáil to ensure support for the proposal. Approval for matters of this nature is usually a foregone conclusion, though it would be necessary for the relevant Minister to acquaint himself or herself with the background information to avoid appearing uninformed during debate. Under the Defence (Amendment) (No. 2) Act, 1960, the Dáil must approve the sending of troops abroad when the numbers exceed twelve.<sup>5</sup> In practice this means that approval is required in almost all situations. On the other hand, in Canada, there appears to be no constitutional requirement to have the decision reviewed by the legislature, but the unwritten rules embodied in certain 'constitutional practices', require that the parliament be consulted on the matter.<sup>6</sup> The actual decision to participate is made by the Governor in Council, which is the executive arm of the government. The Governor in Council is formed by the Governor General, the Queen's representative in Canada, whose role in such decisions is procedural rather than substantive.

When Ireland was first admitted as a member of the UN in 1955, the government of the day did not consider that any enabling legislation was required to allow Ireland to participate in all UN activities and meet the

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<sup>4</sup> See Department of Defence, *White Paper on Defence*, Dublin, (February, 2000), and Department of Defence, *Defence Forces Annual Report*, Dublin, (1999).

<sup>5</sup> Section 2, Defence (Amendment)(No. 2) Act, 1960.

obligations which membership entailed.<sup>7</sup> In the United Kingdom, on the other hand, the United Nations Act, 1946 had been passed in order to give effect to certain provisions of the UN Charter. This Act, however, referred specifically to Article 41 of the Charter (relating to measures not involving the use of armed force) and to decisions taken by the Security Council only.<sup>8</sup> Since the Supreme Court decision in *Crotty v An Taoiseach*,<sup>9</sup> serious doubt has been cast on the constitutionality of Ireland's commitments under the Charter.<sup>10</sup> However, similar issues are unlikely to arise in the context of participation in UN forces at present as these are undertaken on a voluntary basis. Nonetheless, other serious constitutional issues do arise regarding the command and arrest of Irish troops abroad by members of an international UN force who are not Irish citizens.<sup>11</sup> These issues could also arise in the context

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<sup>6</sup> Carter, *op. cit.* (n. 1).

<sup>7</sup> When he was questioned by Mr. de Valera on the need to pass legislation due to the acceptance of Ireland's application for membership, he replied that so far as he knew '... ratification is not necessary nor is any legislation required'. The obligations, he said, were now less onerous than had been anticipated in 1946 and any military commitments under the Charter were 'entirely within our own control'. Dáil Debates, 153 (1601-1608), 15 December 1955. This was a reference to Article 43 of the UN Charter which relates to the use of armed force, see Goodrich, Hambro and Simons, *Charter of the United Nations*, (3rd. ed.), New York: Columbia University Press, (1969), 317-326, and B. Simma (ed.), *The Charter of the United Nations – A Commentary*, Oxford: Oxford University Press, (1995), 636-639. For a comprehensive discussion of the obligations of Irish membership of the UN see L. Heffernan and A. Whelan, 'Ireland, The United Nations and the Gulf Conflict: Legal Aspects'. 3 (3) *Irish Studies in International Affairs*, (1991), 115-145.

<sup>8</sup> Section 1 (1) of the United Nations Act, 1946 states:  
'If, under *Article forty-one* of the Charter ..... (being the Article which related to measures not involving the use of armed force) the Security Council of the United Nations call upon His Majesty's Government ... to apply any measures to give effect to any decision of that Council. His Majesty may by Order in Council make such provision as appears to Him necessary or expedient for enabling those measures to be effectively applied .....

For a discussion on the legal status of British armed forces and related issues, see P. Rowe, *Defence – The Legal Implications*, London: Brassey's, (1987).

<sup>9</sup> [1987] Irish Reports 713. See J. Casey, *Constitutional Law and Ireland*, (3rd. ed.) Dublin: Round Hall Sweet and Maxwell, (2000), 214-218.

<sup>10</sup> *Supra.*, Chapter 3.

<sup>11</sup> *Infra.*, Chapter 5.

of Irish participation in European Union security arrangements or peacekeeping operations in the future.

In the course of the Dáil Debate on the Defence Amendment (No. 2) Act, 1960, which was intended to be the permanent statutory basis for Irish participation in UN peacekeeping, deputies expressed reservations about certain provisions of the Act. In particular, Section 2 appeared to give the government more discretion than was required in determining the extent of Irish participation.<sup>12</sup> In the event, the Act was passed with little controversy and to date no serious problems have arisen regarding its implementation. This is not to say that potential problems do not exist in relation to Defence Forces involvement in UN forces, whether of a peacekeeping character or otherwise.

There are also problems in relation to the arrest and taking into custody of members of the Defence Forces and the Canadian Forces when carried out by international military police that are not part of either the Irish nor the Canadian contingent respectively.<sup>13</sup> This situation is exacerbated in respect of Defence Forces personnel by the fact that the command structure for UNIFIL itself has not been formally established and no Force Regulations have been issued to date. The official UN policy is that the delegation of command within UNIFIL is in accordance with the normal military custom as applicable to integrated command and does not require further elaboration.<sup>14</sup> This contrasts with the arrangements for other UN peacekeeping forces. In practice, reliance is placed on the standing operating procedures and Force Commander directives for UNIFIL, the legal basis of which is questionable, and reference is also made to the Regulations governing the peacekeeping force in Cyprus.<sup>15</sup> None of these issues was addressed in the Defence (Amendment) Act, 1993, or the more recent 1998 Act. The 1993 Act was passed to allow the Defence

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<sup>12</sup> *Infra.*

<sup>13</sup> *Infra.*

<sup>14</sup> Personal interview, UN Secretariat member, July 1990, Lebanon and *infra.*, Chapter 5.

<sup>15</sup> *Ibid.*

Forces to participate in an international UN Force that is not simply of a police or peacekeeping nature, and effectively permits the participation of Defence Forces personnel in any kind of UN military operation.<sup>16</sup>

### **Municipal legal basis for Canadian and Irish participation in peacekeeping**

The possibility of Canadian involvement in a major war during the 1930's was uppermost in the minds of politicians when the then Prime Minister, Mackenzie King, was responding to a question put regarding Canada's future role in the event of a war in Europe. The policy of the government, he declared, is that Parliament will decide what is to be done.<sup>17</sup> However, this declared policy was not reflected in the provisions of the National Defence Act, which came into force in Canada in 1950. The Act does not require that Parliament give its formal approval or consent to the despatch of Canadian Forces on service abroad, whether in a UN or other capacity. Under Section 31 of the Act, the Governor in Council has power to place the Canadian Forces on active service, a status that is usually conferred on troops involved in armed conflict. Despite the fact that there is no specific legal requirement, there is a parliamentary tradition in existence since 1950 for the government to reaffirm that Canadian Forces are on 'active service' for specific UN, NATO and other operations involving substantial numbers of troops when such missions are considered potentially hazardous.<sup>18</sup> The concept of 'active service' and its legal implications under Canadian military law is confusing. The contemporary legal purpose and effect of this status is unclear, and in this regard the National Defence Act is in need of clarification.<sup>19</sup>

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<sup>16</sup> For background see *supra.*, Chapter 2.

<sup>17</sup> House of Commons(Canada) , Debates, Vol.111(1938), 3183.

<sup>18</sup> Carter, *op. cit.* (n. 1).

<sup>19</sup> *Infra.*

The tradition of informing Parliament arose from a decision by Prime Minister Louis St. Laurent during 1950 while debating the National Defence Act in the course of the Korean crisis. An undertaking was given that, henceforth, whenever significant numbers of members of the Canadian Forces were to be deployed outside Canada, the decision would be announced in the House of Commons and an enabling order in Council would be tabled. However, under the National Defence Act, a Governor in Council (Cabinet) decision is all that is lawfully required to place the Canadian Forces on 'active service'. Furthermore, an examination of the relevant legislation indicates that Canadian Forces are not actually required to be placed on 'active service' to participate in an operation. If Canadian Forces are placed on 'active service' while Parliament is not sitting, Parliament must meet within ten days to consider the Governor in Council decision. It is not surprising then that there is a significant amount of confusion in Canada in relation to deployment outside Canada and the concept of 'active service'. This was most recently evident during preparations for participation in the so-called Gulf War, when the requirement to recall Parliament became a matter of some controversy. In spite of the absence of a strict legal or constitutional requirement, Parliament was recalled as a result of what could best be described as political necessity owing to public disquiet at how the matter was being handled.<sup>20</sup>

Before the enactment of the Defence Act, 1954, the statutory basis of the Irish Defence Forces was the Defence Forces (Temporary Provisions) Act, 1923. Amendments to this act were passed annually, until repealed and replaced by the 1954 Act. In 1956, the question of amending the 1954 Act to allow for an Irish contribution to the UN Emergency Force was mentioned by the Taoiseach of the day, Mr. de Valera. In a reply to a question in the Seanad (Senate) about the possibility of Ireland contributing troops to the Force, Mr de Valera stated, *inter alia*, that:

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<sup>20</sup> Personal interview, senior Canadian diplomat in the Department of Foreign Affairs and International Trade, Ottawa, 27 June 1998; and D.L Bland, *Chiefs of Defence-Government and the Unified Control of the Armed Forces*, Toronto: Brown Book Company, (1995), 203.

the situation is new. We were not asked or requested to contribute, nor was it suggested that we should ....It is perhaps something that should be considered, although if we felt morally obliged to make an offer of volunteers, it would be necessary to have an amendment to the law. That is not a very serious matter .... I think it would be necessary to amend the Defence Forces Act [sic] before we could send any troops.<sup>21</sup>

However, as Ireland was not asked to contribute troops to the Force, the question lost its urgency until 1960.

When Ireland was requested to contribute a contingent to serve as part of an international UN force in the Congo on 14 July 1960, the question of the legality of sending such a 'force' abroad for duty of this nature was considered and new legislation was introduced into the Dáil on 19 July, 1960. According to the long title of the Defence (Amendment) Act, 1960, it was passed to authorise the despatch of contingents of the army for service outside the State with international UN forces for the performance of duties of a police character and other related matters. In more specific terms, it was passed as a temporary measure in order to enable the government to accede to Mr. Hammarskjöld's request to make a contingent of Irish soldiers available to go to the Congo.<sup>22</sup> This statute was later repealed by Section 7 of the Defence (Amendment)(No. 2) Act, 1960, which was intended as the permanent legislation to authorise, subject to the previous approval of Dáil Eireann in certain circumstances, the despatch of contingents of the Permanent Defence Force for service outside the

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<sup>21</sup> Seanad Debates 46, (1045 and 1154), 21 November 1956. It is interesting to compare Mr. de Valera's statement that 'there is, in fact, no obligation on any member (of the U.N.) to contribute to this police force (the U.N.E.F.), but there may be perhaps considerations of humanity and a desire to contribute to the maintenance of peace . . .' with that of the Minister for Foreign Affairs, Dr. Fitzgerald, and Minister for Defence, Mr. Donegan, seventeen years later. Dr. Fitzgerald stated that Ireland's decision to contribute troops to the second U.N.E.F. in 1973 was fulfilling 'an obligation and one that we recognize to be such'. Mr. Donegan stated that 'after consideration of the request (for Ireland to contribute troops to the U.N.E.F.) it was decided that, in order that our international obligations be met and our high reputation preserved, the request should be complied with'. Dáil Debates 268 (824 and 816), 30 October 1973.

<sup>22</sup> Dáil Debates 185 (774-781), 7 December 1960.

State with international forces established by the Security Council or the General Assembly, for the performance of duties of a police character.<sup>23</sup> There is no definition in the Act of what constitutes such duties, presumably it was intended to distinguish between what are now often termed traditional peacekeeping duties, and enforcement action missions pursuant to Article 42 of the UN Charter.<sup>24</sup> In any event, the Minister for Defence declined to elaborate upon its meaning when given the opportunity in the course of the debate in the Dáil. This was, and remains, an unsatisfactory position, as there are no definitive legal criteria within the municipal legislative framework to determine such matters. The more recently formulated policy guidelines or criteria for deciding whether or not to participate in peacekeeping or related activities are useful.<sup>25</sup> They do not, however, constitute legal criteria that might be used to challenge a decision of the government to participate in a particular operation. While no such legal challenge has ever been mounted, there is significant public disquiet about security and defence issues in the context of European integration, and the possibility of such a challenge cannot be ruled out in the future.

When the Taoiseach was moving the second reading of the Defence (Amendment)(No. 2) Bill, 1960 (in December of that year) he first placed the measure against the wider background of Ireland's attitude and obligations as a member of the UN.<sup>26</sup> Although he pointed out that there was no agreement

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<sup>23</sup> The Act extended the service of certain members of the Defence Forces and for those purposes amended the Defence Act, 1954 in certain respects. It also provided for the registration of certain births and deaths occurring outside the State and the application of Section 11 of the Wills Act, 1837, and Wills (Soldiers and Sailors) Act, 1918.

<sup>24</sup> See H. McCoubrey & N. White, *The Blue Helmets: Legal Regulation of United Nations Military Operations*, Aldershot: Dartmouth, (1996), 11-37, and Goodrich, Hambro & Simons, *op. cit.* 314-317.

<sup>25</sup> See *Infra*. Chapter 2, and R. Murphy, 'Ireland, the United Nations and Peacekeeping Operations', 5 (1) *International Peacekeeping*, (1998), 22-45, esp. 38-40 and White Paper on Defence, *op. cit.*, 59-70.

<sup>26</sup> Dáil Debates 185, (774-781), 7 December 1960.

among the so called 'big powers' on the implementation of the provisions of Chapter VII of the Charter, he neglected to distinguish between enforcement action pursuant to this Chapter and what was initially intended as a preventive diplomacy mission in the Congo. However, he was careful not to claim that Ireland was being called upon to fulfil a legally binding obligation under Article 43, but that other more general provisions referred to indicated that participation in the UN Force in the Congo, and by implication any similar peacekeeping force, was required by the spirit of the Charter. This reflected the view that participation in UN forces was one of the few methods by which small nations like Ireland could come together to influence world events, and the Taoiseach invoked Article 29 of Irish Constitution which solemnly affirms Ireland's 'devotion to the ideal of peace and friendly co-operation amongst nations, founded on international justice and morality'.<sup>27</sup> The question of the validity of such a laudable contention may well be posed, but the record of Irish initiatives at the UN, and the participation in peacekeeping and other UN activities since admission, has been significant. It was certainly out of proportion to the relative size and importance of the country on the world stage.<sup>28</sup> In any event, much of the discussion that took place in the Dáil concerned the political situation in the Congo and the function of the Irish and other UN troops there.<sup>29</sup> At times it appeared to be forgotten by some that the Bill was intended as permanent legislation to enable the Dáil to agree to Irish participation in any similar UN peacekeeping mission around the world.

### **Parliamentary control of Canadian and Irish participation in UN forces**

According to the 1997 *Report of the Somalia Commission of Inquiry* (the Commission), Canada has begun a new relationship with its armed forces that

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<sup>27</sup> Dáil Debates 185, (777), 7 December 1960.

<sup>28</sup> See Chapter 2, *infra.*, and R. Murphy, *op.cit.*, n.25.

<sup>29</sup> For example, Deputies Browne and McQuillan in particular drew attention to the political situation in the Congo and to the dangers of the U.N. imposing a partition on the Congo similar to that in Ireland.

arguably requires greater involvement by members of Parliament and Canadians generally in the direction, control and supervision of Canadian Forces.<sup>30</sup> It also identified a need to strengthen the role of Parliament in the development and scrutiny of defence policy. One of the prerequisites for the control of the military and defence policy in any democracy is a vigilant parliament. During the course of the cold war, defence policy in Canada was largely determined by the perceived threat and alliance commitments of the era. There was little systematic monitoring of defence policy and military matters by parliament in general.<sup>31</sup> Since 1989, Canada has increasingly been called upon to engage in a wide range of UN sponsored operations in complex situations involving uncertain alliances with unclear mandates and inadequate resources. The Senate and House of Commons Special Joint Committee also highlighted the issue of strengthening the role of parliament in the whole process in 1994 when it reported that:

whatever our individual views on particular issues of defence policies or operations, there was one matter on which we agreed almost from the beginning - that there is a need to strengthen the role of Parliament in the scrutiny and development of defence policy<sup>32</sup>.

In Canada, the different government departments involved in peacekeeping operations use a set of guidelines when determining whether Canada should participate in a particular operation.<sup>33</sup> In 1996, an Irish Government White Paper on Foreign Policy, and a later White Paper on Defence, identified a number of factors that are taken in account when

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<sup>30</sup> *Report of the Somalia Commission of Inquiry*, Vol. 5, 'The Need for a Vigilant Parliament', p.1. Available at <<http://www.dnd.ca/somalia/somaliae.htm>>.

<sup>31</sup> *Ibid.*

<sup>32</sup> Parliament of Canada, Senate and House of Commons, Special Joint Committee, *Security in a Changing World*, Report of the Special Joint Committee on Canada's Defence Policy (October 25, 1994), 57.

<sup>33</sup> E. Reumiller, 'Security in a New World Order: A Canadian Perspective' and 'Canadian Perspectives and Experiences with Peacekeeping: General Policy Considerations' in *Conflict Resolution and Peacemaking/Peacekeeping: the Irish and Canadian Experience*, P. O Gormaille, and R. Murphy, The Association for Canadian Irish Studies(ACSI), (1997), 15-22 and 23-36, and White Paper on Defence, *op. cit.*, 59-70.

considering requests for Irish participation in peacekeeping or similar operations.<sup>34</sup> When compared, the political criteria adopted by both countries are remarkably similar. Furthermore, in both countries experience shows that these guidelines or criteria are not applied in any strict sense. The respective governments of Canada and Ireland retain discretion to decide if the armed forces should participate in a UN or similar operation. The guidelines do provide a benchmark by which to examine each proposal and they also facilitate parliamentary control, albeit limited, over the decision by government whether or not to participate.

In Ireland, the power of the Dáil to monitor and scrutinise defence policy, in particular, participation in UN forces is quite limited. Under the provisions of Section 2 of the Defence (Amendment)(No. 2) Act, 1960, ('the 1960 Act'), the Dáil must first approve by means of a resolution the despatch of a contingent of armed members of the Permanent Defence Force exceeding twelve in number for service outside the State as part of an international UN Force. Section 2 states:

2 (1) Subject to subsection (2) of this section, a contingent ... may be despatched for service outside the State as part of a particular International United Nations Force if, but only if, a resolution has been passed by Dáil Eireann approving of the despatch .....

(2) A contingent ... may be despatched for service outside the State ... without a resolution approving of such despatch having been passed by Dáil Eireann, if, but only if

(a) that International United Nations Force is unarmed, or

(b) the contingent consists of not more than twelve members of the Permanent Defence Force, .....

(c) the contingent is intended to replace, in whole or in part, or reinforce a contingent of the Permanent Defence Force serving outside the State as part of that International United Nations Force and

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<sup>34</sup> O. MacDonald, 'The Irish Peacekeeping Experience and its Influence on Doctrine', O Gormaille and Murphy, *op. cit.* 44-57; and *supra*, Chapter 2.

consisting of more than twelve members of the Permanent Defence Force.

This allows the Dáil to discuss in detail the implications of Irish participation in any UN force prior to giving its approval. This Section was discussed at length during the Dáil Debate of the Bill and reservations were expressed regarding its exact implications. In response, the Minister for Defence, Mr. K. Boland, pointed out that it would not be possible to reinforce an unarmed force, which did not require Dáil approval, by a contingent such as would be sent to an armed force under Subsection(2)(1).<sup>35</sup> However, once the Dáil had passed a resolution approving the despatch of an armed contingent of over twelve personnel, then it must be left to the government to determine the size of the contingent and the duration of its mission. Similarly, the government could replace the original contingent as necessary for the duration of the UN mission. In this way, the government could continue sending contingents to the Congo for the next forty years without ever coming back to the Dáil for any authority or discussion.

It was not surprising then, that in the circumstances, certain Deputies opposed some of the provisions contained in Section 2.<sup>36</sup> They considered that the Dáil was entitled to have a discussion on the merits or otherwise of sending and maintaining troops abroad on a regular basis. The political situation in the Congo during the 1960's alone, and more recently in Somalia, show that events can develop in such a way that the original mandate of a UN force would have to be modified or changed as a result of subsequent developments. This could bring about a situation in which the contingent going to replace the troops originally sent out with Dáil approval could find themselves in totally different circumstances than originally envisaged and planned for. They could also find that the original mandate was so modified to meet these changed circumstances that it amounted to a new mandate altogether. In this way, Section 2 of the 1960 Act gave the government more discretion than was probably required.

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<sup>35</sup> Dáil Debates 185, (1133-1134), 14 December 1960.

<sup>36</sup> *Ibid.*, (1139).

This situation has since been changed somewhat and under Section 4 of The Defence (Amendment) Act, 1993 the Minister is required to make an annual report to the Dáil on the operation of Section 2 of the 1960 Act, and the Dáil may by resolution approve of the report. This provision was prompted by an opposition amendment to the original bill after a number of deputies had expressed misgivings about the lack of parliamentary control over Irish involvement in UN forces.<sup>37</sup> In reality it amounts to a minimalist parliamentary control mechanism with which to monitor the activities of government and the defence forces in this area, but it does at least provide for some debate and it requires that the Minister apprise the Dáil of all relevant matters at least once a year.

While it appears an exaggeration to suggest the government may send the entire Defence Forces to form part of an international UN force, it would be empowered under Section 2 of the 1960 Act to do so. This is not to suggest that the Dáil should control the day-to-day movements of the contingent abroad, or its tactical deployment. Nonetheless, it is an essential element of a parliamentary democracy that the government should have to obtain the approval of Parliament before taking certain action. It is difficult to sustain Deputy Lionel Booth's claim that debates on such issues should be avoided as 'ill informed debate might prove a considerable embarrassment to our troops'.<sup>38</sup> In any event, public statements by politicians outside the Dáil have, on occasion, caused embarrassment and even danger for Irish troops serving with UN peacekeeping forces.<sup>39</sup> The situation in Ireland contrasts with that in the Netherlands, where Parliament exercises greater control and supervision over its armed forces serving with the UN.<sup>40</sup> The continued participation in UNIFIL

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<sup>37</sup> Dáil Debates 433, (310), 29 June 1993, (689, 718 and 722), 30 June 1993.

<sup>38</sup> Dáil Debates 185, (1149-1152), 14 December 1960.

<sup>39</sup> See R. Murphy, 'Background to the 1980 At-Tiri Incident - A Personal Assessment', *An Cosantoir* (1988), 38.

<sup>40</sup> J.O. de Lange, 'Peacekeeping Operations of the UN and Public International Law - Some Legal Aspects in the Netherlands' (1981) 28 *Netherlands International Law Review*, 182-187. See also the Netherlands Supreme Court judgment on the despatch of

of troops from the Netherlands was reassessed regularly. This may be one reason why, unlike the Irish government, the government of the Netherlands withdrew its contingent due to the lack of support UNIFIL received from parties to the conflict. The Netherlands armed forces are not made available to the UN without constant re-examination of their role and their indefinite involvement in a peacekeeping operation may not be taken for granted.<sup>41</sup>

The scope of the 1960 Act was confined to matters concerning the contribution of an Irish contingent to a UN force established by the Security Council, or the General Assembly, for the performance of duties of a police character only. There is no elaboration in the Act on what these police duties involve. The most likely purpose for its use was to distinguish between 'peacekeeping' and 'enforcement action'. The term could be construed as somewhat misleading when some of the events in which the UN Force in the Congo were involved, particularly in the Katanga Province, are taken into account.<sup>42</sup> The term also reflects the ambiguous and compromised role in which UN forces can find themselves, and was epitomised by the UN peacekeeping forces in Lebanon during the 1982 Israeli invasion.

The 1960 Act does not provide any definition of 'contingent' either.<sup>43</sup> It was probably considered more expedient at the time to omit such a definition. In military terms it can denote anything from the usually less than twelve Irish personnel that form the Irish Contingent with the UN Force in Cyprus, to the six hundred or more forming the Irish Contingent with UNIFIL.

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troops to UNIFIL, *The State of the Netherlands V. A.I. Toonan*, Supreme Court, 8 February 1980, reported in the *Netherlands Yearbook of International Law*, (1981), 353-356.

<sup>41</sup> *Ibid.*

<sup>42</sup> R. Higgins, *The United Nations Operation in the Congo (ONUC) 1960-1964*, London: Royal Institute of International Affairs, (1980) and E.W. Lefever, *Crisis in the Congo - A United Nations Force in Action*, Washington DC: Brookings Institute, (1965), 72-121.

<sup>43</sup> Defence Force Regulations CS7 governing 'A Contingent of the Permanent Defence Force serving with an International United Nations Force' states in Para 1 that 'the word "contingent" means a contingent of the Permanent Defence Force dispatched pursuant to the provisions of the Defence (Amendment)(No. 2) Act, 1960, for service outside the State with a Force'.

The Defence (Amendment) Act, 1993 has amended and extended the 1960 Act in significant respects. The principle amendment is contained in Section 1 which by defining an 'International United Nations Force' as an international force or body established by the Security Council or General Assembly of the UN, goes beyond the previous definition contained in the 1960 Act which had limited Defence Force participation to UN peacekeeping operations. This brought about a radical change in Irish defence and foreign policy that was not reflected in the level of public or parliamentary debate at the time. Although the Dáil debate indicated that at least some did appreciate the wider ramifications of the change in Irish municipal law, it seemed that the Dáil as a whole did not.<sup>44</sup> It is unlikely that the new legislation would have had such an uncontroversial passage but for the humanitarian considerations in sending an Irish army transport unit to Somalia and the presence of Irish aid workers in that country.

There is no equivalent provision in the National Defence Act, although Section 33 provides that all regular forces are at all times liable to perform any lawful duty. This is a very broad provision that, *inter alia*, permits deployment in accordance with government policy to any country outside Canada. It reflects Canadian history of involvement in major conflicts outside of Canada, as well as the present commitment to the Atlantic Alliance. Looked at in isolation it might appear that there is little or no control by Parliament over the deployment of Canadian Forces at home and abroad. When one examines the provisions of the National Defence Act as a whole, in particular those relating to the issue of command and control, it is evident that this is not the case. In this way the issue of command and control of the Canadian and Irish Forces is also intrinsically linked to the matter of parliamentary control, and this is addressed later.<sup>45</sup>

A significant means of achieving greater parliamentary control in both Canada and Ireland would be the setting up of a special parliamentary

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<sup>44</sup> Dáil Debates 433, (309, 363, 376), 29 June 1993.

<sup>45</sup> *Infra.*, Chapter 5.

committee made up exclusively of elected members of the Dáil and the Canadian Parliament respectively. Although joint committees are established from time to time in Canada, there is no permanent standing committee composed of elected parliamentarians dealing exclusively with security and defence issues in either country. A parliamentary committee of this nature could build up considerable expertise over time and parliament would not have to rely exclusively upon *ad hoc* committees, or military and other experts for their information. Since its establishment in Ireland, the Joint Oireachtas Committee on Foreign Affairs has functioned well, despite the limitations of its mandate. The Standing Committees on National Defence and Veterinary Affairs in Canada has also performed a worthwhile function, but the establishment of a permanent committee could significantly improve the current situation.

The power and influence of the Parliament could also be significantly enhanced by adopting one of the proposals of the Commission, namely, enacting legislation requiring that Parliament receive notice of Canadian Forces deployments, which in any important context would be expected to provoke a debate in Parliament.<sup>46</sup> This would include situations when it is proposed to place Canadian Forces on 'active service', or even whenever the government contemplates deploying any sizeable unit or other element of the Canadian Forces outside Canada. In such circumstances, the Chief of Defence Staff could be required to make a report to Parliament on the effectiveness and readiness of the Canadian Forces not simply to deploy overseas, but to undertake the proposed mission in all respects.<sup>47</sup> This would avoid what the Commission identified as one of the major deficiencies in the pre- deployment phase of the Somalia mission. No one seemed prepared to say that the Canadian Forces were not ready to undertake such a mission.<sup>48</sup> Parliamentary

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<sup>46</sup> *Report of the Somalia Commission of Inquiry, op. cit.*, (n.30), 'The Need for a Vigilant Parliament', Vol. 5, p.4.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.* 'The Failure of Senior Leaders', in the Executive Summary of the *Commission Report*.

supervision of this nature would ensure greater accountability and transparency at all levels of decision making in defence and security matters. This would avoid ill-considered decisions being taken without proper debate and consideration of the full implications of a particular course of action.

### **The policy of sending volunteers on UN operations and the implications of 'active service' status<sup>49</sup>**

From the Irish Defence Forces' point of view, Section 3 of the 1960 Act is the most significant. Under this Section, all officers and men who are appointed or enlisted on or after the date of the passing of the Act shall be liable to serve outside the State with a contingent of the Permanent Defence Force. There is a similar provision contained in Section 2 of the Defence (Amendment) Act, 1993. Wherever practicable, the Defence Forces have adhered to a policy of sending volunteers on UN service. In certain circumstances, however, this is not always possible. It may happen, for example, that there is a limited number of army personnel suitably qualified to fill specific appointments in a contingent.<sup>50</sup> At the time of the debate on this Section, Deputy Sherwin and others did not consider that anyone should be compelled to serve overseas.<sup>51</sup> His primary fear that army recruiting might be seriously affected did not materialise. Nor did the more far fetched scenario painted by Mr. Sherwin, of soldiers with left wing political leanings deserting to the other side in an

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<sup>49</sup> For an overview of the legal and disciplinary implications of participation in UN operations, see P. Rowe, 'Maintaining Discipline in United Nations Peace Support Operations: The Legal Quagmire for Military Contingents', *5(1) Journal of Conflict and Security Law*, (2000), 45-62.

<sup>50</sup> At the time of writing (late 2000), there are a number of Irish engineer and specialist staff with UNIFIL as on a non voluntary basis owing to short term requirements arising from the Israeli pull out and UNIFIL redeployment. In October 1984, an army medical doctor instituted proceedings in the High Court to restrain the Minister for Defence from sending him to the Lebanon as part of the Irish contingent with UNIFIL. He claimed his health would be damaged by such service. His action was unsuccessful and Mr. Justice McMahon was satisfied he should not grant an injunction. *The Irish Times*, 26 October 1984.

'ideological clash between Russia and the West', come to pass.<sup>52</sup> In the event, this Section of the 1960 Act did not receive very much attention in the debate and it merely brought Irish military law on overseas service into line with that of most other countries, including Canada. Nevertheless, it is an emotive subject in Ireland. Recent debates on Irish participation in some form of European defence commitment have often raised the spectre of Irish soldiers being conscripted to serve in or alongside foreign armies.<sup>53</sup> In the course of the debate on the Defence (Amendment) Act, 1993 the question of sending volunteers on UN service was considered once again.<sup>54</sup> The Minister for Defence pointed out, however, that in practice overseas missions are heavily oversubscribed and the question of compulsory UN service did not arise.<sup>55</sup> This, of course, was true at the time, but it did not change the fact that personnel joining the Defence Forces after July 1993 are liable for service with a UN force of an unspecified nature.

The reality is now that the volunteer list for missions abroad is no longer heavily oversubscribed, though a fresh intake of recruits, or the instigation of regular recruiting to the Defence Forces could change this situation relatively quickly. It was reported recently that it might prove necessary to recruit civilian staff, in particular para-medics, for service with the Irish battalion in Lebanon. This is due to a shortage of personnel with specialised skills.<sup>56</sup> The Minister for Defence conjured up an even more drastic scenario when he said that Ireland would withdraw from participation in

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<sup>51</sup> Dáil Debates 185, (892-896), 7 December 1960.

<sup>52</sup> *Ibid.*

<sup>53</sup> Personal interviews with serving Defence Forces personnel, Dublin and Galway, 1998. See also E. Horgan, 'Committing our troops to EU force clear breach of neutrality', *The Irish Times*, 1 November 2000, 16.

<sup>54</sup> Dáil Debates 433, (309 and 363), 29 June 1993.

<sup>55</sup> *Ibid.*, (373). Towards the end of Irish participation in UNIFIL, it was often difficult to find sufficient volunteers from the ranks of the Defence Forces due to shortage in numbers, and a degree of exhaustion and boredom with the mission.

<sup>56</sup> *The Irish Times*, 11 May 1998.

UNIFIL if the shortage of volunteers became chronic.<sup>57</sup> This statement, without any indication by the Minister of his intention to address and resolve the problem, is unacceptable for a Minister with responsibility for the Defence Forces and defence policy. It shows no appreciation of the causes of this problem, and a total unwillingness to accept any responsibility for the situation brought about by years of neglect.

The Canadian Forces and the Irish Defence Forces consist of volunteers. Both forces are organised and divided into a regular full time professional force and a reserve force of part time volunteers. Under Section 33 of the National Defence Act, regular force members are liable to be deployed at any time and anywhere. Members of regular forces have also been placed on 'active service', which in the context of Canadian military law means they can be immediately deployed. This is in contrast to Irish Forces, who are deemed to be on 'active service' when deployed on UN duties abroad, and for whom the term has radically different legal consequences, and political connotations. Section 4 of the 1960 Act lays down that members of the Defence Forces serving with armed UN Forces shall be deemed to be on active service. This is a status usually deemed appropriate for troops participating in some kind of offensive military operation or involved in actual armed conflict. One of the effects of this section under Irish military law is that it confers unlimited jurisdiction on a court-martial, convened for the trial of an offence alleged to have been committed by a person subject to military law, while serving outside Ireland with an armed International UN Force.<sup>58</sup> Section 126 of the Defence Act, 1954, is also important in this regard. It lists a number of

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<sup>57</sup> Statement by the Minister of Defence at the annual PDFORRA (soldiers representative association) conference, reported in *The Irish Times*, 5 November 1998.

<sup>58</sup> Section 3 of the Defence (Amendment) Act, 1993 applies the provisions of Section 4 of the 1960 Act to Defence Force units participating on peace enforcement missions. See the comments by Finlay, C.J., *Ryan v. Ireland*, *The Attorney General and the Minister for Defence* [1989] Irish Reports. 177 at 182 and M.N. Gill, 'Development of the Military Jurisdiction of the Irish Defence Forces', *Revue de Droit Penal Militaire et De Droit De La Guerre*, (1980), 427-433. For example a soldier cannot be tried by court martial for the offences of treason, murder, manslaughter, treason felony, rape or buggery, unless he was on active service at the time of allegedly committing the offence. (Section 192, Defence Act 1954)

offences more severely punishable on 'active service' than at other times. This means that Irish soldiers with UN Forces are subject to a stricter military code of discipline due to the severe punishments for certain breaches of military law while on active service.<sup>59</sup> The Canadian position is different in significant respects as under Section 31 of the National Defence Act, the Governor in Council, in effect the cabinet in Canada, has power to place Canadian Forces on 'active service'. The question of placing forces on 'active service' in this way is considered important. This is reflected in the requirement that if placed on 'active service' when Parliament is not sitting, Parliament must meet within ten days to consider the Governor in Council decision.<sup>60</sup> Under Section 31, Canadian Forces may be placed on 'active service' 'when advisable' by reason of an emergency, for the defence of Canada; or for action taken under the UN Charter, or NATO. However, unlike the situation prevailing in Ireland, the National Defence Act is permissive rather than mandatory, and Canadian Forces do not have to be placed on 'active service' to participate in a UN sponsored operation. In fact, there appear to be no circumstances where it is a requirement or prerequisite for a particular course of action.

In practice, a somewhat unusual situation prevails with regard to Canadian Regular Forces in that they have been placed on 'active service' on what amounts to a permanent basis.<sup>61</sup> This renders the concept of 'active

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<sup>59</sup> One other aspect of military law affecting persons subject to it while on overseas service that is worth mentioning is that relating to military detention. Soldiers may be awarded short periods of detention (usually 7 or 14 days) by either their Commanding Officers or Courts-Martial if found guilty of an offence under military law (see Section 178 and Sections 209 to 212 of the Defence Act, 1954). This is quite common both at home and on overseas service. When a soldier is awarded this punishment he forfeits his pay for the period of his detention. However, when a soldier is on UN overseas service he not only forfeits his pay for the period of detention but also his overseas allowances for the same period. This anomaly has never been challenged. It is surely unjust to withhold payment of overseas allowances while a soldier serves a period of detention while overseas as he continues to be overseas during the period in question. This almost amounts to a double punishment for the one offence.

<sup>60</sup> Section 32 of the National Defence Act states in part: 'Whenever the Governor in Council places the Canadian Forces or any component or any unit thereof on active service, if Parliament is then separated by an adjournment or prorogation that will not expire within ten days, a proclamation shall be issued for a meeting of Parliament within ten days....'

service' for Canadian Forces somewhat meaningless, both legally and politically. This issue can cause confusion, and this was evident during the 'Gulf War' when at the beginning of the crisis many observers thought the Parliament would have to be recalled to allow the Canadian Forces go on 'active service'.<sup>62</sup> No one in the public service or in the Department of National Defence seemed to understand how Canada should actually participate in an offensive military operation or Parliament's role in the decision. The then Prime Minister, Mulroney, wanted to avoid recalling Parliament for domestic political reasons.<sup>63</sup> The Clerk of the Privy Council tried to maintain that Parliament's role was only customary and not required. The Chief of Defence Staff, De Chastelain, said that the Prime Minister was not required to refer the matter to Parliament.<sup>64</sup> This statement, though legally correct, was probably not a politically astute observation at the time. In the event, Parliament was recalled.

The episode shows the confusion surrounding the law, and the status and implications of 'active service' for Canadian Forces. Canadian military personnel might well argue that current commitments to the UN and NATO entail large numbers of Canadian Forces being deployed outside Canada at any given time, and the permanent state of 'active service' reflects this. However, what is the point of 'active service' if it is a permanent status and a mere administrative convenience? This situation is unsatisfactory. The matter could be clarified by amending the National Defence Act and making it a statutory requirement to place Canadian Forces on 'active service' for any operation under the UN Charter, the NATO, the Organisation for Security and Co-operation in Europe, or any similar organisation. A further amendment could also make it a statutory requirement to refer the matter to Parliament before any such decision is made. This would clear up the semantic and legal confusion

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<sup>61</sup> Personal interview, JAG officer, Canadian Forces, Ottawa, 21 June 1998. Reserve forces are not placed on active service, and a formal Order in Council is required for any such forces to be placed on active service.

<sup>62</sup> Bland, *op. cit.*, 203.

<sup>63</sup> *Ibid.*

surrounding the matter, and enhance Parliamentary control over the Canadian Forces, and in particular over their deployment outside Canada.

The policy in Ireland reflected in the statutory requirement to place troops involved in UN operations on an 'active service' footing does have merit. While involvement in peacekeeping and similar operations should not be equated with armed conflict, the unpredictable and volatile environment in which such operations often take place may require resort to the use of force in certain circumstances, albeit in a restrained and defensive manner. The need to maintain discipline is of the utmost importance in such sensitive situations. The situation under Irish law of enshrining this in the legislative framework governing participation has been vindicated by the nature of such operations since 1960. In this way, the legal position of Irish troops is clearer than that of Canadian Forces, whose status depends on practice rather than a precise legal provision.

The practical significance for Irish troops of Section 4 of the 1960 Act became evident in 1983 when a court-martial tried a soldier for the murder of three comrades in Lebanon.<sup>65</sup> Under the Defence Act, 1954, a court-martial does not have jurisdiction in such cases unless the offence was committed while on 'active service'. In this way, Section 4 of the Act conferred jurisdiction on the court-martial to try Private McAleavy for the murders in question. Under the National Defence Act, 'active service' has no such legal significance. Nevertheless, a similar situation prevails with regard to Canadian Forces who commit an offence under military law while outside Canada. Under Section 130 of the National Defence Act all federal Acts are incorporated into military law, and unlimited jurisdiction is granted to courts

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<sup>64</sup>

*Ibid.*

<sup>65</sup> Private McAleavy was found guilty of all three murders on 27 September, 1983. He was sentenced to penal servitude for life and was discharged from the Permanent Defence Force with ignominy. (*The Irish Times*, 28 September 1983). The decision was appealed to the Courts-Martial Appeals Court that confirmed the finding and sentence of the Court-Martial. The court consisted of the Chief Justice, Mr. O'Higgins, Mr. Justice Barrington and Mr. Justice Lynch. The judgment was unreported. See the Order of the Courts-Martial Appeals Court dated 29 March 1984, and *The Irish Times*, 30 March 1984.

martial in respect of offences committed outside of Canada. Furthermore, there is a different scale of punishment for offences committed outside Canada.

Although the means by which the Canadian and the Irish legislation achieve this result is different, the net effect of the respective sections is much the same. There is one potentially important distinction. In theory, a Canadian Forces member may find himself or herself liable to a stricter military code for offences committed outside Canada in a private capacity. There is no requirement that the offence relate to or be associated with official duty or service outside of Canada. This is in contrast with the code of discipline governing Defence Forces members, who must be deemed to be on 'active service' before Section 126 of the Defence Act can be invoked. There is no similarity between 'active service' under military law and what is often termed 'emergency legislation' provisions under civil law. Some might argue that 'active service' and combat situations require strict discipline and a somewhat harsher code of military law. This has not been the experience of the United States military in Vietnam or elsewhere, nor has it been the experience of Canadian Forces.<sup>66</sup> Such situations do not justify the suspension of any of the rights or duties of an accused under military law, and neither Canadian nor Irish military law provide for any derogation.

### **Legality of the arrest of Irish and Canadian personnel forming part of international forces**

The question of placing of Irish and Canadian Forces personnel serving with UNIFIL and other UN forces under arrest also raises serious constitutional questions. Although the problems can arise in respect of any international UN force, it is convenient to focus on UNIFIL as a prime example.<sup>67</sup> The Regulations applied to a number of forces have expressly provided for powers

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<sup>66</sup> Personal interview, JAG officer, Ottawa, 21 June 1998.

<sup>67</sup> Although Canadian Forces do not participate in this force at present.

of arrest to be exercised by UN military police personnel<sup>68</sup>. At the time of writing, UNIFIL's standing operating procedures governing duties and responsibilities of military police purport to grant powers of arrest over any member of the peacekeeping Force.<sup>69</sup> Once taken into custody, the arrested person must be transferred as soon as practicable to the custody of his or her own national contingent. In addition, Paragraph 41 of the UNIFIL Status of Force Agreement provides as follows:

The military police of UNIFIL shall have the power of arrest over the military members of UNIFIL. Military personnel placed under arrest outside their own contingent areas shall be transferred to their contingent Commander for appropriate disciplinary action.....

This appears to grant a power of arrest over and above that conferred by the military law of a Participating State upon a member of its forces over another.<sup>70</sup> Sections 171 and 172 of the Defence Act, 1954, govern the powers of arrest of members of the Defence Forces. These provisions specify those authorised to place under arrest persons subject to military law and those listed do not include military police serving with UN forces that are not themselves members of the Defence Forces.<sup>71</sup> Furthermore, they do not authorise arrests by Defence Forces personnel of persons not subject to Irish military law, i.e. members of other contingents with UNIFIL.

According to the Constitution, no citizen shall be deprived of his or her personal liberty, save in accordance with law.<sup>72</sup> It would appear that there is no statutory or common law basis for authorising the UN military police to arrest

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<sup>68</sup> See Article 15 of the UNFICYP Regulations and UNEF Regulation 14.

<sup>69</sup> Personal interview, Comdt P. Murphy, Deputy Provost Marshal UNIFIL MP Company 1989/1990, Galway, June 1997.

<sup>70</sup> Draper, *op. cit.* 71.

<sup>71</sup> Section 171 provides *inter alia*, that a provost marshal, an officer or non commissioned officer or any person subject to military law who is so authorised by any commanding officer may arrest a person subject to military law.

<sup>72</sup> Article 40.4.1° of the Constitution provides 'No citizen shall be deprived of his personal liberty save in accordance with law'.

members of the Defence Forces. In fact, the matter was covered by the Chief of Staff's directive to the Irish contingent and unit commanders with UNIFIL.<sup>73</sup> This directive purported to authorise such powers of arrest by UNIFIL military police as may be defined by, or on behalf of, the Force Commander.<sup>74</sup> These were outlined in the UNIFIL standing operating procedures dealing with the duties and responsibilities of the military police. The issue is whether the purported granting of authority to military police personnel belonging to other contingents with UNIFIL is in accordance with Irish municipal law.<sup>75</sup> It would appear that the Chief of Staff's directive in relation to powers of arrest has no basis in law. Furthermore, the Minister for Defence has no authority to direct the Chief of Staff to issue such a directive for reasons already outlined. Furthermore, Paragraph 41 of the UNIFIL Status of Force Agreement has significant potential to bring about a conflict between UN military arrangements and the national military law of contributing states. This is not a situation unique to Irish or Canadian military forces.<sup>76</sup>

Sections 171 and 172 of the Defence Act, 1954, are quite specific in relation to the arrest and placing in custody of persons subject to military law. These sections have not been amended to take account of the situation created by Defence Forces participation in UN forces. In the case of *The People (Attorney General) v O'Callaghan*, the Irish Supreme Court reinforced an earlier suggestion that Acts of the Oireachtas delimiting personal liberty would be scrutinised on general constitutional principles rather than accepted as automatically validating their contents as being in 'accordance with law'.<sup>77</sup> The policy of UNIFIL military police is to ensure that persons carrying out an

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<sup>73</sup> Personal interview, former Irish Contingent Commander UNIFIL, November 1989.

<sup>74</sup> *Ibid.*

<sup>75</sup> This should not be confused with the question whether members of the Defence Forces in a foreign jurisdiction may be lawfully deprived of liberty in accordance with the law of that jurisdiction, which is a separate circumstance not in issue in this case.

<sup>76</sup> See McCoubrey and White, *op. cit.*, 179-181.

arrest are from the same contingent as those being arrested. However, it is not always possible to implement this policy.<sup>78</sup> For this reason, certain arrests of members of the Irish contingent with UNIFIL may be rendered unlawful and unconstitutional, as it appears there is no constitutional or statutory authority for extending the powers of arrest already lawfully in existence. While the common law machinery for challenging the legality of a detention by way of *Habeas Corpus* embodied in Article 40.4.2°-5° of the Constitution may be of limited benefit to a soldier unlawfully detained in a remote area of south Lebanon, according to the Supreme Court in *The People (Director of Public Prosecutions) v Conroy*<sup>79</sup>, the burden of proof in establishing the legality of arrest and detention is on the military authorities. Furthermore, evidence obtained from the accused during an unlawful detention will normally be inadmissible at the trial.<sup>80</sup>

The authority to arrest members of the Canadian Forces under Canadian law is governed by Part IV, Sections 154 to 159 of the National Defence Act. In this regard, Section 154(1) provides:

Every person who has committed, is found committing or who is believed on reasonable grounds to have committed a service offence, or who is charged with having committed a service offence, may be placed under arrest.

Sections 155, 156 and 157 respectively outline the persons entitled to arrest a members of the Canadian Forces subject to the Code of Service Discipline. Those categories mentioned are Canadian Forces personnel of specified ranks. However, Section 157(4) is a saving provision and it provides:

(4) Nothing in this section shall be deemed to be in derogation of the authority that any person, including an officer or non commissioned

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<sup>77</sup> [1966] Irish Reports 501.

<sup>78</sup> Personal interview, Comdt Murphy, *op. cit.*, (n.69).

<sup>79</sup> Supreme Court, unreported, 31 July 1986.

member, may have under other sections of this Act or otherwise under the law of Canada to arrest any other person without a warrant.

The effect of this subsection is to permit any person to arrest a member of the Canadian Forces in accordance with Canadian law. Even if a specific statutory provision does not exist, there is a common law right of arrest recognised under Canadian law. Unlike the situation prevailing in respect of Irish Defence Forces, there is a right for non Canadian Forces personnel, and non-Canadian nationals, to arrest a member of the Canadian Forces. This raises the question regarding what law, rights and obligations are applicable at the time of the arrest. Are they Canadian, in particular, does the Canadian Charter of Rights and Freedoms, which is part of the Constitution Act 1982, apply at the time of the arrest or later? The Canadian Courts Martial Appeal Court has judicially considered this matter in 1987. In the appeal case *Bernaour v. The Queen*, the appellant appealed his conviction on a charge of operating his motor vehicle while the concentration of alcohol in his blood exceeded a certain level.<sup>81</sup> The conviction was based on an analysis of a blood sample taken from the appellant under German law after he has been brought to a hospital by police following a collision. The analysis of that blood sample was the basis of his conviction by Standing Court Martial of an offence punishable under Section 120 of the National Defence Act.<sup>82</sup> The record did not disclose that the appellant was advised by the German police of a right to counsel, nor whether such a right exists under German law. Neither did the record disclose that the various requirements of Section 238 of the Canadian Criminal Code as to the taking of blood samples were met nor whether German law imposes such requirements. On the record, the Court assumed that German law was complied with.

The significant element in the judgement was the opinion of the Court that Sections 8 and 10 of the Canadian Charter of Rights and Freedoms did not

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<sup>80</sup> *The People (D.P.P.) v Shaw* [1982], Irish Reports. 1. *The People (D.P.P.) v O'Loughlin* [1979], Irish Reports 85. *The People (D.P.P.) v O'Higgins* (Supreme Court, November 22, 1985). See generally Casey, *op. cit.*, at 381-383 and 414-422.

<sup>81</sup> *Bernaour v. The Queen*, C.M.A.C. 287, Ottawa, Ontario, 16 September, 1988.

<sup>82</sup> Namely, operating a motor vehicle while the concentration of alcohol in his blood exceeded .08% contrary to 237(b) of the Criminal Code.

impose obligations on German police conducting an investigation into the conduct of a member of the Canadian Forces in Germany. However, the Court went on to say that a member of the Canadian Forces is entitled to his or her Charter rights when being tried by a Canadian Court Martial in or outside Canada. The law would therefore seem to be that any member of the Canadian Forces may be arrested by a foreign national in accordance with the municipal laws applicable in the arresting national's country. Evidence and the arrest procedure is not tainted by any illegality under Canadian military or civil laws. It follows from this that a member of a UN military police unit may also arrest Canadian Forces personnel in accordance with UN standing operating procedures, and still avoid the potential difficulties encountered by Irish authorities in similar circumstances. Once the Canadian Forces member is handed over to Canadian authorities, then the Canadian Charter of Rights and Freedoms, the Criminal Code and the National Defence Act, must be complied with in every respect.

This would appear to render the whole process somewhat straightforward and without legal impropriety under Canadian law. Nonetheless, legal and constitutional issues could still arise where the admission of evidence obtained by foreign authorities in compliance with their domestic laws, or international organisations, could bring the administration of Canadian justice into disrepute. This would be for a court to determine in accordance with the facts in a particular case. In this way the court will examine the arrest and any other relevant procedures prior to the handing over of the accused to Canadian authorities. If there is a breach of a fundamental personal right, for example, the subjecting of an accused to cruel, inhuman or degrading treatment, then a Court Martial will not admit any evidence obtained in such circumstances. The issue was not raised in the *Bernaour* case, but the Court did state that it was satisfied that the admission of the evidence of the blood sample taken could not bring the Canadian justice system into disrepute.<sup>83</sup> It held, *obiter*, that it did not reject the possibility that a Court Martial could refuse to admit evidence in such circumstances in the future.

## Conclusion

The Defence (Amendment)(No. 2) Act, 1960, made statutory provision for service outside the State as part of an international UN police force. Under the terms of this Act, the Dáil must approve the initial dispatch of members of the Defence Forces for UN peacekeeping, thereafter however, considerable discretion is left to the government in determining the extent of Irish involvement. The Act also provides that members of the Defence Forces shall be liable to serve outside the State with the UN peacekeeping forces, and while so serving, they are deemed to be on active service. In certain circumstances this confers unlimited jurisdiction on a court martial and renders the accused liable to a more severe punishment.

The 1960 Act was intended as a permanent piece of legislation to provide for potential future participation by Ireland in UN peacekeeping forces. It has been satisfactory to date and in this respect it will probably continue as the statutory basis for Irish involvement in future peacekeeping missions. The Defence (Amendment) Act, 1993 made provision for Irish involvement in UN forces not of a peacekeeping nature. This is the most significant development in the municipal legal basis for Irish involvement in UN forces to date. It permits participation in any kind of UN operation and makes all Defence Forces personnel joining after the 1 July 1993 liable to service on UN enforcement missions. Yet in planning for future roles of this nature, it is not possible to take everything into account or to provide a definitive legal criterion of what this role must be on each occasion. The enabling legislation merely provides the general legal framework for Irish involvement. While the term police character may cause some confusion about the precise role of peacekeeping forces, it has not in any way hindered Irish participation in such forces to date. However, despite the recent legislation, there are still matters pertaining to such participation that require urgent attention. In particular, the question of command of members of the Defence Forces and the powers of arrest of those who are not subject to Irish military law is in need of review.<sup>84</sup>

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<sup>83</sup> *Bernaur v. The Queen, op. cit.*, (n. 81), 571.

<sup>84</sup> This issue of command and control is dealt with in Chapter 5, *infra*.

There is no equivalent Act in Canada as the Canadian National Defence Act is the source document and statutory legal basis for all Canadian Forces activities. Unlike the Irish practice of enacting new laws and statutory amendments to existing legislation in the form of Amendment Acts, the Canadian practice is to revise and amend the National Defence Act as deemed appropriate, without a whole new Act being enacted. The current National Defence Act is a consolidating legislative enactment incorporating all amendments since 1950.<sup>85</sup> In this way, a single basic Act is a comprehensive and effective way to keep legislation up to date, and preferable to the piecemeal and confusing methodology prevailing in Ireland.

Under Canadian law, the National Defence Act does not require formal parliamentary approval or consent to the despatch of Canadian Forces for service abroad. There does not appear to be any constitutional requirement to have the decision reviewed by the legislature either, although rules embodied in certain 'constitutional practices' require that the parliament be consulted. Unlike the situation under Irish military law, the distinction between enforcement action and traditional police type peacekeeping duties is of little legal relevance in respect of Canadian participation in UN operations. Military service in Canada entails service with NATO and the UN as part of normal military activities. Once declared lawful and part of Canadian policy, all Canadian Forces are liable under the National Defence Act to service outside of Canada. Though the deployment of Canadian Forces abroad without the approval of Parliament is legally permissible, the reality is that Parliament must be informed if the government wants to avoid a political storm. Nevertheless, the 1997 *Report of the Somalia Commission of Inquiry* highlighted the need to strengthen the control exercised by Parliament over the activities of Canadian Forces, and reform of the law to provide for the mandatory approval of Parliament for deployment of Canadian forces abroad would be preferable to the current situation.

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<sup>85</sup> Revised Statutes of Canada, 1985, c. N – 5. Although the current Act is being reviewed and amendments proposed as a result of adopting certain of the Dixon Committee report recommendations, which itself was a result of the *Report of the Somalia Commission of Inquiry*.

As all regular Canadian Forces are on a semi permanent 'active service' footing, the status has little real significance. Under Section 31 of the Act, the Governor in Council has power to place the Canadian Forces on 'active service' and despite the fact that there is no specific legal requirement, there is a parliamentary tradition in existence since 1950 for the government to reaffirm that Canadian Forces are on active service when specific operations involving substantial numbers of troops are considered potentially hazardous. Unlike the situation of Irish Defence Forces, Canadian Forces are neither deemed nor required to be placed on active service to participate in an operation. Under the National Defence Act, a Governor in Council decision is all that is lawfully required to place the Canadian Forces on active service. There is a need to clarify the status and implications of 'active service' under Canadian military law. This should be undertaken in a way that would clear up the semantic and legal confusion over the issue and enhance rather than diminish parliamentary control over Canadian Forces. The most significant differences between the situation of Canadian Forces and the Defence Forces is in the area of command and control. The legislative framework governing Canadian Forces works well domestically and in the context of international UN and similar forces.

The Defence (Amendment) Act, 1993 is the most recent piece of enabling legislation passed in Ireland providing for participation in international forces, and it is similar to the 1960 Act insofar as its terms are permissive rather than mandatory. The 1993 Act does not outline nor define the nature and kinds of operations envisaged under the Act. There is only the definition of 'International United Nations Force' as 'a international force or body established by the Security Council or General Assembly of the UN'. There is no mention of duties of a police character, enforcement action or 'peace enforcement'. It is a very short piece of legislation that in effect permits involvement in any kind of international UN force and leaves many issues undetermined. Nonetheless, its significance should not be underestimated. It provided the legal basis for participation in the UN sponsored, but NATO led operations in the former Yugoslavia. The extent to which this expansion of the municipal legal basis for Irish participation in UN forces will widen the

parameters of Irish involvement in general remains to be seen. It is apparent that Canada has conducted a more thorough consideration of all of the issues, and Ireland could learn a significant amount from the Canadian experience to date.

## Chapter 5

### LEGAL FRAMEWORK OF UN PEACEKEEPING FORCES AND ISSUES OF COMMAND AND CONTROL

#### Introduction

The question of command and control of UN and other multi-national operations is one of the more serious issues confronting the formation of international forces. Command of UN forces is fraught with difficulties arising from both subjective human factors, and objective legal constraints. This chapter examines these and related issues as a follow up to chapter 4, with particular reference to the UNIFIL and UNOSOM operations. The problems encountered at an international level often have their origins in municipal law and the national policy of contributing states. In this regard, the municipal laws of Canada and Ireland are relevant. Under Canadian law, at no stage in any international operation is national command<sup>1</sup> of Canadian Forces handed over to a foreign commander. However, unity of command is axiomatic to any military force, including international UN forces.<sup>2</sup> The problem of submission of national contingents serving in UN forces to foreign command, where the Force Commander is drawn from another contributing country, is unavoidable in multi-national UN forces.<sup>3</sup> In theory, the command structure of such forces is straightforward, but in practice this is seldom the case. A mechanism to overcome the difficulties so created has been described as follows:

the multi-national character [of UN forces] introduces difficulties that otherwise might not be encountered. Command is normally a national matter, and some countries, in recognition of this basic fact, have specific prohibitions precluding their military forces from taking orders from nationals

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<sup>1</sup> This and associated concepts are defined and discussed later, *infra.*, 128-131. See also M. H. MacDougall, 'UN Operations: Who Should Be In Charge?,' XXXIII *Revue De Droit Militaire Et De Droit De La Guerre*, 1 to 4, (1994), 21-87 at 27.

<sup>2</sup> See D.W. Bowett, *UN Forces*, London: Stevens ,(1964), MacDougall, *op. cit.*, 45-47, and *The Preparedness Gap: Making Peace Operations Work in the 21<sup>st</sup> Century*, A Policy Report of the United Nations Association of the USA, 2001, 3 and 15.

of another country. Fortunately ... a *modus vivendi* [can] be found during actual operations... by using [national] ... officers on the Force Commander's staff to transmit force directives.<sup>4</sup>

In order to take account of this and to participate in international operations, Canadian law and military custom allows for operational control to be vested in a Force Commander or equivalent, but even then the operational command is retained by a member of the Canadian Forces. This system seems to operate without any serious difficulty for Canada, or the international forces to which Canada contributes forces.

The situation with regard to Ireland is more problematic. For example, in spite of Ireland's significant contribution to the peacekeeping force in Lebanon, the Force Commander of UNIFIL does not appear to have been vested with lawful command over that portion of the Defence Forces forming part of the International UN Peacekeeping Force.<sup>5</sup> The procedure whereby the Minister for Defence directs the Chief of Staff of the Defence Forces to issue a directive to the Irish contingent commander, purporting to place the unit under the operational command of the UNIFIL Force Commander, has no statutory basis. In this way, the Minister's action may be *ultra vires*, as he or she is not empowered to issue directives or make regulations that in effect usurp the power of the Oireachtas (legislature). The matter has certain constitutional implications, which do not appear to have been considered either.

One of the fundamental characteristics of a UN peacekeeping force is its international character, and as such, it neither represents the State contributing a contingent, nor the host State.<sup>6</sup> It follows logically from this that a peacekeeping force

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<sup>3</sup> H. McCoubrey & N. White, *The Blue Helmets: Legal Regulation of UN Military Operations*, Aldershot: Dartmouth, (1996), 144.

<sup>4</sup> J. M. Boyd, *UN Peacekeeping Operations: A Military and Political Appraisal*, New York: Praeger, (1971), 150. For example, German forces in Somalia remained under the full command authority of the German Minister for Defence, but the forces did come under the 'operational control' of the US Commander of the Logistic Support Command, see Lt. Col. Vogt, 'Experiences of a German Legal Adviser to the UNOSOM II Mission', *XXXV (1-4) The Military Law and Law of War Review*, (1996), 219-227 at 220.

<sup>5</sup> See *infra*.

<sup>6</sup> D.W. Bowett, *op. cit.*, 121.

should not take the side of any party to a conflict, in particular, where there has been a breakdown in law and order to the extent that it is difficult to determine which, if any forces represent the legitimate interests of the state concerned. The consent of the host state to the presence of a peacekeeping force confers the legitimacy required for a lawful presence in its territory, and it is normally specified in an agreement concerning the rights and duties of the force.<sup>7</sup> In fact, the legality of a peacekeeping force on any country's territory should be guaranteed in a legal instrument known as the SOFA.

### **Legal framework of UN operations and the SOFA**

In order to understand the international legal context within which the municipal laws of contributing states apply, it is necessary to examine the legal framework of UN peacekeeping and similar forces.<sup>8</sup> The main legal structure for the majority of peacekeeping forces, including UNIFIL, was derived from the precedent of the first ever such force established in 1956, the United Nations Emergency Force (UNEF).<sup>9</sup> Nonetheless, individual forces did possess their own distinctive legal characteristics. Before a peacekeeping force commences operations it is necessary that some guidance be given to the Force Commander. For this reason the Secretary-General must issue a Directive to the Force Commander that is based on the mandate and provides the Force Commander with his or her instructions for carrying out the tasks assigned. At the same time it is necessary to negotiate with the host state a Status of Force Agreement (SOFA) that will enable the Force to carry out its function within the area of operations without undue interference from the host state. Based on these two documents the Force Commander will issue his or her own instructions and standing operating procedures. Ideally, both the Directive and the SOFA should be signed and ready when the force is being deployed, but the reality is that this is seldom the case.

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<sup>7</sup> *The Peacekeepers Handbook*, New York: International Peace Academy, (1984), 362.

<sup>8</sup> Lecture delivered by Col. P. Ghent, Deputy Judge Advocate General of the Defence Forces to students of the Military College. From the lecture it was evident that the Office of the Deputy Judge Advocate General was fully aware of the legal anomalies in regard to Irish participation in UN forces, and that the need to update and amend the relevant legislation had been highlighted by the Military authorities. See also P. Rowe, 'Maintaining Discipline in UN Peace Support Operations: The Legal Quagmire for Military Contingents', 5(1) *Journal of Conflict and Security Law*, (2000), 45-62.

<sup>9</sup> See UN Document S/12611, Secretary-General's report to the Security Council on the Implementation of Resolutions 425, 19 March 1978, para 4.

Most peacekeeping forces are rushed affairs, and tying up the loose administrative and legal strings is not a priority. In this way the legal framework for UN peacekeeping forces is usually made up of the following:

- the resolution of the Security Council or the General Assembly;
- the SOFA between the UN and the host State;
- the agreement by exchange of letters between each of the participating States and the UN; and
- the regulations for the force issued by the Secretary-General.

The need to define in advance the legal basis upon which the force relies for carrying out its duties has been accepted for some time as most advisable given difficulties that can be encountered.<sup>10</sup> Whereas the mandate establishing a force defines its purpose, a SOFA provides the more detailed principles under which a force functions, and specifies its relationship with the host government and other countries parties to the conflict. In this regard, it provides for special freedoms, privileges and duties that are necessary to enable a peacekeeping force carry out its mission.<sup>11</sup> The general nature of SOFAs is described by Professor Kirgis as follows:

When peacekeeping forces are to be stationed on the territory of a state, arrangements need to be made between the UN and the state regarding such things as logistics, facilities, privileges, and immunities of persons from property, dispute settlement etc. Beginning with the First UN Emergency Force in Egypt, these arrangements have been embodied in formal arrangements between the UN and host governments. Drawing on this experience, in 1990 the Secretary-General (at the request of the General

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<sup>10</sup> There have been SOFAs in respect of ONUC, UNEF, UNFICYP, and more recently, UNIFIL. For a discussion of the NATO SOFA and British forces, see P. Rowe, *Defence – The Legal Implications*, London: Brassey's, (1987), esp. Chapter 6.

<sup>11</sup> These include, *inter alia*, freedom of movement, freedom to carry arms, unrestricted communications in its area of operations, immunity of its members from criminal prosecution so that they are subject to the exclusive jurisdiction of their national state, landing and procurement facilities etc.

Assembly) prepared a model agreement to serve as the basis for individual agreements subject to modifications appropriate for particular cases.<sup>12</sup>

The obvious difficulty that can arise in situations like Lebanon and Somalia is who represents the legitimate interests of the state? In Somalia, all semblance of normality had disintegrated and there was no effective government with which to negotiate and agree terms for deployment.<sup>13</sup> In these circumstances, even if agreed, the SOFA would be worthless on the ground.

The issue of the consent of the host government to the presence of a peacekeeping force embodies one of the fundamental principles upon which traditional peacekeeping is based. Despite this, the question is dealt with in the recently signed UNIFIL SOFA in a remarkable fudged and ambiguous manner. The actual status of the Force is dealt with in Article 5 of the Agreement, which states:

UNIFIL and its members shall refrain from any action or activity incompatible with the impartial and international nature of their duties or inconsistent with the spirit of the present arrangements. The Force Commander shall take all appropriate measures to ensure the observance of those obligations.

For its part, the government of Lebanon undertakes to respect the exclusive international nature of UNIFIL.<sup>14</sup> The issue of freedom of movement is dealt with in Article 12 which states 'UNIFIL and its members shall enjoy... freedom of movement throughout Lebanon'. These articles are based on a similar provision in the model SOFA with the overriding consideration being to strike a balance between the sovereign rights of a host state and the peacekeeping interests of the international community.<sup>15</sup> There is no specific provision governing revocation of consent and it seems that the host state's consent is still imperative to ensure respect for sovereign rights, and this consent may be withdrawn at any time. This is also linked to the question of the duration of an operation, of which there is no mention in the UNIFIL

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<sup>12</sup> F. L. Kirgis, *International Organizations in their Legal Setting*, (2nd. ed.), Egan, Minnesota: West Publishing Co. (1992), 722-733.

<sup>13</sup> *The UN and Somalia, 1992-1996*, New York: UN, (1996); and *The Blue Helmets*, (3rd. ed.) New York: UN, (1996), 287-318.

<sup>14</sup> Article 6 of the UNIFIL SOFA.

SOFA. The issue of duration and consent can be crucial, as the experience of the UN Emergency Force (UNEF) proved.<sup>16</sup> The question of whether a peacekeeping force must withdraw if there is a unilateral withdrawal of host state consent is still a controversial issue which has become more problematic in the context of peace enforcement operations of recent years.

Much could be gained from incorporating in the SOFA, or appending thereto, a more detailed definition of the mandate of the force and the conditions thereof for its execution. Its omission is almost certainly deliberate as most mandates are couched in politically ambiguous terms in order to make them acceptable to the parties involved. This can often give rise to serious difficulties for the peacekeeping force in the subsequent interpretation and implementation of the mandate.

### **The case of UNIFIL**

In the case of UNIFIL, no SOFA was concluded when the Force was established and the Force had to rely on the principles of Articles 104 and 105 of the Charter. These articles provide that UN organs will enjoy such privileges and immunities in the territories of member states as are necessary for the independent exercise of their functions.<sup>17</sup> Reliance was also placed on The UN Convention on Privileges and Immunities, and the practice and custom of peacekeeping forces reflected in agreements concluded in respect of these forces.<sup>18</sup> However, the above Convention was inadequate in certain respects, most notably that criminal immunity only exists in respect of acts in the course of official duties.

The absence of a formal agreement in respect of UNIFIL did not create as serious a situation as it might initially seem. Agreements in respect of other peacekeeping forces were still awaiting formal signature and promulgation over

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<sup>15</sup> H. McCoubrey & N. White, *op. cit.*, (n.3), 73.

<sup>16</sup> See A. Di Blase, 'The Role of Host State Consent with Regard to Non-Coercive Actions by the UN, in A. Cassese,(ed.), *UN Peacekeeping: Legal Essays*, Dordrecht: Sijthoff and Nordhoff, (1978), 55-94, esp. 67-73.

<sup>17</sup> Article 104 and 105 of The UN Charter.

<sup>18</sup> Personal Interview, Mr. Rosetti, Legal Advisor to the Force Commander UNIFIL, Naquora, September 1989.

eighteen months after their inception.<sup>19</sup> The absence of a formal agreement did place the Force in a vulnerable position so far as its rights and status were concerned, though in most instances UNIFIL functioned adequately on the basis of a gentleman's agreement.<sup>20</sup> In any event, when Agreements were concluded almost immediately, as in the case of the peacekeeping Force in Cyprus, they still contained weaknesses.<sup>21</sup> The reliance on a gentleman's agreement is only satisfactory as long as those parties to it consider it to be to their advantage to respect its terms and negotiate amicably any difference that may arise. Certain freedoms are axiomatic to the nature of peacekeeping and without them the force's function would be so severely restricted as to make the fulfilment of its mandate difficult, if not impossible. It may also contribute to reluctance by member states to participate in peacekeeping duties. The Secretary-General of the UN has wide powers in relation to the internal affairs of peacekeeping forces.<sup>22</sup> He may be authorised to issue appropriate regulations and instructions to ensure the effective functioning of the force. The authority to issue such regulations stems from the Organization's exclusive competence in regard to the direction and operation of a peacekeeping force. Such regulations, if issued, can also constitute an important part of the legal framework of a force. Regulations usually govern the issue of command orders and such questions as the powers and responsibilities within the structure of the force.<sup>23</sup>

As no formal agreement was concluded with the Lebanese government until December 1995, the status of UNIFIL, and that of its personnel, was based upon the Security Council resolution establishing the Force. This could only be interpreted by

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<sup>19</sup> *Peacekeepers Handbook, op. cit.*, 32-33.

<sup>20</sup> Personal Interview, Rosetti, *op. cit.*, (n.18).

<sup>21</sup> The SOFA for UNFICYP took effect on 24 March 1964, three weeks after the Security Council approved its creation. See G.I.A.D Draper, 'The UN Force in Cyprus', *Revue De Droit Penal Militaire et De Droit De La Guerre*, (1967), 58-62.

<sup>22</sup> Personal Interview, Rosetti, *op. cit.* (n.18).

<sup>23</sup> They also govern administrative, executive and financial arrangements, and general rights and duties of members of the Force. Such regulations were issued for UNEF, ONUC and UNFICYP. Draper, *op. cit.* 65-71 and Bowett, *op. cit.*, 102-103, 119-121 and 219-222. Regulations in respect of ONUC are reproduced in their entirety in R. Higgins, *The UN*

reference to the guidelines that were published for the Force.<sup>24</sup> These provided, *inter alia*, that the Force was under the command of the UN, vested in the Secretary-General, under the authority of the Security Council. The command in the field was to be exercised by the Force Commander, who was responsible to the Secretary-General. As with the SOFAs concluded for the peacekeeping forces in Cyprus and the Congo, the guidelines provide that the Force must enjoy freedom of movement and be granted the relevant privileges and immunities provided for by the Convention on the Privileges and Immunities of the UN.<sup>25</sup> The guidelines contained considerably less detail than the SOFA for other peacekeeping forces. This reflects the hasty manner in which UNIFIL was established and the fact that the authority of the government of Lebanon did not extend to the area where the Force was deployed.<sup>26</sup> In these circumstances, guaranteeing the exclusion of the jurisdictional competence of the host state was probably seen to have little practical value.

Certain matters not provided for in the UNIFIL guidelines laid down by the Secretary-General, could have been included in Force or Staff Regulations that were issued for all the other peacekeeping forces prior to UNIFIL. The authority to make force regulations stems from that given the Secretary-General by the Security Council to establish a peacekeeping force.<sup>27</sup> However, no such regulations have been issued for UNIFIL. Instead UNIFIL relies on a series of standing operating procedures (S.O.P.'s), which lay down the guidelines and define the method by which the UNIFIL operation is conducted.<sup>28</sup> They appear to be issued on behalf of the Force Commander, though he does not sign them. While their legal standing is consequently questionable, they have worked out primarily due to the goodwill and the co-operation of the participating contingents.

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*Operation in the Congo (ONUC) 1960-1964*, London: Oxford University Press, (1980) 68-77 and 207-209.

<sup>24</sup> These are contained in UN Document S/12611, 19 March 1978 and they were approved by the Security Council Resolution 426(1978), 19 March 1978.

<sup>25</sup> *Ibid.*

<sup>26</sup> I.J. Rikhye, *The Theory and Practice of Peacekeeping*, London: Hurst and Co., (1984), 100-113.

<sup>27</sup> Rosetti, *op. cit.*, (n.18)

<sup>28</sup> *Ibid.*, and personal interview, Defence Forces Legal Officer, 13 March, 1998.

### **Consequence for Irish and Canadian personnel in breach of UN regulation**

The force regulations issued for previous peacekeeping forces, and the standing operating procedures in respect of UNIFIL, are intended to be legally binding, although in many instances they are general in nature and open to different interpretations.<sup>29</sup> In the circumstances, it is not clear what the consequences are if an Irish or Canadian soldier or Commander at any level is in breach of UN regulations, or other established procedures. Can such a breach be regarded as an offence under military law? The mere fact that a state concluded an agreement to contribute troops to UN peacekeeping does not mean it has automatically amended its municipal law, or that it has a legal obligation to do so. It may well be the case that breaches of UN regulations or procedures are also offences against military law, but if this is so, it is not because of any UN regulation having municipal effect. In this way, the situation of an Irish or Canadian soldier or officer who finds himself charged before the military authorities with the violation of a specific UN regulation or similar instruction is unclear. A potential defence that might be put forward is that there is no such offence known to Irish or Canadian municipal or military law.

On the other hand, it could be argued that a breach of UN regulations is an example of conduct to the prejudice of good order and military discipline contrary to Section 168 of the Irish Defence Act, 1954; or Section 129 of the Canadian National Defence Act.<sup>30</sup> The military authorities often use section 168 and Section 129 as a form of safety net in the event of a more specific charge being struck down, or when there is uncertainty regarding the exact nature of the offence committed. A formal charge under either section in Canadian or Irish military law while part of a UN operation raises fundamental issues, namely, which military discipline is covered by the Act, that of the relevant armed forces, or that of the UN? It is submitted that it would not be possible to establish, beyond a reasonable doubt, that every act that

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<sup>29</sup> *Ibid.* On the issue of discipline and the legal framework governing contingents with UN peace operations, see P. Rowe, 'Maintaining Discipline in UN Peace Support Operations: The Legal Quagmire for Military Contingents', *op. cit.*, 45-62.

<sup>30</sup> Section 168 of the Defence Act, 1954 provides *inter alia*, that every person subject to military law who commits any act, conduct, disorder or neglect to the prejudice of good order and discipline is guilty of an offence against military law. Section 129 of the National Defence

violates UN regulations is *per se* prejudicial to the military discipline of either the Defence Forces or Canadian Forces. This argument is all the greater in respect of UN standing operating procedures. In order to overcome this difficulty, an amendment to the Defence Act, 1954 and the National Defence Act is required, to the effect that any conduct of a member of an Irish or Canadian contingent of a UN peacekeeping or other force which breaches UN regulations or procedures, shall be considered to be conduct to the prejudice of good order and discipline for the purpose of Section 168 or Section 129 respectively. This particular legal difficulty in relation to the binding effect of regulations is also common to other contingents and peacekeeping forces.<sup>31</sup> The matter is made all the more difficult in UNIFIL owing to the fact there are no regulations, and the standing operating procedures are unsigned and of dubious authority.

### **Command and control**

An even more serious difficulty than that outlined above arises in the case of command, and the command of UN has always been 'a somewhat delicate issue'.<sup>32</sup> In this context there are three inter linked and essential features of the military system, namely command, discipline and leadership. At the head of the system stands the commander. The term commander is used generally to refer to any officers in positions of command. In the Canadian Forces and the Defence Forces, the term commander can be used generally to describe any officer who is appointed to a position of command of a command,<sup>33</sup> unit or element of the armed forces.<sup>34</sup> Traditionally, command is defined

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Act states that 'any act, conduct, disorder, or neglect to the prejudice of good order and discipline is an offence...'

<sup>31</sup> Draper, *op. cit.*, 65-68.

<sup>32</sup> H. McCoubrey, 'International Law and National Contingents in UN Forces', XII (3) *International Relations*, 39-50, at 41. On the issue of command and international humanitarian law, see C. Greenwood, *Command and the Laws of Conflict*, Pamphlet published by Strategic and Combat Studies Institute for the Ministry for Defence, 1993

<sup>33</sup> Command of a command in Ireland refers to a specific territorial area, whereas in Canada it denotes a particular branch such as 'air', 'land' or 'maritime' command. For an overall view of Canadian forces and command issues in peacekeeping, see S.M. Maloney, 'Insights into Canadian Peacekeeping Doctrine', 76 (2) *Military Review*, (1996), 12-23.

<sup>34</sup> In the Canadian Forces and the Defence Forces, an officer commanding a command is usually a general officer appointed by the Chief of Defence Staff in Canada, and the Minister

as the legal authority to issue orders and to compel obedience. In this way, command is the authority lawfully exercised by a commander over his or her subordinates by virtue of the rank or appointment held. Command provides the authority and responsibility for effectively planning and executing the employment of assigned resources to accomplish the mission. Thus, command, decision and organization are highly integrated.<sup>35</sup>

Control, on the other hand, is the process through which a commander, assisted by staff, organises, directs and co-ordinates the activities of the assigned forces. The command and control process establishes how the commander and staff accomplish the mission i.e. in the case of a UN force, fulfils the mandate. Command is a human activity that involves procedures, methodologies and techniques used to understand the prevailing situation, to decide what action to take, to issue instructions, and to supervise the execution of orders. As it is a process involving options and judgement, it also has an ethical dimension. Traditionally, commanders are held ethically responsible for their acts or omissions. All members of the Canadian Forces and the Defence Forces are ethically responsible for observing a code that is implicit in the custom of the service and military regulations.<sup>36</sup>

Command and control issues are not new to the UN or multinational forces. In 1945, a collective security system was put in place to ensure that recalcitrant states could be dealt with in accordance with the provisions of the UN Charter. An essential element in the collective security mechanism was the planned provision of national contingents that together would comprise the UN armed forces.<sup>37</sup> This never materialised, but the signatories to the Charter agreed upon a model for the command

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for Defence in Ireland. Officers are also appointed to command units, e.g. the 65 Infantry Battalion, UNIFIL, or the Canadian Airborne Regiment. The major difference between command appointments is that they all have graduated powers of punishment and other powers drawn from the National Defence Act and the Defence Acts respectively.

<sup>35</sup> H. Eccles, *Military Concepts and Philosophy*, New York: Rutgers University Press, (1965), 118-119.

<sup>36</sup> R. Gabriel, *To Serve with Honour*, Westport: Greenwood Press, (1982). These are traditions and customs that, although unwritten, have come to be accepted aspects of military practices and behaviour, Interview, Defence Forces Legal Officer, March 1998.

<sup>37</sup> Goodrich, Hambro and Simons, *Charter of the UN*, (3rd. Ed.), New York: Columbia University Press, (1969), 314-326.

and control of UN forces, but cold war political developments prevented its actual adoption.<sup>38</sup> This model is to some extent the benchmark by which to examine all subsequent arrangements for command of international UN forces. In effect, the Charter model was replaced by systems of command and control that evolved to meet the needs of two quite distinct UN missions. The most common of these systems evolved to cater for the unique nature of peacekeeping operations, but even this system is not as straightforward as it first might appear. The other general system to emerge was designed to cater for the more complex and controversial multinational enforcement operations.

Like the concept of peacekeeping, these command and control systems emerged outside the express constitutional framework of the UN Charter. They were a response to the need to provide some workable alternative in the context of cold war suspicion and mistrust. Nevertheless, even with the end of the cold war, the problems surrounding this issue remain. In order to analyse the complexity of the problems involving the concept of command and control, it is useful to outline some definitions and historical background.

In order to understand how command and control of armed forces operates in practice, it is necessary to examine what these concepts mean in practical military terms, and the legal implications of the different categories and levels utilised in national and international armed forces. The actual operation of the system of command and control in Canadian Forces is outlined and defined in the Canadian Forces Joint Doctrine Manual. Although this is a Canadian military document intended primarily for North Atlantic Treaty Operations, and it is not a legal document and possesses no legal status under either Canadian or international law, it does outline what is internationally accepted as constituting the three levels of military command i.e. full, operational and tactical command.<sup>39</sup> These are defined in the Manual as follows:

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<sup>38</sup> J. W. Houck, 'The Command and Control of UN Forces in the Era of 'Peace Enforcement'', 4 (1) *Duke Journal of Comparative and International Law*, (1993), 1-69 at 11.

<sup>39</sup> Department of National Defence, *Joint Doctrine for the Canadian Forces Joint and Combined Operations*, pp.2-1 and 2-2.

- Full command is the military authority and responsibility of a superior officer to issue orders to subordinates. It covers every aspect of military operations and administration and exists only within national services. It is sometimes referred to as national command. A UN Force Commander, or an alliance or coalition commander does not have full command over forces assigned to him or her. It is the ‘command’ referred to in the Irish Constitution and legislation governing command of all Defence Force personnel.<sup>40</sup>

- Operational command is the authority of a commander to assign missions or tasks, redeploy forces, and reassign forces. It does not include responsibility for administration or logistics.

- Tactical command is the authority of commander to assign tasks to forces under their command. It is narrower in scope to operational command.

The concept of control is also an integral part of the overall command of armed forces. It is the authority exercised by a commander over part of the activities of subordinate organizations or other organizations not normally under command. Control is also defined more specifically in military doctrine as operational, tactical, administrative, or technical.<sup>41</sup>

- Operational control is the authority of a commander to direct forces assigned so that the commander can accomplish specific missions or tasks, which are usually limited by function, time, or location; to deploy units concerned ; and to retain or assign tactical control of those units.

- Tactical control is the authority of a commander to give detailed direction and control the movement of units necessary to accomplish a mission or task.

- Administrative control is the direction or exercise of authority over subordinates regarding administrative matters.

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<sup>40</sup> See *infra*. 163-171.

<sup>41</sup> Department of National Defence, *Joint Doctrine for the Canadian Forces Joint and Combined Operations*, pp.2-1 and 2-2.

- Technical control is control within specialised areas such as medical or legal jurisdiction, parallel to but outside the chain of command, for purely technical issues. Operational commanders can override this control if it is seen to jeopardise the mission.

Under the terms of the UN Charter, the Security Council has primary responsibility for the maintenance of international peace and security and UN member states agreed to be bound by the decisions of the Security Council concerning such matters. In accordance with this primary role, the Security Council was authorised to establish a UN armed force under Article 43 of the Charter. Furthermore, Article 46 gave the Security Council responsibility for making plans for the application of the armed forces under its control. In addition, the Security Council had a wide range of powers under Charter to bring about the pacific settlement of disputes, or to authorise the use of varying degrees of coercion and force. It is now a matter of historical record that members of the UN have been prepared to support the establishment of a UN force in situations of emergency when they considered that a force was called for, and when they knew what its purpose and specific task would be. Although ‘stand by’ arrangements have been agreed with a number of member states, they have not been disposed to support the establishment of a permanent force. The Charter provided for the establishment of a Military Staff Committee to advise and assist the Security Council on all questions relating to the Security Council’s military requirements.<sup>42</sup> It envisioned an important role for the Military Staff Committee once UN forces became involved in a conflict situation. It was to ‘advise and assist’ the Security Council on the ‘employment and command of forces placed at the disposal of the Security Council’.<sup>43</sup> In addition, it was to be to this Committee that the strategic direction of any armed force placed at the disposal of the Security Council was to be entrusted.<sup>44</sup>

There is no definition of what strategic direction means in this context. However, the Military Staff Committee was modelled on the function and structure of the Allied Combined Chiefs of Staff during World War II.<sup>45</sup> This operated on the basis

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<sup>42</sup> Article 47 of the UN Charter.

<sup>43</sup> *Ibid*, para. 3.

<sup>44</sup> *Ibid*.

of regular consultation on the broad objectives of the war and after establishing a common position in relation to an issue, the members would consult their respective civilian leaders for approval.<sup>46</sup> Then the crucial link in the chain of command emerged, the military commanders would translate political direction received from the civilian leadership into a military plan that was communicated to the subordinate operational commanders on the ground for execution. In this way it appears that the strategic direction referred to in the Charter meant in practice a system or process whereby the Military Staff Committee would fulfil the vital link in the chain of command from the Security Council to the operational commander of UN forces on the ground. In practice this would mean that after considering the views of the operational commander on the ground, the Military Staff Committee would advise the Security Council of the military options available to it and the implications of any military plan of action. Likewise, the Security Council would outline to the Military Staff Committee the decision and objectives to be achieved, and these would be translated into a military plan that would be communicated to the field commander(s) for their action.

The Military Staff Committee was not intended to be involved in the day to day operational or tactical command of UN forces. It was considered preferable to vest the detailed operational and tactical decisions in a single commander. This was certainly consistent with conventional military operations and practice. Interestingly, there seemed to be a consensus about the meaning of command, and the problems relating to command centred on agreeing a mechanism for selecting and appointing commanders. In the event, this latter issue remained unresolved and it was agreed that the selection of individual commanders would be determined on the basis of the requirements of each case.<sup>47</sup>

The Military Staff Committee did present a report to the Security Council on the planned permanent UN force, but there were areas of insurmountable

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<sup>45</sup> Goodrich, Hambro and Simons, *op. cit.*, 329.

<sup>46</sup> W. Churchill, *The Grand Alliance*, The Second World War Series, Vol. 5, London: Cassells, (1950), 686-687.

<sup>47</sup> R. C. Hilderbrand, *Dumbarton Oaks: The Origins of the UN and the Search for Post War Security*, Chapel Hill: University of North Carolina Press, (1990), 157-158.

disagreement.<sup>48</sup> The question of command and control was not one of these areas, and the report recommended that the UN force remain under exclusive national command except when operating under the Security Council.<sup>49</sup> When required by the Security Council to act under the provisions of the Charter, the UN forces would then come under the control of the Security Council and the Military Staff Committee would be responsible under the Security Council, for their strategic direction.<sup>50</sup> There was also agreement that national contingents would remain under the command of national commanders, or be appointed by their respective Member States.<sup>51</sup> More significantly, the Security Council was to have the authority to appoint an overall supreme commander or its equivalent, though there remained disagreement about the appointment of subordinate commanders of air, sea and land forces.<sup>52</sup>

This, then, was the command and control model to be adopted for Chapter VII operations. When the two major UN enforcement operations in Korea and the Persian Gulf are examined, it is evident that the model envisioned under the Charter was not followed.<sup>53</sup> In fact, Security Council involvement was marginal. After initial authorisation, the Security Council had little political control over the operation, largely due to the divisions within the Council itself and the military requirements of each operation. In the circumstances, the one military power with the capacity to act and fill the vacuum took the lead. In this way, *de facto* command and control of the operations was in the hands of the United States. Despite this, the actual command and control mechanism for each operation was significantly different.<sup>54</sup> The current force

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<sup>48</sup> Report of the Military Staff Committee, General Principles Governing the Organization of the Armed Forces Made Available to the Security Council by Member Nations of the UN, UN Security Council Official Reports Supp. (no.1), UN Document. S/336(1947), reprinted in the *1946/47 UN Yearbook*, New York, UN, 424-43.

<sup>49</sup> *Ibid.*, Article 36.

<sup>50</sup> *Ibid.*, Articles 37 and 38.

<sup>51</sup> *Ibid.*, Article 39.

<sup>52</sup> *Ibid.*, Article 41.

<sup>53</sup> Houck, *op. cit.*, 12 to 20.

<sup>54</sup> *Ibid.*

in Kosovo is UN mandated and 'deployed under UN auspices'.<sup>55</sup> It represents the reality of Chapter VII operations in the post cold war era and an emasculated UN. The enabling resolution stipulated that the 'international security presence with a substantial NATO participation must be deployed under a unified command and control'. This means that it is NATO led under the North Atlantic Council and a command structure incorporating SHAPE (Supreme Headquarters Allied Powers Europe). Within SHAPE there is an Inter Co-ordination Centre (ICE) for Non NATO Troop Contributors. But where is the real concentration of power? It is not with the Secretary-General, and nor is it with the Security Council. This is a NATO led and *de facto* NATO commanded operation. There is no strategic direction from the Military Staff Committee or any other UN body, and the reality is that the Security Council is merely kept informed.

### **Command and control of peacekeeping operations**

The situation regarding the command and control of peacekeeping forces was problematic for a number of years and linked to the constitutional difficulties surrounding the establishment of peacekeeping operations.<sup>56</sup> The then Soviet Union and its allies believed that any action by the UN involving the use of force should be the primary responsibility of the Security Council, and that the Military Staff Committee should be at the disposal of the Council. The majority of member states took a different point of view. Peacekeeping operations were regarded as a special kind of UN activity involving the consent of the states concerned and outside the scope of Chapter VII enforcement provisions. In the circumstances, it was permissible and even necessary, that the control of peacekeeping operations be vested in the Secretary-General. Much of the early difficulties have been resolved since the establishment of UNEF II. The then Secretary-General, Kurt Waldheim, proposed formally that the Security Council have ultimate control over peacekeeping missions. This would involve the Security Council authorising the operation initially and approving any fundamental changes in its mandate. The Secretary-General exercised actual control

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<sup>55</sup> Resolution 1244 (1999), 10 June 1999, para. 5.

<sup>56</sup> J.O.C. Jonah, 'The Management of UN Peacekeeping', I. J. Rikhye, & K. Skjelsbaek, (eds.) *The UN and Peacekeeping*, New York: St. Martins Press (1991), 75, and H. McCoubrey and N. White, *op. cit.* (n.13), 137-152.

of the day-to-day operation.<sup>57</sup> This was intended to avoid the difficulties of involving a potentially divided Committee in the detailed activities of an operation. This was a valid cause of concern; as such a Committee was unlikely to be able to respond quickly to critical situations on the ground. Even the system adopted was found to be seriously wanting during the crisis in the former Yugoslavia, when General McKensie and others were very critical of the lack of support and leadership from the UN headquarters in New York.

The precedent established with UNEF II is now well established, and all traditional peacekeeping operations, including UNIFIL, have followed this pattern. In practice this meant that in the case of UNIFIL, the operation was authorised by the Security Council, while the day to day supervision and responsibility for what happens on the ground rests with the Secretary-General. This is an excellent model when there is general agreement in the Security Council about the political and military goals of the peacekeeping operation. In the case of UNIFIL, this consensus within the Security Council was not always present and from the beginning it is questionable if it had the full support of all the members of the Council that originally voted in favour of adopting Resolution 425 (1978).<sup>58</sup> This had left the Secretary-General in a difficult and almost untenable position regarding UNIFIL on occasion. It shows that even this model for relatively straightforward peacekeeping operations has limitations. These limitations are not legal and do not reflect a bad system of command and control. They are political difficulties caused by different political agendas and different perceptions of the function of peacekeeping operations. Even the best system cannot withstand the pressures created by ambiguous or divided leadership from the Security Council.

An Under Secretary-General for peacekeeping operations and a military advisor assist the Secretary-General. In theory, the military advisor should fulfil the function intended for the Military Staff Committee and the position was created by Dag Hammarskjöld in late 1960 to assist in the management of peacekeeping

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<sup>57</sup> For a discussion of the delegation by the Security Council of powers to the Secretary-General, see D. Sarooshi, *The United Nations and the Development of Collective Security*, Oxford: Clarendon, (1999), 50–85, esp. 63.

operates.<sup>59</sup> It is essential that the Secretary-General have available to him or her independent military advice relating to proposed or ongoing operations. The role of the military advisor is, as the name suggests, purely advisory. A Force Commander in fact exercises command of peacekeeping operations on behalf of the Secretary-General. Not surprisingly in the circumstances, the Secretary-General, with the approval of the Security Council, appoints the Force Commander. What the exact criteria are for appointment to this position is not clear, but it is the most significant link in the chain of command from the Secretary-General to the contingents on the ground. As the Military Staff Committee is essentially out of the picture, the role of the Force Commander and the military advisor is crucial to the Secretary-General. It is often said that peacekeeping is more a political than a military mission, consequently, a Force Commander must be as much a diplomat and politician, as a military commander.<sup>60</sup> Nonetheless, the inherently military nature of peacekeeping should not be underestimated, even in the more complex multi-dimensional operations of recent years.

Once deployed in the field, the Force Commander assumes the main management functions, but it would be misleading to suggest that he or she is in command in the sense understood in conventional military operations. A traditional peacekeeping operation has a unique system of dual command, where the Force Commander or equivalent reports directly to the Under Secretary-General for Peacekeeping Operations. The Force Commander usually has a Chief of Staff to assist in the exercise of military command and authority in the field. However, all peacekeeping operations have a significant civilian component under a Chief Administrative Officer.<sup>61</sup> The Chief Administrative Officer will report to the Force Commander, but he or she also reports directly to Field Operations Division in New

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<sup>58</sup> Adopted 19 March 1978.

<sup>59</sup> For general background on the role of the military advisor, see I.J. Rikhye, *Military Advisor to the Secretary-General: UN Peacekeeping and the Congo Crisis*, London: Hurst and Co., (1993).

<sup>60</sup> Jonah, *op. cit.*, 77.

<sup>61</sup> This civilian component should not be confused with the humanitarian workers, human rights and electoral monitors, and nation building civilians, part of the more recent multi-dimensional peacekeeping operations.

York. Given the logistical, administrative and financial aspects of any operation, and the fact that the UN is a civilian, and not a military bureaucracy, this is a good idea. Differences have arisen between Force Commanders and the Chief Administrative Officer in the field, however, it is now well established that the Force Commander has overall responsibility for the field management of peacekeeping.<sup>62</sup> In practice, problems can still arise and there is a need for co-ordinating the military and civilian staff responsibilities and efforts. A lot also depends on subjective factors such as personality, but this does not excuse failure to address structural or organizational deficiencies.

In UN peacekeeping and similar operations, as in other military operations, no two situations are identical. The political situation and tactical considerations appropriate to one mission will not necessarily prove relevant elsewhere. There are, nonetheless, certain matters of principle that remain unchanged whenever an international force is deployed. One of the most critical problems facing a senior officer in a UN force is that of command, and the reality that troops under his or her operational control will also remain loyal to their national governments. This potential problem of duality of allegiance is common to all international forces and alliances, but it may be more acute in what can often be an *ad hoc* and hastily established UN force. The growing tendency of some national contingents within a UN force to maintain a back channel communication link with their home governments is a potential problem that may adversely affect effective management of peacekeeping operations in the field.<sup>63</sup> For practical reasons and being aware that it can do nothing to prevent such communication, the UN has not discouraged links between national governments and battalions. But it remains a threat to the operational functions and effectiveness of a peacekeeping force.

It has happened that on occasion, national governments have become aware of incidents and operational developments on the ground involving UNIFIL and other

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<sup>62</sup> Personal interviews, Lt. Gen. Walgren and Lt. Gen. Callaghan, former Force Commanders, UNIFIL, 1989 and 1998 respectively.

<sup>63</sup> Jonah, *op. cit.*, 86. See also C. Brady and S. Daws, 'UN Operations: The Political-Military Interface', 1 *International Peacekeeping* (F. Cass), (1994), 29-79, esp. 66, 68 and 71.

peacekeeping operations prior to UN headquarters in New York.<sup>64</sup> While this may be a reflection on the nature of communication within the Organization, it is especially embarrassing when the government concerned seeks a response, and New York is still not formally informed of all the facts. The most serious negative dimension to this ability of contingents to stay in close touch with their respective national governments, is when the same government gives what amounts to operational orders to the national contingent that are inconsistent or even contrary to those of the Force Commander.<sup>65</sup> This undermines the concept of integrated UN command, and it is serious threat to the proper command and management of peacekeeping operations in the field.<sup>66</sup>

### **Command and control of UN forces in Somalia**

Unlike the model prevailing with UNIFIL, the command and control mechanism for the UNOSOM II operation in Somalia was not according to a well-established precedent. The background to the establishment of the operation is outlined elsewhere.<sup>67</sup> Prior to the Somalia crisis, the Secretary-General had responded to a Security Council request to report on ways the capacity of the UN could be improved upon in the maintenance of international peace and security. In his report, *An Agenda for Peace*<sup>68</sup>, the then Secretary-General Boutros-Ghali, conducted a detailed

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<sup>64</sup> Personal Interviews, Walgren and O Callaghan, *op. cit.*

<sup>65</sup> Jonah, *op. cit.*, 87 and MacDougall, *op. cit.*, 63. The following quote illustrates the point:

'Individual contingents remain, as they have been historically, extremely reluctant to accept the chain of command within missions and have placed their loyalty to Force Commanders in doubt by referring matters to national authorities.....the case of Italian 'insubordination' in Somalia...is merely the most published case. It is well known that French and British soldiers in the former Yugoslavia refer to Paris and London before, if at all, consulting with the UN Secretariat in New York. Among officers serving in Bosnia, the Spanish battalion is known to refer practically all operational issues that arise on the ground to authorities in Madrid. Similarly, Indonesian force in Cambodia were notorious for their tendency to take directions from the Indonesian Ambassador in Phnom Penh rather than from Lt. Gen. John Sanderson, UNTAC's Force Commander.' (Mats R. Berdal, *Whither UN Peacekeeping*, Adelphi Paper 281 (1993) at 42).

<sup>66</sup> For recommendations to improve command and control of UN operations, and enhance the military expertise available to the Department of Peacekeeping Operations, see *The Preparedness Gap: Making Peace Operations Work in the 21<sup>st</sup> Century*, *op. cit.*, 2-3 and 15-18.

<sup>67</sup> *Infra*. Chapter 6. See also, *The UN in Somalia*, *op. cit.*, 3-29.

examination of the full range of UN peace and security responsibilities, and the mechanisms available. The Secretary-General envisaged a role for the moribund Military Staff Committee in assisting to draw up agreements with member states under Article 43 of the Charter. One of the more intriguing aspects of the report concerned traditional peacekeeping operations and enforcement action operations. In an attempt to reflect the changing nature of maintaining international peace and security, and the *de facto* situation emerging on the ground, the Secretary-General called for the creation of 'peace enforcement' units. These were to be composed of personnel from member states in accordance with agreements drawn up under Article 43 of the Charter. The concept was something of a half way house between traditional peacekeeping and enforcement action. The units were to be heavily armed and would be deployed with the authorisation of the Security Council and serve under the 'command' of the Secretary-General.<sup>69</sup>

It is easy in hindsight to be critical of proposals that have since failed, but given the history of command and control mechanisms within UN forces, it was at the least overly optimistic to expect that this would be acceptable in practice. Furthermore, once relations between Boutros-Ghali and the United States Administration became strained, the actual difficulties were exacerbated.<sup>70</sup> A proposal of this kind required the active support of the United States, and a willingness to agree to relinquish some degree of operational command and control to the Secretary-General. This was never a likely prospect, despite the optimism of the time. Identifying what amounted to a form of 'second generation' peacekeeping and clearing up some of the semantic confusion surrounding the various concepts was useful. Unfortunately, the issue and complexity of the command and control of these new so called 'peace enforcement' operations was not appreciated. This soon became evident after the UNOSOM I operation, which was a more traditional style peacekeeping operation, was being wound down and replaced by the more robust and United States led UNITAF mission.

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<sup>68</sup> UN document: A/47/277 - S/24111, (June 1992).

<sup>69</sup> For a discussion of the delegation by the Security Council of powers to the Secretary-General, see D. Sarooshi, *op. cit.*, 50-85 and *passim*.

<sup>70</sup> See *The Irish Times*, 11 and 12 October 1993.

The actual idea for a countrywide enforcement operation in Somalia originated with the United States.<sup>71</sup> The Secretary-General favoured UN command of any such operation, but he conceded it was not a realistic option at that time. In fact, the Chairman of the Joint Chiefs of Staff, General Colin Powell, and other military leaders were insistent that the operation be under the command and control of the United States. This was not surprising, and the most the Secretary-General could do was attach as many conditions as possible to ensure some control over the operation by the UN itself. It was the Security Council that ultimately decided the issue in what was essentially a compromise. Security Council Resolution 794 (1992) implicitly accepted the United States demand to command the operation that was to be known as UNITAF. The Security Council provided the new force with an expansive mandate which included the usual euphemism for the use of force i.e. authorising 'all necessary means' to establish a secure environment for the delivery of humanitarian aid in Somalia.

Despite agreeing to the fundamental demand for command by the United States, the Resolution also authorised the Secretary-General to participate in the necessary arrangements for command and control of the forces.<sup>72</sup> The Security Council also agreed to the establishment of an ad hoc commission to oversee the operation as recommended by the Secretary-General. Furthermore, the Security Council declined to place the existing small force, UNOSOM I, under the command of the United States. Instead it opted to create a formal liaison mechanism between UNOSOM I and the unified command.<sup>73</sup> The Security Council did, however, retain one vital control mechanism. It reserved the right to phase out the UNITAF part of the operation and effectively terminate it in favour of a more traditional peacekeeping operation.<sup>74</sup>

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<sup>71</sup> Letter dated 29 November 1992 from the Secretary-General Addressed to the President of the Security Council, U.N. SCOR, 47th Session at 1, Document S/24868, 1992.

<sup>72</sup> *Ibid.* para. 12.

<sup>73</sup> *Ibid.* paras. 14-15.

<sup>74</sup> *Ibid.* para. 18.

The initial decision of the Security Council and its general policy regarding UNITAF are important in so far as they indicated a significant departure from previous models for command and control. At a superficial glance, the model seems to resemble the single state United States dominated system employed during the Korean operation, and to a lesser extent the managed coalition model adopted during the 'Gulf War.' In the debate leading to the adoption of Resolution 794 (1992), concern was expressed on a number of occasions about the need to retain significant political control of the Force by the Secretary-General and the Security Council, and this was reflected in the limited but important control retained by them under the Resolution.<sup>75</sup> The fact that the United States did not get its own way entirely and the evident tension that developed between the United States and the UN over the timing of the transition to the second phase of the operation, UNOSOM II, indicated how effective this control turned out to be.<sup>76</sup> During the course of the UNITAF phase of the Somalia operation, the United States and the Secretary-General engaged in public debates in the media that reflected in unambiguous terms the level of disagreement between them.<sup>77</sup> In particular, the United States accused the UN of being too slow to assume responsibility for the operation, while the Secretary-General insisted that the United States needed to do more to disarm the violent elements of the population before the UN could assume control. This form of public airing of differences arose as much from the command and control mechanism, as from the nature of the conflict in Somalia. Disagreements of this nature, even if they did occur, were not aired publicly during the Korean operation, or during the 'Gulf War.'

The establishment of the UNOSOM II force of twenty eight thousand personnel in March 1993 had many similarities with that of a traditional peacekeeping force. A Turkish General Cevic Bar commanded the force, and he had contingents from a wide political spectrum under his control. The force was established under

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<sup>75</sup> Security Council Official Records, 47th. Sess., 3145 Mtg. at 17, UN Doc. S/PV. 3145(1992).

<sup>76</sup> C. O'Cleary, 'US Public Grows Wary of Foreign Entanglements', *The Irish Times*, 12 October 1993, p.11; J. Lancaster, 'United States Beginning Pullout form Somalia; Slow Withdrawal Aimed partly at Forcing UN to Take Responsibility', *Washington Post*, 19 January 1993, p.A1.

<sup>77</sup> *Ibid.*

Resolution 814 (1993), which included a provision to the effect that the force would be supervised closely by the Secretary-General and the Security Council.<sup>78</sup> More importantly, Resolution 814 (1993) cited Chapter VII and the force was expressly authorised to use force. This was the first such occasion since the ONUC operation in the Congo prevented the attempted secession of the Katanga province that a UN operation of this nature was authorised to use force in this way. In addition, the United States agreed to allow a significant number of its armed forces participate in the operation.<sup>79</sup> This, not surprisingly, was made subject to a number of significant conditions, none of which were conducive to a unified system of command and control under the Security Council.

In the first instance, orders from the UN affecting United States forces were transmitted from the UN Force Commander to the United States troops through the UNOSOM II Deputy Commander, Major General Montgomery, who was a United States army general. General Montgomery was the highest ranking United States serving officer in the field, and in that capacity he was also the Commander of United States Forces Somalia.<sup>80</sup> This was a convenient mechanism to allow the United States ensure that one of its own officers retained full command of United States troops in Somalia, as General Montgomery reported directly to the Commander in Chief, United States Central Command. In fact, United States Central Command considered that it retained command over United States Forces Somalia, and delegated 'operational, tactical and/or administrative control of USFORSOM (United States Forces Somalia) as required to support the Commander, UNOSOM II Force Command.'<sup>81</sup> It was no surprise either that the Force Commander belonged to a member of NATO, and that the Secretary-General's Special Representative in Somalia was from the United States, retired Navy Admiral Howe. The Force Commander reported directly to the Special

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<sup>78</sup> S/Res/814 (1993), 26 March 1993, paras. 14 and 18.

<sup>79</sup> *Message from the President of the United States - A Report on the Military Operation in Somalia*, October 13, 1993, (US Government Printing Office, 1993).

<sup>80</sup> *Ibid.* 9 and 18.

<sup>81</sup> *Ibid.* 18.

Representative, who in turn reported to the Secretary-General.<sup>82</sup> This gave significant influence to the United States, even if it did not formally command the mission.

The question with this system is what did it all mean in reality, and how effective was it as a model for command and control in practice? The United States was adamant that it retained full command of all its forces, and it did not even relinquish operational control of combat forces to the Force Commander of UNOSOM II. With regard to United States logistic units that were there to support the UN operation, these were said to be assigned to the Force Commander through the Commander of United States Forces in Somalia for 'operational control.'<sup>83</sup> That meant that for purposes explicitly agreed in writing between the United States and the UN, the Force Commander may provide them direction in their logistic mission of supporting UN units.

This was a complex system that was made even more cumbersome by the decision of the United States to establish a Quick Reaction Force. The justification for this was the continuing presence of well armed private militias that 'thwarted the original, lightly armed UN peacekeeping mission (UNOSOM I) as well as the UN's inexperience in conducting a peace enforcement operations.'<sup>84</sup> However, this ignored the United States own lack of experience in UN military operation. The Quick Reaction Force was intended to respond to hostile threats and attacks that exceeded UNOSOM's military force capabilities. When the security situation improved, it was to move offshore from Somalia and out of the way. Like other United States combat forces, these were not in the UN chain of command. They were under the direct command of the United States Commander and Chief, Central Command. The Deputy Commander of UNOSOM II could have tactical control of the force delegated to him if the situation within Somalia so required. This in effect amounted to the establishment of a parallel United States chain of command that was intended to exist alongside, but independent from, the UN command structure. How this was intended to operate in times of crisis in the context of an already complex multi-dimensional operation

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<sup>82</sup> S/Res/814 (1993), 26 March 1993, para. 14.

<sup>83</sup> *Message from the President of the United States, op.cit.*, (n.79), 18.

involving around thirty nations and many non governmental organizations, is a question that must not have been addressed seriously by military planners in Washington and the Department of Peacekeeping Operations in New York.

It is difficult to describe this set up as other than a recipe for confusion and ultimate disaster. It constituted the very antithesis of a unified system of command. It was also a dangerous and deceptive system of command in that it created an illusion of UN control. It would have been preferable to delegate command of the force to the United States. At least this would have been closer to the reality. Instead, a system was put in place that allowed the United States control key positions within UNOSOM, while retaining full and operational command of all its combat forces in Somalia. Furthermore, it permitted the United States to retain its special forces on call should the Commander of United States Forces Somalia deem it necessary to deploy them. In addition, the United States deployed a specially constituted Task Force Ranger, which remained at all times under the direct command and control of the commander in chief, United States special operations. In Sierra Leone, although British Forces were also deployed outside the UN chain of command to, *inter alia*, support the UN mission, these forces were not intended to adopt a combat role.<sup>85</sup>

When this was combined with different perceptions of what the actual mission entailed among the troop contributing countries, including the United States, it was not surprising that serious problems arose on the ground.<sup>86</sup> This culminated in the United States attempt to capture one of the 'warlords,' General Aided. It took place outside the UN chain of command, and it was in fact a unilateral act by the United States using the rangers that were part of the Quick Reaction Force. Among the many consequences of this action, was the row between Italy and the UN, and the refusal by

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<sup>84</sup> *Ibid.*

<sup>85</sup> Though in the case of British Forces in Sierra Leone, the primary task was to train and support the armed forces of the government of Sierra Leone, and evacuate British nationals. See Ministry of Defence Press Release No. 270/00, 10 October 2000 and statement to Parliament by Defence Secretary on Sierra Leone, 15 May 2000; Eight Report of the Secretary-General on the UN Mission in Sierra Leone (UNMASIL), S/2000/1199, 15 December 2000, paras. 30-32.

<sup>86</sup> *Ibid.* 20-21. The United States President also stated at page 2 that 'the US military mission is not now nor was it ever one of 'nation building'. It is difficult to reconcile this statement with the provisions of Resolution 814 (1993), especially para. 4.

Italy to replace its commander in Somalia.<sup>87</sup> The United States and other contingents could have learned something from the successful deployment of Italian armed forces in and around Beirut as part of the Multi-National Force in the early 1980's.<sup>88</sup> The UN's primary complaint seemed to be that the Italian commander referred first to Rome before carrying out UN orders. It was acknowledged that Italy had the right to appoint its own general in Somalia, but the UN held the view that it had to right to insist upon a unified disciplined command structure. This would have been a fair argument if it was not for the fact that the UNOSOM II command structure was anything but unified owing to the United States insistence on maintaining a parallel but independent chain of command, and the problems with the Italians stemmed directly from this situation.

Good relations between a Force Commander and subordinate national contingents are vital. It has been said that officers selected for UN missions should therefore when possible be in the Eisenhower rather than Montgomery or Patton mould.<sup>89</sup> It has been remarked elsewhere that,

A successful officer in command of a UN force must necessarily possess not only a high measure of military skill, *stricto sensu*, but also well developed diplomatic and political skills in dealing with what may be a diverse and incohesive multi-national military force.<sup>90</sup>

Ability to compromise and a disinclination to 'rock the boat' are essential qualities. In the normal course of events, the orders of the Force Commander of a peacekeeping or similarly constituted force will be loyally accepted and executed. National contingents, nevertheless, retain a form of 'right of appeal' to their own governments should a unit or contingent commander feel that the interests of the unit are being

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<sup>87</sup> *The Irish Times*, 16, 17 and 19 July 1993.

<sup>88</sup> See generally R. Thakur, *International Peacekeeping in Lebanon*, Boulder: Westview Press, (1987), esp. 79-103; and N.A. Pelcovits, *Peacekeeping on Arab Israeli Fronts*, Boulder: Westview Press, (1984), 31-68.

<sup>89</sup> A.J. Wilson, *Some Principles for Peacekeeping Operations - A Guide for Senior Officers*, Monograph No. 2, International Information Centre on Peacekeeping Operations (France), (June 1967), 2.

unfairly or improperly exploited. Moreover, a proposed strategy or deployment on the ground may not be deemed to be in the best interests of the national government of the unit involved. The command structure imposed by the United States in Somalia was contrary to the concept of a unified command and inconsistent with the principles established in previous operations. While not the sole cause of the problems encountered by UNOSOM II, it was a major factor in the lack of cohesion and general confusion associated with the operation.

The prospect of a subordinate officer disobeying a lawful order while serving as part of an international force is always a possibility, and although this is not a frequent occurrence, it does happen from time to time.<sup>91</sup> When it does occur, it will not always be associated with the high profile figures involved in controversy over the attempted removal of the Italian commander in Somalia, and consequently it may not receive much media attention. There may be a range of causes for insubordination, but one potential defence to a charge of disobeying a lawful command is to challenge the legality of the order itself on the basis that it was not consistent with the mandate, or even that the Security Council was not competent to adopt a particular resolution in the first place. The matter is most serious if it involves the unit or contingent commander. Consider the situation where the Irish unit commander is ordered to extend his area of operation and re-deploy the troops under his or her command by a certain date.<sup>92</sup> He or she declines to do so because it involves exposing the personnel to serious risk and these are already over-stretched in the unit's area of operations. Furthermore, it may involve using force against local armed elements in order to establish UNIFIL authority in the new area. According to the unit commander's assessment of the

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<sup>90</sup> H. McCoubrey and N. White, *op cit.* (n.3), 143. See also by the same authors, *International Organizations and Civil Wars*, Aldershot: Dartmouth, (1995), 194-196.

<sup>91</sup> In February 1998, an Irish commandant (major) was found guilty of disobeying a lawful order of a superior officer in Lebanon. The incident was minor in nature and it probably should never have got that far. See *The Irish Times* and the *Irish Independent*, 5 February 1998. For a more general discussion see L.C. Green, 'Superior Orders and Command Responsibility', 27 *Canadian Yearbook of International Law*, (1989), 167-203; and L.C. Green, 'Superior Orders and the Reasonable Man', 8 *Canadian Yearbook of International Law* (1970), 61-103, at 96 and *passim*.

<sup>92</sup> Although this is a hypothetical example, it is based on an actual incident involving the Irish battalion with UNIFIL in the 1980's.

situation, this proposal might entail casualties and it would achieve little in the long term.

What are the consequences for the unit commander concerned? The Force Commander may decide to take no action.<sup>93</sup> Sometimes a superior officer will weigh up the pros and cons of any such action, and he or she may decide that it is in the best overall interest of all concerned if the matter is allowed to rest. This may not always be an option though, in particular if the authority and reputation of the commander concerned is at stake. However, if he or she does take action, then the national government or governments concerned will become involved. The national government will either support the unit commander's actions, an option which could ultimately lead to the withdrawal of the whole unit, or the commander will be replaced pending disciplinary action. In the course of the UNOSOM II mission, when serious differences arose between the commander of the Italian contingent and the overall commander of the Force, the Italian government supported the contingent commanders actions.<sup>94</sup> The backing of the home government is not something the unit commander could depend upon and in due course the charge could lead to a courts martial for disobeying a lawful order. In such a case the unit commander could plead that the order was impossible to carry out or that it was not a lawful order in the first instance. In the case of UNIFIL, Resolution 426 (1978) lays down the guidelines and terms of reference for the Force, one of which is that it will not use force except in self-defence.<sup>95</sup> The defence counsel acting on behalf of the officer charged could therefore argue that the action proposed taking an initiative involving the use of force, which was inconsistent with Resolution 426(1978), and for this reason, the order was unlawful in the first place.

Another possible defence to a charge of disobeying a lawful order is that no valid chain of command existed between the superior and subordinate officer concerned. The chain of command is one of the essential features of military

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<sup>93</sup> This is in fact what happened in the real incident. It was unclear if the Force Commander gave an actual order, in any event the order/instruction was not carried out as and when it was intended.

<sup>94</sup> *The Irish Times*, 14,16, 17 and 19 July 1993.

<sup>95</sup> UN Document S/12611, *op.cit.*

structures and organization. It is the military connection that joins a superior officer to a subordinate for the legal transfer of orders and instructions. An established chain of command is the hallmark of all organised military groups and organizations, and is a prerequisite for the success of any military enterprise, in particular international UN peacekeeping or similar operations. Once an order or instruction is given, the appropriate legal authority is vested in the recipient to carry out those orders. The chain of command is thus a military hierarchy that is common to all armed forces. It is such an intrinsic part of every military organization that it is easy to take it for granted, but in a multinational force of any nature, it is one of the more sensitive and complex issues that needs to be addressed and agreed upon at an early stage.

In the armed forces of most democracies, it is relatively easy to determine the chain of command from the legislation governing their establishment and operation. It is not a subject that gives rise to difficulties when different elements of a national armed force work together as a cohesive group. This is because it is laid down in civil and military law, and emphasised at every level of training, and in the daily operational and administrative functioning of the force. Matters can change quickly though, when forces that do not usually share a combined and unified command structure become involved in a common enterprise or mission. This can occur when police and military units come together as part of an aid to the civil power operation, or when units from different countries and different military traditions, form part of an international UN force. One of the lessons from the UNOSOM II operation is that in such scenarios, the issue of command and control is crucial to ensure the overall operational effectiveness and cohesiveness of the combined operation or force. It was unfortunate the relearning of this fundamental lesson was at such a price for all involved.

### **Command and control of Canadian forces**

The organization of the military forces of Canada and Ireland is based on the British regiment concept. There is, however, one important difference regarding participation in international forces. In almost all cases, Canada deploys entire units on UN service, while in the case of Ireland, special units are organised and established for peacekeeping duties. Another important difference between Canadian and Irish force participation is in the use of reserve forces for UN deployment. Since 1988, Canada has applied a concept of 'total force', which structurally integrates regular and reserve

units more and more. As a result, any major deployment of Canadian Forces will inevitably involve the reserve forces. To date, Irish reserve units and forces have been precluded from participation in UN operations.

Within the Canadian Forces, the chain of command is a line of authority extending from the Chief of Defence Staff to the lowest ranking member of the Forces. Under Canadian municipal and military law, its effect is to link a 'superior officer', meaning 'any officer or non-commissioned member who, in relation to any other officer or non-commissioned member, is by [the National Defence Act], or by regulation or custom of the service, authorised to give lawful command to other officer or non-commissioned members of the Canadian forces'.<sup>96</sup> No other person, including ministers and public servants, is part of the chain of military command within Canadian Forces, nor does any other person have any command authority.<sup>97</sup> From this it can be seen that the chain of command is clearly delineated, and does not include anyone outside the armed forces structure and hierarchy. A question that naturally comes to mind then is, how does Canadian law and the Canadian Forces provide for troops operating as part of an international UN force, or as part of the North Atlantic Treaty Alliance?

Command and control, though intrinsically linked and an essential part of any military organization or coalition of forces, are not synonymous. Command may be defined as the authority vested in an individual member of the armed forces to direct, co-ordinate and control military forces.<sup>98</sup> Control is the authority exercised by a commander over a part of the activities of subordinate organizations of other organizations not normally under command. The matter of command and control is much more clearly defined under Canadian law than under Irish law. At first glance it

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<sup>96</sup> Section 2, National Defence Act, 'Interpretations'. To paraphrase, an 'officer' is a person who holds Her Majesty's commission in the Canadian Forces, and a 'non-commissioned member' is any other person enrolled in the Canadian Forces.

<sup>97</sup> *Report of the Somalia Commission of Enquiry*, Vol. 1, 'Structure and Organization of the Canadian Forces', p.3 of 13. Available at <<http://www.dnd.ca/somalia/somaliae.html>>

<sup>98</sup> Department of National Defence[Canada], *Joint Doctrine for the Canadian Forces Joint and Combined Operations*, 2-1 and 2-2. See also *Report of the Somalia Commission of Enquiry*, Vol. 1, Structure and Organization of the Canadian Forces, *op. cit.* (n.97), 7 and 8.

seems that the question of command of the Defence Forces is straightforward, and that of the Canadian Forces is somewhat more complex. In fact the reality is quite different. The Governor General of Canada, as the sovereign's representative, is the overall Commander in Chief of the Canadian Forces. However, civil control of the Canadian Forces is firmly rooted in the parliamentary system and the cabinet is responsible to Parliament for, *inter alia*, formulating and implementing government defence and security policy. Through the National Defence Act, Parliament has set out the basic law governing command of the Canadian Forces. Primary authority rests with the Governor in Council to implement the National Defence Act by regulations for the organization, training, discipline, efficiency, administration and good government of Canadian Forces.<sup>99</sup> Under Section 12(2) of the National Defence Act, the Minister of National Defence has the power to regulate the same matters, but subject to any regulation made by the Governor in Council and Treasury Board. The Minister does retain one of the key links within the command framework, i.e. he or she has the power to make regulations governing who commands what and whom, but the 'exercise' of command is then in the hands of the designated commanders subject to law.

Under Section 18(1) of the National Defence Act, the Governor in Council may appoint a Chief of the Defence Staff 'who shall subject to the regulations and under the direction of the Minister, be charged with the control and administration of the Canadian Forces'. Furthermore, 'command' of and in the Canadian Forces is confirmed as a military activity that flows through commissioned and non-commissioned officers under Section 18(2):

Unless the Governor in Council otherwise directs, all orders and instructions to the Canadian Forces that are required to give direction to the decisions and to carry out the directions of the Government of Canada or the Minister, shall be issued by or through the Chief of the Defence Staff.

The position of the Chief of Defence Staff is therefore quite powerful, and in terms of actual command, bestows significant responsibility on the holder of the office. Although he or she is subject to the Minister's direction in exercising general powers, it is evident from the legislation that the responsibilities of the Chief of Defence Staff

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<sup>99</sup> Section 12, National Defence Act.

are not delegated from the Minister. In fact, the Chief of Defence Staff has responsibility exclusive of the Minister in three significant areas, the most important of which in the context of service with international UN forces is the conduct of military operations.<sup>100</sup> Although the Chief of Defence Staff may assign some command and administrative responsibilities to subordinate officers, these are not to be confused with a delegation in law that cannot be further delegated under the maxim *delagatus non potest delagare*. The assignment of command is limited by regulation or custom of the service.<sup>101</sup> One of the central pillars of the command structure and chain of command is that commanding officers at every level are always responsible for the whole of the organization they command, and they cannot delegate this overall responsibility to subordinates.<sup>102</sup> Within these parameters and framework the military chain of command is formed.

A significant difference in relation to military command and civil control of the armed forces in Ireland and Canada is in the respective roles of the Canadian Chief of Defence Staff and the Irish Chief of Staff. Under Canadian law, the minister has responsibility for the 'management and direction' of the Canadian Forces, whereas the Chief of Defence Staff has 'control and administration' of the Forces under the direction of the minister.<sup>103</sup> The distinction between what is meant by management and administration in this context is not clear, but it is evident that the Parliament chose to vest 'control' of the Canadian Forces directly in the Chief of Defence Staff with just one proviso, that it be subject to the direction of the minister.

The role of the Irish Chief of Staff under the Defence Acts is circumscribed.<sup>104</sup> Up to very recently he or she was the holder of a 'principal military

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<sup>100</sup> *Report of the Somalia Commission of Enquiry*, Vol. 1, Structure and Organization of the Canadian Forces, *op. cit.*, (n.97), p.2, The other two areas are in the promotion of members below the rank of general and in all matters related to aid to the civil power.

<sup>101</sup> Section 49, National Defence Act.

<sup>102</sup> Queens Regulations and Orders, 4.20(3).

<sup>103</sup> Section 3 and Section 4 of the National Defence Act govern the role of the Minister for National Defence, while Section 18(1) clearly sets the Chief of Defence Staff apart from the Minister.

<sup>104</sup> Sections 11, 12 and 13 of the Defence Act, 1954.

office', and as such was the head of one of the three principal military branches, namely the branch of the Chief of Staff. The 1954 Act provided that there be two other branches, and the head of each branch 'shall be directly responsible to the Minister for the performance of such duties as may from time to time be assigned to him'.<sup>105</sup> The purpose of this division of command was to ensure that no one person within the Defence Forces was vested with overall command. The heads of all three branches were directly responsible for the performance of such duties as could from time to time be assigned to them by the Minister. The Defence (Amendment) Act, 1998 abolished the old three tier command structure and put in its place a single streamlined system of command which provided that the Chief of Staff would be accountable only to the Minister.<sup>106</sup> It did nothing to address the problem of command within international forces. Although the Minister may also delegate to the Chief of Staff such duties in connection with the business of the Department of Defence as he or she may from time to time determine, it is clear that the role of the Chief of Staff is of much less significance than that of his or her counterpart in the Canadian Forces. Although the Canadian system vests very significant power in the Chief of Defence Staff, the holder of this office is directly answerable and responsible to the Parliament. This system allows for greater Parliamentary supervision of the armed forces, and ensures that no one minister of a political party in government will exercise too much control. This system is superior to that operating in Ireland, and could be considered as a model in the current debate on the reform of the structures and legislative framework governing the Defence Forces. The enhanced parliamentary control that the Canadian system provides would be particularly appropriate in Ireland owing to the lack of Dáil supervision in the role and commitments of the Defence Forces.

Canadian military personnel provided to UN controlled operations are put under the operational control of the UN Force Commander, or it's equivalent, in the field. He or she has authority to task the Canadian troops within the agreed terms for which they were provided. Canada, however, retains operational command of its forces at all times. In practice this does not appear to cause any difficulties, the

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<sup>105</sup> *Ibid.*

<sup>106</sup> Section 4 of the Defence (Amendment) Act, 1998, which inserted a new Section 13 to the Defence Act, 1954.

mission of the UN force will be determined by the relevant Security Council, or in some instances, General Assembly resolution. The Force Commander retains the authority to direct and deploy Canadian Forces within the parameters set by the overall mission. Most importantly of all, the Force Commander has tactical control of the forces on the ground. The concept of operational control is an accepted and convenient concept to apply in multinational coalitions and international UN forces. It permits a national government to retain overall operational command of its national armed forces, while still placing them under the operational control and tactical management of a military commander outside the national military chain of command.

This is in contrast to the case of Ireland, where troops are supposedly placed under the command of the UN commander in the field. This is despite the fact that it may be unconstitutional under Irish law to do so. The Canadian system operates smoothly in practice. The relevant Canadian laws attach much more importance to the distinction between operational command and operational control than does Irish law. Furthermore, the constitutional difficulties that are present in the case of the command of Irish troops by non-Irish citizens do not arise in respect of Canadian forces.

#### **Constitutional issues arising in the command of Irish Defence Force personnel**

The potential problems in relation to the command of an international force outlined above could arise in respect of a unit commander of any nationality.<sup>107</sup> The case of Irish officers serving with UN forces is even more problematic. While the Regulations of peacekeeping Forces in the Congo and Cyprus provided that in these Forces the national contingents are under the operational command of the UN Commander, there was no statutory provision in Irish legislation authorising this position. As a result, a practice arose whereby the Chief of Staff issued a directive, on the authority of the Minister for Defence, placing the relevant unit and contingent under the command of the UN Commander of the Force.<sup>108</sup> There is no statutory basis for the issue of this

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<sup>107</sup> Draper, *op cit.*, 67-70.

<sup>108</sup> Personal Interview, Lt. Col. Liddy, former Defence Forces Judge Advocate and Legal Officer, January 1990.

directive. This is still the practice today with regard to Irish contingents with UN forces and SFOR in the former Yugoslavia.<sup>109</sup>

The military authorities highlighted the matter when the provisions of the 1960 Act were being considered and drafted.<sup>110</sup> The question whether specific provision should be made in that Act placing the commander of an Irish contingent under the command of the Commander of a UN Force was also considered. In the event, it was decided not to include such a provision on the grounds that it could be controversial and that the operational command referred to in UN regulations should be distinguished from command in general.<sup>111</sup> The command referred to in the Defence Act was considered much wider than operational command, and included the authority to discipline and punish troops. Any provision for operational command would therefore have to be worded carefully and circumscribed. Furthermore, at that time the Irish authorities were examining the regulations governing the first UN Emergency Force and there was no assurance that future peacekeeping forces would be similarly regulated for.<sup>112</sup> Despite the complexities of providing a statutory basis in Irish law for distinguishing between the overall command referred to in the Defence Act and operational command within the context of a UN force, there is a responsibility on the Irish government to introduce amending legislation. The example of Canada, which provides for Canadian Forces to be placed under the operational control of a UN commander in the field, is one model that could be considered. The Minister could incorporate the different levels of command and control already outlined into Defence Force Regulations, and the Defence Acts amended to provide for elements to be placed under the operational command or the operational control of commanders of international forces organised and established under the authority of the UN. This would have the merit of reflecting the reality of what is an established current practice, and giving it a basis in law. One possible disadvantage at present to such a proposal is that it would be perceived by some groups in Ireland as a precursor to Irish

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<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid.*

<sup>112</sup> *Ibid.*

participation in some kind of European military or security alliance. This may seem like a good reason for avoiding this potentially controversial issue, but it does not excuse inaction by successive governments in relation to this fundamental matter of command.

The command of the Defence Forces is governed by the Irish Constitution and legislation and statutory regulations made in accordance therewith. The supreme command of the Defence Forces is vested in the President by virtue of Section 4 of Article 13 of the Constitution, which states:

4. The supreme command of the Defence Forces is hereby vested in the President.

Were this to be the sole constitutional provision governing the command of the Defence Forces, the President would clearly be the supreme commander, rather than a titular or nominal commander similar to that of many other heads of state.<sup>113</sup> However, two further constitutional provisions are also relevant and qualify the power of the President in regard to the Defence Forces. Article 13.5.1 states that:

- 5.1. The exercise of the supreme command shall be regulated by law.

and this is qualified by Article 13.9 which states:

9. The powers and functions conferred on the President by this Constitution shall be exercisable and performable by him only on the advice of the government, save where it is provided by this Constitution that he shall act in his absolute discretion or after consultation with or in relation to the Council of State, or on the advice or nomination of, or on receipt of any communication from, any person or body.

In this regard Section 17 of the Defence Act, 1954 makes provision for the exercise of the supreme command envisaged by Article 13.5.1 as follows:

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<sup>113</sup> J. Casey, *Constitutional Law in Ireland* (3rd ed) Dublin: Sweet and Maxwell, (2000), 79.

17. (1) Under the direction of the President, and subject to the provisions of this Act, the military command of, and all executive and administrative powers in relation to, the Defence Forces, including the power to delegate command and authority, shall be exercisable by the Government and subject to such exceptions and limitations as the Government may from time to time determine, through and by the Minister for Defence.

(2) (a) The delegation of command and authority by the Minister-

(i) may be made subject to such exceptions and limitations as he may from time to time determine,

(ii) may be in relation to any area, place or state ship or any military body organized under section 22 and may embrace different components of the Defence Forces,

(iii) may, during a period of emergency, be in relation to the whole of the Defence Forces.

(3) The Minister may make regulations, applying to officers, as the persons to be invested, as officers, with military command over the Defence Forces or any part thereof or any person belonging thereto and as to the mode in which such command is to be exercised.

The position of the President in this context appears to be a purely ceremonial one.<sup>114</sup> This titular position is not unlike that of the Queen under the Canadian Constitution Act, 1867 which provides that the supreme command is vested in the Queen as 'Commander-in- Chief...of all...Military Forces.'<sup>115</sup> It is evident from the Dáil debates in relation to the Constitution in 1937 that it was intended that the role of the President be a purely nominal one.<sup>116</sup> Nonetheless, the significance of the word 'direction'

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<sup>114</sup> J.M. Kelly, *The Irish Constitution*, (3 rd. ed.) Hogan, G. and Whyte, G., Dublin: Butterworths, (1994), 90-91. See also D. Gwynn Morgan, *Constitutional Law of Ireland*, (2nd ed.), Dublin: Round Hall, (1990), 46-47.

<sup>115</sup> Constitution Act, 1867, Part 111, Section 15.

in Section 17 of the 1954 Act has never been judicially considered. When this is read in conjunction with Article 13.9 of the Constitution, it would appear that any role over and above the ceremonial shall be exercised and performed on the advice of the government. This is the only reasonable interpretation of the role of the President under the Constitution, and is similar to that of other heads of state, or in the case of commonwealth countries like Canada, the Sovereign or her representative. In this way the position of the President as commander is circumscribed by the Constitution as a whole.. It would make no sense, legally or otherwise, if the President was to play an active part in the command and control of the Defence Forces on an every day basis. While the 1954 Act gives the government command and all its concomitant powers, these too must be exercised in accordance with the Constitution and any laws made there under.

Section 17(3) of the Defence Act, 1954 empowers the Minister for Defence to make regulations in relation to the exercise of military command by officers. Section 2 of Act defines the expression 'non commissioned officer' and the word 'officer,' when used without qualification, as referring exclusively to a man of the Defence Forces and a person holding commissioned rank in the Defence Forces respectively. The Force Commander of a UN force is not normally a member of the Defence Forces, although from time to time Irish officers have held such a position. Section 17(3) refers exclusively to officers of the Defence Forces. This Section empowers the Minister for Defence to make regulations in relation to the exercise of military command by officers.<sup>117</sup> It does not empower the Minister to issue directives or make regulations authorising persons who are not members of the Defence Forces, to exercise command over any part thereof, or persons belonging thereto. Neither the Constitution, nor the Defence Act, distinguishes operational command from military command. Although the matter has not been judicially considered, there is a strong case to be made that the 'military command' referred to in the Act is an all embracing concept which includes, *inter alia*, national command and operational command as generally understood

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<sup>116</sup> Mr. de Valera said on 26 May 1937: 'In regard to the position here that the supreme command of the Defence Forces should be vested in the President, it is quite clear that it is only nominal. It could only be nominal. Any powers that he might exercise there will have to be exercised under the Constitution, and, therefore, any power that he might exercise in virtue of that vesting will have to be exercised on the direct advice of the Government'. Dáil Debates 67, (1222), 26 May 1937.

<sup>117</sup> These are in the form of Defence Force Regulations or General Routine Orders.

internationally. If it were otherwise, then 'military command' under the Act would have little practical significance.

The Constitution also states that all commissioned officers of the Defence Forces shall hold their commissions from the President.<sup>118</sup> The form of commission issued to an officer upon appointment refers to 'such lawful orders and directions as you shall from time to time receive from the Minister for Defence, or from any of your superior officers'.<sup>119</sup> Furthermore, Section 131 of the Defence Act, 1954, which deals with the offence of disobedience to a superior officer, refers to 'a lawful command of a superior officer'.<sup>120</sup> The words 'superior officer' and 'lawful' are very significant in these provisions. An officer of any other national or international force who is not a member of the Defence Forces is not a superior officer for the purposes of the Act and is therefore not vested with any statutory authority to issue a lawful command to Defence Forces personnel. In order to enable the Force Commander of UNIFIL or a similar UN force exercise lawful command over that portion of the Defence Forces forming part of the peacekeeping Force, it is essential that he or she be vested with lawful command. The current procedure, whereby the Minister for Defence directs the Chief of Staff to issue a directive to a unit commander purporting to place the unit under the operational command of the Force Commander, is *ultra vires* the Minister, without, at the very least, a statutory basis on which to authorise it. It seems that the Minister has, as a matter of convenience, presumed to define 'military command' in such a way as to delimit its scope and significance.

It is self evident that any Minister who acts in an unconstitutional fashion will thereby exceed jurisdiction and authority.<sup>121</sup> Even if it was found by the Courts that the Minister was not acting unconstitutionally, a result that would be by no means certain, the question arises whether the Minister is acting within powers conferred by statute

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<sup>118</sup> Article 13.5.2° of Bunreacht na hEireann (The Irish Constitution of 1937).

<sup>119</sup> This is set out in the Fifth Schedule to the Defence Act, 1954.

<sup>120</sup> Section 131 states: 'Every person subject to military law who disobeys a lawful command of a superior officer is guilty of an offence against military law .....'

<sup>121</sup> See the comments of Henchy, J. in *The State (Holland) v Kennedy* [1977] Irish Reports 193, 201 and *The State (Byrne) v Frawley* [1978] Irish Reports 326, 345 and those of Walsh, J. in *Shelley v Mahon* [1990] Irish Reports. 36, 45.

i.e. the Defence Acts. There have been a number of cases in recent years where the courts have set aside decisions by Ministers on the grounds that they were not authorised.<sup>122</sup> Section 17 of the Act does not empower the Minister to issue directives or to make regulations authorising persons who are not members of the Defence Forces, to exercise command over any part thereof, or persons belonging thereto. Furthermore, the administrative act in question does not appear to be reasonably incidental to or within an implicit powers conferred by the Act.<sup>123</sup>

The Minister's action in directing the Chief of Staff of the Defence Forces to issue a command directive as outlined may also infringe the principle *delegatus non potest delegare*, i.e. a power may only be delegated to a body or persons other than that designated by the Oireachtas if this is authorised, expressly or by implication, by the legislation in question.<sup>124</sup> It cannot be transferred to any other person or body. In relation to this rule of statutory construction it has been said that:

Whether a person other than that named in the empowering statute is empowered to act will be dependent upon the entire statutory context, taking into account the nature of the subject matter, the degree of control retained by the person delegating and the types of person or body to whom the power is delegated.<sup>125</sup>

The question of the command of the Defence Forces must be examined in the context of the Defence Act, 1954 as a whole. When the nature and importance of command of the Defence Forces is considered along with the lack of control exercised by the Minister over those elements of the Forces placed under the command of the

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<sup>122</sup> *Meade v Cork County Council*, Supreme Court, July 31, 1974. *Reidy v Minister for Agriculture & Food*, High Court, June 9, 1989. *Devitt v Minister for Education* [1989] Irish Law Reports Monthly 696.

<sup>123</sup> See G. Hogan and D. Morgan, *Administrative Law in Ireland*, (3rd Ed), Dublin: Round Hall Sweet and Maxwell, (1998), 394.

<sup>124</sup> For an example of the principle see *O'Neill v Beaumont Hospital Board* [1990] Irish Law Reports Monthly 419. See generally Hogan and Morgan, *op. cit.*, 328-330 and 396-400.

<sup>125</sup> P. Craig, *Administrative Law*, (3rd. ed.), London: Sweet and Maxwell, (1989), 386. See also H. Wade & C. Forsyth, *Administrative Law*, (7th. ed), Oxford: Clarendon, (1994), 884

UN, it follows that neither the Minister nor the Chief of Staff of the Defence Forces, have any right to delegate command in the manner currently prescribed.

The question of command is rendered more uncertain in the case of UNIFIL owing to the fact that there have been no Regulations published for that force to date. In 1981, the directive issued by the Chief of Staff was amended to take account of this, however, the fundamental problem outlined remains.<sup>126</sup> It cannot be circumvented or resolved by what amounts to little more than tinkering with the words. The directive depends, to some extent, for its validity on the existence of a parallel UN instrument regulating the designation of the chain of command from the Force Commander. In the absence of this link, it is difficult to see how an identifiable command structure can be maintained. When the matter was queried, the opinion of the UN Secretariat was that the delegation of command within UNIFIL in general is in accordance with the normal military custom as applicable to an integrated command.<sup>127</sup> It was considered that power to determine chain of command was inherent in the Force Commander's exercise of command in the field in accordance with the guidelines laid down, and it did not require further elaboration.<sup>128</sup>

In fact, the guidelines merely stipulate that a Force Commander will exercise command in the field.<sup>129</sup> It therefore appears that in the absence of UN regulations for UNIFIL empowering the Force Commander to designate the chain of command and to delegate his authority, the command structure within the Force has not been formally established.<sup>130</sup> The fact that this has not caused any particular difficulty in the operation of the Force to date is due to the professionalism and commitment of those who have served in UNIFIL. A 'gentleman's agreement' or 'understanding' is surely not a sufficient legal basis for the exercise of command in an international UN force. In the circumstances, it is desirable that the Secretary-General issue UNIFIL

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<sup>126</sup> Personal interview, senior Irish army officer, Army Headquarters, October 1997.

<sup>127</sup> *Ibid.*

<sup>128</sup> *Ibid.*

<sup>129</sup> UN Document S/12611, *op. cit.*, para 4(a).

<sup>130</sup> Bowett, *op. cit.*, 115-117.

regulations governing the designation of the chain of command and empowering the Force Commander to delegate his authority.

The question of command of a UN force as envisaged under the Defence (Amendment) Act, 1993 may be even more problematic than that of a traditional peacekeeping force. In the course of the Dáil Debate on the new legislation Deputy Taylor-Quinn put the question succinctly when she enquired ‘... what the command structure and rules of engagement will be [for the UN force in Somalia, UNOSOM II] who will be giving the orders?’<sup>131</sup> These matters have been the subject of considerable controversy. The issue was most recently evaded and fudged in the debate regarding participation in KFOR, with a statement by the Minister that the command and control arrangements were analogous to that of SFOR in Bosnia-Hertzgovina.<sup>132</sup> What exactly are the arrangements for SFOR? This is the kind of question to which a clear and satisfactory answer is not possible in the present circumstances. The question of command of multinational forces has been a difficult issue for major powers participating in such forces. While the broader issues of command of international forces are outside the scope and competence of Irish municipal law, the overall uncertainty regarding the command of UN forces is exacerbated in respect of Defence Forces personnel by the failure of successive governments to attempt any resolution of the potential difficulties outlined.

### **Conclusion**

In the case of UNIFIL, no formal SOFA was concluded until late 1995, and the Secretary-General has not issued any Force Regulations. The status of the Force and other matters relating to its operation and establishment initially had to be interpreted by reference to the terms of reference, general considerations and guidelines for UNIFIL laid down by the Secretary-General and approved by the Security Council in Resolution 426 (1978).<sup>133</sup> This contained considerable less detail than formal agreements concluded for other peacekeeping forces. Instead, UNIFIL relied on a series of standing operating procedures that lay down guidelines and define the method

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<sup>131</sup> Dáil Debates 433, (600-601), 1 July 1993.

<sup>132</sup> Dáil Debates 507, (852-869 at 857), 1 July 1999.

by which the operation is conducted. Although issued on behalf of the Force Commander, their legal basis is questionable. In practice, reference was made to the SOFA and Regulations governing the UN Force in Cyprus.<sup>134</sup> The SOFA has resolved much of the initial legal uncertainty. But the legal obligation on members of the Irish Defence Forces to obey the UNIFIL standing operating procedures remains uncertain, as they have no status under Irish military law, and they do not form part of the municipal law of Ireland. A similar situation pertains with regard to UN standing operating procedures under Canadian law, they have no legal status and Canadian forces are not obliged to obey them.

One relatively simple method of resolving the legal difficulties created by these standing operating procedures is for contingent or unit commanders concerned to examine their content and effect. If there is nothing illegal or contrary to the municipal law of the contributing state, then the commanding officer should sign them, and in this way incorporate them into contingent or unit regulations. Few legal problems are amenable to such simple solutions, and when they are not illegal, there seems to be little reason not to incorporate them into unit regulations.

Arising from a number of incidents that occurred during Canadian participation in the UN operation in Somalia, Canada established a major federal Commission of Inquiry into all aspects of its involvement in this mission. The recommendations and conclusions were very critical of certain personnel, and the overall 'system' in operation at the time. Some of these criticisms may have been unduly harsh. In any event, countries like Ireland could take many of the recommendations on board. Somalia remains one of the most controversial UN missions in recent times. Ireland was fortunate to remain unscathed by the controversies that have also involved Belgian, Italian and United States armed forces. The reality for all countries involved is that Somalia proved a mission impossible.

Despite the complexities of providing a statutory basis in Irish law for distinguishing between the overall command referred to in the Defence Act and operational command and/or within the context of a UN force, there is a responsibility on the Irish government to revise existing legislation. The example of Canada, which

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<sup>133</sup> See UN Document S/12611, *op. cit.* and Resolution 426, 19 March 1978.

provides for Canadian Forces to be placed under the operational control of a UN commander in the field, is one model that could be considered. Defence Force Regulations could be introduced by the Minister providing for different levels of command and control, and the Defence Acts amended to provide for elements to be placed under the operational command or the operational control of commanders of international forces organised and established under the authority of the UN.

The Canadian experience can also be relevant to Ireland in other apparently less significant contexts. For example, Canadian Forces doctrine has consistently stated that any major deployment of Canadian Forces will include a legal officer to advise the Canadian Commander on all legal matters, including the application of international humanitarian law. In recent years, the practice of sending an Irish legal officer to accompany units with the UNIFIL has been discontinued. This was done without proper consultation, and without considering all of the implications.<sup>135</sup> In particular, the level of human rights and humanitarian law training and education in the Canadian Forces is greater than that in the Defence Forces. In Ireland, operational, financial and political considerations have been paramount, but these should not be allowed to deflect from other areas.

In the final analysis, it may be that the problem confronting Canadian and Irish participation in the more pro-active peacekeeping and enforcement action missions of today is capability and capacity to participate. The current rationalisation and 'downsizing' of armed forces throughout the developed world will undoubtedly impact on the capacity of countries to participate in UN forces. This may be an even more important determiner of mission success than the nature of the conflict for which intervention is being considered. Canada, despite membership of NATO, does not appear to have compromised its status as a 'middle power.' As the European Union moves closer to some form of security and defence arrangements, and Ireland opts to join the NATO sponsored Partnership for Peace, Ireland must look to countries like Canada in assessing the political and legal implications of such changes.

From the point of view of Ireland; the issue of command and control is even more complex in the context of the recent SFOR and KFOR missions. At the time of

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<sup>134</sup>

Rosetti, *op. cit.* (n.18.)

writing, the highest-ranking Defence Force officer in Kosovo is currently a Lieutenant Colonel; there is no staff or other officer in the headquarters.<sup>136</sup> The chain of command is directly from the Force Commander to the Irish contingent commander on the ground. This may be unconstitutional, and /or contrary to military law, as the Force Commander is neither a 'superior officer' nor a member of the Defence Forces as required by the Defence Act, 1954. In any event, this is an unsatisfactory situation. Command and control issues are also foremost in the minds of NATO political and military leaders. For this reason NATO is alert to the need to 'be careful not to subordinate NATO to any other international body or compromise the integrity of its command structure'.<sup>137</sup> The current force in Kosovo is UN mandated. If the NATO led operation is not subordinate to the UN, then what is its relationship with the Security Council? This depends on where the real concentration of power is based? It is not with the Secretary-General, and nor is it with the Security Council. This is a NATO led and *de facto* NATO commanded operation. There is no strategic direction from the Military Staff Committee, and the reality is that the Security Council is merely kept informed.

Revision of the legal framework of UN peacekeeping operations is long overdue. The *ad hoc* and improvised structures and procedures are a source of concern and potential difficulty. Usually these forces have enough to contend with on the ground besides the ineptness of their own organization. In all of the Western armed forces, unity of command is axiomatic.<sup>138</sup> While it may be difficult to appreciate the full significance of this principle, there is a strong argument to be made that as long as the UN Organization wishes to use a military force as a peacekeeping or peace

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<sup>135</sup> Personal interview, Defence Forces Legal Officer, March, 1998.

<sup>136</sup> November 1999. In fact, the officer commanding is Commandant M. Gibson, who has been promoted acting Lieutenant Colonel for the duration of his tour of duty with KFOR.

<sup>137</sup> See Deputy Secretary of State Strobe Talbott on NATO's future 'Strategic Concept', in B. Simma, 'NATO, the UN and the Use of Force: Legal Aspects', 10 *European Journal of International Law*, (1999) 1-22, 15. See also A. Cassese, 'Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?', 10 *European Journal of International Law*, (1999), 23-30; and K. Ambos, 'NATO, the UN and the Use of Force: Legal Aspects. A comment on Simma and Cassese', *Deutsches Rotes Kreuz, Humanitares Völkerrecht*, No. 2, (1999), 114-115.

<sup>138</sup> Bowett, *op. cit.*, 341

enforcement mechanism, the principle must be maintained. It is essential to the success of a military operation that a valid chain of command be authorised. For this reason, there is an onus on the UN Secretariat and the Irish government to resolve the question of command, especially in regard to UNIFIL where over six hundred troops currently serve. The situation prevailing for Canadian Forces has much merit and is a pragmatic attempt to balance the needs of the mission with that of the Canadian requirement to retain overall national command of the armed forces. In general, the record in this area with peacekeeping forces seems to have been excellent. This owes much to the professionalism and commitment of those involved. However, events in the Congo operation, and more recently in Somalia, show that the consensus required to maintain this may not always be present.<sup>139</sup>

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*Ibid.*, 343.

## Chapter 6

### THE POLITICAL AND DIPLOMATIC BACKGROUND TO THE ESTABLISHMENT OF UNIFIL IN LEBANON, AND THE UNITAF AND UNOSOM MISSIONS IN SOMALIA.

#### **Introduction**

The chapter examines the background to the establishment of the UN mandated military forces in Lebanon and Somalia. Its purpose is to explain how the background influenced the outcome of the operations, and the central role played by the United States throughout, the primary contention being that the lack of support from the permanent members of the Security Council, especially the United States, undermined the political base and viability of the operations from the beginning. Apart from the loss of life on all sides, the real tragedy of the United States and UN intervention in Somalia was the failure to learn the right lessons. Events in Somalia should not be used to discredit UN led peace support operations, or to deny the imperative to respond that global human rights crises such as that of Rwanda will present.

There are as many contrasts as there are comparisons in the form of peacekeeping adopted to deal with the conflicts that arose in Lebanon and Somalia. In the case of Lebanon, the mandate adopted was controversial and it was considered to be deficient in a number of respects. UNIFIL emerged from difficult negotiations that required a compromise by the parties to the conflict. While it was deployed with undue haste against the advice of many commentators at the time, its survival in what were often very difficult circumstances is testimony to the wisdom and astuteness of those charged with implementing the mandate. However, this should not be seen as a reflection on the appropriateness of the UNIFIL mission and mandate.

The UN operations in Somalia were more ambitious in comparison, and they involved significantly more resources. Initially at least, they were also less controversial. The consensus and enthusiasm for involvement in Somalia

changed quickly as 'mission creep' set in and doubts were expressed about the efficacy of UN policy there. In order to analyze and appreciate the way events unfolded in respect of each mission, it is necessary to start at the beginning and examine the background to the establishment and deployment of the respective UN forces. It was at this stage that the foundation and overall policies were adopted that determined the response to the sometimes almost impossible scenarios presented in each mission area.

In his first report to the Security Council on UNIFIL, the Secretary-General outlined the three essential conditions that needed to be met for the Force to be effective. First, it must have at all times the full confidence and backing of the Security Council. Secondly, it must operate with the full co-operation of all the parties concerned. Thirdly, it must be able to function as an integrated and efficient military unit.<sup>176</sup> In 1983, the now retired Under Secretary-General of the UN with special responsibility for peacekeeping operations, Mr. Brian Urquhart, elaborated upon this when writing about the Multi National Force in Beirut and stated that successful peacekeeping depends, *inter alia*, on a sound political base, a well defined mandate and objectives, and the co-operation of the parties concerned.<sup>177</sup> The requirement of a well defined mandate and objectives was a somewhat glaring omission from the Secretary-General's otherwise pragmatic report.<sup>178</sup> Using these factors as criteria, the chapter focuses on the political and diplomatic background to the establishment and deployment of the UN forces in Lebanon and Somalia. It examines the challenges and dilemmas that confronted the UN forces, especially when the parties to the conflict failed to provide the

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<sup>176</sup> Document S/12611, 19 March 1978, para 3.

<sup>177</sup> *The New York Times*, 19 December 1983.

<sup>178</sup> The recently published *Report of the Panel on UN Peacekeeping Operations*, UN, 23 August 2000 (*Brahimi Report*, A/55/305-S/2000/809 available from <<http://www.un.org>>), recommended that UN peacekeepers have, *inter alia*, 'clear, credible and achievable mandates'. The Secretary-General urged world leaders to join him in implementing the far-reaching changes in the structures and management of UN peace operations recommended, Press Release, UN, 23 August 2000.

required level of support, and the deficiencies in the organization and structure of those forces.

### **Factors influencing the decision to deploy UN forces in Lebanon and Somalia**

When the Lebanese civil war was at its height during 1975 and 1976, serious efforts were made to determine the feasibility and value of establishing a UN peacekeeping force there. However, no such force was established after strong reservations were expressed regarding its practicality in what was essentially a civil war situation.<sup>179</sup> There were similar reservations with regard to any form of UN intervention in Somalia on the same grounds, with the added dimension that Somalia was of no strategic or other significance to the members of the Security Council. There were also financial considerations to be taken into account, and there was substantial resistance at first from the United States and Russia to plans for a more proactive UN policy in Somalia as both countries were in substantial arrears in peacekeeping accounts even before the operation began.<sup>180</sup> In both Lebanon and Somalia, the actual decision to intervene was taken against a background of ongoing civil war and a state imploding on itself. In the case of Lebanon, the decisive factor was that of third party intervention, namely the Israeli invasion of south Lebanon in 1978.<sup>181</sup> At that time there was no real effective government, and the south of the country was dominated by Palestinian

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<sup>179</sup> Lecture delivered by Maj. Gen. E. A. Erskine on UNIFIL and UNDOF at the International Peace Academy Seminar, Lagos, April 1979, 7.

<sup>180</sup> Hence they insisted that early involvement be limited to humanitarian operations, which are financed within the regular UN budget. H. Cohen, 'Intervention in Somalia', in A. E. Goodman, (ed.), *The Diplomatic Record, 1992-1993*, Boulder: Westview Press, (1994), 54.

<sup>181</sup> Security Council document S/12600, 15 May 1978. The Israeli invasion did not come as a surprise and many commentators had predicted some form of large scale Israeli military action against the PLO. See K. Whittingham's report in *81 Middle East International*, (March 1978), 16-18. The raid had been the subject of considerable adverse comment in the Israeli media, see *Time* magazine, 27 March 1978.

forces in and around the old city of Tyre, in an area often referred to as the 'Iron Triangle'.<sup>182</sup>

In common with most problems of this nature brought before the Security Council, the parties to the conflict in Lebanon only sought a solution to the problem within the framework of the UN when the problem otherwise proved insoluble. In this context, the major player not a direct party to the conflict was the United States. Yet its role in the conflict in both Lebanon and Somalia was crucial, but in each case for different reasons. In the case of Lebanon, the real agenda was the Middle East peace process, but in Somalia it is difficult to discern any ulterior motive apart from recognizing and living up to its responsibilities as a major power, and a desire to rebuild the institutions of state in a war torn society. Though the policy of replicating western democratic values in east Africa should not be underestimated, humanitarian disaster was the primary motivation for the UN and the United States major post cold war intervention in Somalia.<sup>183</sup> The situation in Somalia was not some unresolved international problem deriving from the cold war. But the cold war had helped shape the crisis that led to UN intervention in 1992. The aftermath of the inter clan fighting had left it without any semblance of a state, and with no one party or clan that could conveniently be treated as the legitimate government and provide the UN with the 'consent' required for the deployment of a peacekeeping force. This left the Organization with a number of serious dilemmas, one of the more significant of which was with whom to negotiate in the circumstances.

In any event, after the attempt to deploy an effective peacekeeping force failed, the consequent intervention planned for Somalia had no clear precedent in

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<sup>182</sup> See E. A. Erskine, *Mission with UNIFIL*, London: Hurst, (1989), 117.

<sup>183</sup> See J. Mayall (ed.), *The new interventionism 1991- 1994; UN experience in Cambodia, former Yugoslavia, and Somalia*, Cambridge: Cambridge University Press, (1996), 9; R. Thakur, 'From Peacekeeping to Peace Enforcement: the UN Operation in Somalia', 39 (3) *The Journal of Modern African Studies*, (1994), 387-410 at 388; J. Hirsch and R. Oakley, *op. cit.*, xviii and A. Natsios, 'Humanitarian Relief Interventions in Somalia: the Economics of Chaos', 3(1) *International Peacekeeping*, (Spring, 1996), 68-91. For an alternative point of view, and in many ways a more compelling argument, see Mohamed Diriye Abdullahi, *Fiasco in Somalia: US-UN intervention*, Africa Institute of

UN peacekeeping practice. The force could not be deployed at the request or the consent of a host government, or on the bases of an agreement between the parties. For that reason, the Security Council had to invoke the enforcement provisions of Chapter VII of the Charter of the UN for the United States led multinational force (UNITAF) and for UNOSOM II.<sup>184</sup> This was the first occasion this was done in order to deal with a conflict within a state's borders. It took place in the slipstream of success generated by the dramatic result of Operation Desert Storm. A fundamental matter that did not seem to be appreciated in full was the fact that the situation in Somalia was nothing like that of the Gulf War. The latter conflict had arisen from a classical act of aggression by one state against another and it constituted a text book example of the illegal use of force against the territorial integrity of Kuwait. It was against this background of optimism and hope for the effective functioning of the UN that the decision to launch one of the most complex and challenging UN operations in the post cold war era was taken.

The decision to intervene and deploy a UN military force, like the nature of the actual force ultimately established, was very different in the case of Lebanon in 1978 and Somalia in 1992. Neither crisis had developed overnight, and there had been many calls for assistance on the basis of the threat posed to the respective regions by the civil wars and the humanitarian disaster unfolding in Somalia in particular. Both crisis also shared a common handicap from the beginning, in that the real focus of attention was elsewhere when it was decided to deploy UN military personnel. In the case of Lebanon, the United States administration was primarily concerned with the Egyptian Israeli peace treaty and the Camp David Accords. In the early 1990's on the other hand, the Somalia crisis happened at a time when the world's attention was drawn to the break up of the Soviet Union and the outbreak of fighting in the former Yugoslavia. By the time the international media brought attention to bear on the plight of the people

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South Africa, Occasional Paper No. 61, (1995), 12-15.

<sup>184</sup> See *The UN and Somalia 1992-1996*, UN Blue Book Series, Vol. VIII, New York: UN, (1996), 4.

of Somalia in 1992, the Somali state had ceased to exist and the people there sought the only security they could find from the clan system.<sup>185</sup>

The UN was often blamed for failing to resolve an intractable problem not of its making in Lebanon, and for failing to fulfill its ambitious programme in Somalia. It is all too easy place the blame on an international organization that even its strongest defenders accepted had weaknesses. However, the UN can only succeed if it given the support and the means to do so. When it appears to fail, the permanent members of the Security Council are quick to point the finger at the Organization itself and thereby deflect attention away from themselves.<sup>186</sup> But it was the Security Council, in particular the United States, that originally sponsored the initiative to establish UNIFIL, and failed to give the Force the support it both deserved and needed to be effective. Furthermore, neither the United States nor the Soviet Union put sufficient pressure on their respective allies in the Middle East region to co-operate with UNIFIL. From the outset it was clear the Force required that certain essential conditions be fulfilled before it could be effective.<sup>187</sup> In particular, it required the co-operation of the parties concerned. The actual fulfillment of these conditions was largely outside either the Secretary-General's or the Force's control. This was one of the primary reasons for the apparent inability of UNIFIL to carry out its mandate. In Somalia, after initial hesitancy, the United States became one of the main backers of the operation. But the American aspirations for UN involvement were not matched by willingness to take the necessary risks or commit more resources than was deemed necessary to fulfill what were defined and limited objectives. In the end, the United States effectively terminated the operation having hijacked aspects of the mission when its own unilateral actions backfired. The Clinton

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<sup>185</sup> J. Hirsch and R. Oakley, *Somalia and Operation Restore Hope*, Washington: US Institute of Peace, (1995), 9.

<sup>186</sup> See Simon Jenkins, 'Out of the Valley of Death', *The Times*, 20 April 1994.

<sup>187</sup> Security Council document S/12611, 19 March 1978, para. 3.

administration, in a classic damage limitation and deflection exercise, blamed the UN for what amounted to deficiencies in American policies.<sup>188</sup>

### **Security Council considerations and the decision to intervene.**

#### *The case of Somalia*

Peacekeeping in Somalia, if that is the correct term, was complex and difficult. In effect it was a mixture of peacekeeping, peace making, peace enforcement and nation building. There were so many changes of direction and strategic goals that it is not possible to generalize. Initially, policy directions decided by the Bush Administration were changed by the Clinton Administration. Somalia brought the terms 'mission creep' and crossing the 'Mogadishu line' into the everyday vernacular of commentators and observers.<sup>189</sup> With the full backing of the United States, the Secretary-General and the Security Council embarked on an expansive and ambitious programme which many in Somali perceived as an attempt to establish a *de facto* trusteeship.<sup>190</sup> The result of these series of UN military engagements in Somalia was to bequeath a legacy that profoundly affected United States and UN policy on peacekeeping and related matters thereafter.<sup>191</sup>

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<sup>188</sup> See Boutros Boutros-Ghali, *Unvanquished: A US -UN Saga*, New York: Random House, (1999), 105,107 and 119-120.

<sup>189</sup> The phrase 'crossing the Mogadishu line' was reputedly coined by Lt. Gen. Michael Rose, former British commander of UNPROFOR. It refers to when a peacekeeping force adopts robust rules of engagement, loses its impartiality and becomes more of a peace enforcement operation. See generally W. Shawcross, *Deliver Us from Evil*, London: Bloomsbury, (2000), 65-124 and 189-221.

<sup>190</sup> J. Hirsch and R. Oakley, *op. cit.*, xix.

<sup>191</sup> See generally, I. Daalder, 'Knowing when to Say No: The Development of US Policy for Peacekeepers', and W. Durch 'Keeping the Peace: Politics and Lessons of the 1990's' in W. Durch (ed.), *Peacekeeping, American Policy, and the Uncivil Wars of the 1990's*, London: Macmillan, (1997), 1-34 and 35-68 respectively; also T. Farrell, 'Sliding into War: The Somalia Imbroglia and US Army Peace Operations Doctrine', 2 (2) *International Peacekeeping* (F. Cass), (Summer 1995), 194-214.

The UN was deeply involved in Somalia, particularly in the field of humanitarian assistance, well before it ever considered deploying military observers and peacekeepers in 1992.<sup>192</sup> Although there is a long history to the conflict, it was the overthrow of the regime of Said Barre in January 1991 that marked a significant stage in the deterioration of the overall situation there.<sup>193</sup> The withdrawal of UN relief agencies in early 1991 was a fatal decision for the people of Somalia. At this stage, although lawlessness and anarchy were rampant, famine was not widespread. The necessity for some form of non coercive intervention by the UN to prevent the humanitarian situation worsening was obvious.<sup>194</sup>

The slow response of the UN inevitable meant lost opportunities for mediation and preventive diplomacy at an earlier stage. Such approaches have a fairly good chance of success without great expense and the need for a large military presence.<sup>195</sup> However, the lack of an early and effective response must be considered in the context of other events happening at that time. Despite the end of the cold war, the UN still faced crippling financial difficulties, and its peacekeeping role was over stretched dealing with, among others, major events in the former Yugoslavia and in Cambodia. At first the deployment of UN military

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<sup>192</sup> *The UN and Somalia 1992-1996, op. cit.*, 15.

<sup>193</sup> For a good general background see M.D. Abdullahi, *op. cit.*, 1-11. See also *The UN and Somalia, op. cit.* 9-13; Human Rights Watch/Africa, 7 (2) *Somalia Faces the Future - Human Rights in a Fragmented Society*, ( April 1995), 13-16; Lee V. Cassanelli, 'Somali Land Resources Issues in Historical Perspective', in W. Clarke and J. Herbst, *Learning From Somalia*, Boulder: Westview Press, (1997), 67-76; and M. H. Brons, *Society, Security, Sovereignty and the State: From Statelessness to Statelessness?*, Utrecht: International Books, (2001).

<sup>194</sup> See T. Deagle, 'Famine threatens Somali capital as thousands of refugees flock in', *The Times* (London), 23 May 1991, 11. See also M. D. Abdullahi, *op. cit.*, 8-9.

<sup>195</sup> For three instances where early intervention might have been successful, see M. Sahnoun, *Somalia - The Missed Opportunities*, United States Institute of Peace, Washington DC, (1994), 5-11. See also T. Mockaitis, 'Civil Conflict Intervention: Peacekeeping or Enforcement?', in A. Morrison, D. Fraser & J. Kiras (eds.) *Peacekeeping With Muscle: The Use of Force in International Conflict Resolution*, Cornwallis: Canadian Peacekeeping Press, (1997), 31-50 at 37.

forces in Somalia was somewhat more subtle than that of Lebanon. Intervention in a civil war or internal conflict situation presents special difficulties, and this explained in large part the view of those at UN headquarters that the response should be limited to the delivering humanitarian aid. This view was also significantly influenced by the United States and Russian reluctance to become involved.<sup>196</sup> This was not unlike the policy and reluctance of the UN with regard to intervention in Lebanon also.<sup>197</sup> In fact, the possibility of a peacekeeping or similar initiative by the UN was not even considered at first. The issue of state sovereignty hampered efforts to decide on a plan of action as there was no government to request assistance or give its consent, and intervention was not favoured by the Organization of African Unity.

In early 1992, in a somewhat belated attempt to respond to the crisis, the Security Council adopted Resolution 733(1992) which imposed a mandatory arms embargo and strongly urged the various armed factions to observe a cease fire.<sup>198</sup> It still amounted to a less than enthusiastic response from the Security Council to the situation in Somalia, and the resolution was little more than an expanded humanitarian and diplomatic effort. In a country awash with weaponry of all kinds, such a resolution was bound to have little practical effect, but it did create the impression that the international community was responding to the crisis.

Early mediation efforts had limited success but did secure agreement on a cease-fire between the leaders of two major factions, General Aided and Ali Mahdi, and the deployment of a UN technical team. Although any agreement on a cease fire was welcome, it was vague in some crucial respects. In particular, it was not evident which of the warring factions was included, and it left most of the country unaffected.<sup>199</sup> It also had the unintended effect of focusing on Mogadishu

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<sup>196</sup> Cohen, *loc. cit.* n. 2.

<sup>197</sup> Interview, Sahnoun, *op. cit.*

<sup>198</sup> Resolution 733 of 23 January 1992, paras. 4 and 5.

to the detriment of the remainder of the country. It may even have intensified the rivalry for control between Aided and Mhadi in the city, and it allowed each in turn to claim legitimacy through dealing with the UN. Local clan leaders and elders felt excluded from the process, and that the problems of the remainder of the country were not recognized.<sup>200</sup> These factors complicated the task later undertaken by the UN of rebuilding the state and involving all the parties in the negotiations to achieve this.

Although the policy of dealing with leaders like Aided and Mhadi was based on pragmatic considerations, it ignored their record as leaders of groups that were responsible for grave breaches of human rights and humanitarian law during the conflict.<sup>201</sup> The UN emphasis on the importance of a good working relationship with all the parties may be a barrier to confronting recalcitrant leaders effectively.<sup>202</sup> Even worse was the fact that the policy was inconsistent throughout the period and 'wavered between identification of the war leaders as the primary decision-makers in Somali political life, and dubbing them mere terrorists.'<sup>203</sup> Such policy shifts did little to inspire confidence among traditional Somali leaders and elders, and it must have been somewhat bewildering for the 'war

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<sup>199</sup> This cease-fire was signed in New York on 14 February 1992. Signatories represented the 'Interim Government of Somalia' and the Central Committee of the United Somali Congress, Security Council document S/23693, 11 March 1992.

<sup>200</sup> Personal interview, Ambassador Sahnoun, Dublin, November, 1993. Aided also manipulated Jonah's visit so that no contact was made with neutral clans such as the Murasade who had played a central role in resolving earlier fighting. Jonah may also have compromised UN neutrality by declaring Aided the greatest obstacle to cease-fire in the war Africa Watch, 'A Fight to the Death?', 13 February 1993, 7-10.

<sup>201</sup> See Human Rights Watch/Africa, 7 (2) *Somalia Faces the Future - Human Rights in a Fragmented Society*, (April 1995), 17-32.

<sup>202</sup> According to Stedman and Rothchild, in Angola, Cambodia and Rwanda appeasement was an inefficient and morally bankrupt policy. Appeasement cannot work if the targeted party interprets it as weakness, S. Stedman and D. Rothchild, 'Peace Operations: From Short -Term to Long-Term Commitment', in Jeremy Giner (ed.), *Beyond Emergencies - Development Within Peacekeeping Missions*, 3 (2) *International Peacekeeping*, (Summer 1996), 17-35 at 24. See also Ratner, *op. cit.*, 200-202.

<sup>203</sup> *Ibid.* 6.

leaders' also. There were other less obvious factors at play in the lead up to UN intervention. Aided was opposed to any deployment of UN personnel and to a cease fire.<sup>204</sup> He perceived this as a means of freezing the *status quo* and preventing him from defeating Madhi, which he considered he was in a position to do in a relatively short time. There was also significant animosity between Aided and the new Secretary-General.<sup>205</sup> This went back to the time when Boutros-Ghali was the Egyptian minister responsible for foreign policy at a time when the Egyptian government supported the Siad Barre regime. This 'baggage', or personality factor, was to significantly influence events throughout the period of UN involvement.

### *The case of Lebanon*

The controversy surrounding the actual adoption of Resolution 425(1978) establishing UNIFIL provides important clues to understanding the problems confronted by the Force on the ground.<sup>206</sup> In addition, the mandate given the Force by the Security Council has not changed since 1978, and this is in stark contrast to the changes in the mandates and actual forces deployed in Somalia. Again, it was the United States that did the work behind the scenes and then made

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<sup>204</sup> See J. Drysdale, 'Foreign Military Intervention in Somalia: The Root Cause of the Shift from UN Peacekeeping to Peacemaking and Its Consequences', W. Clarke and J. Herbst, *op. cit.*, 118-134 at 121.

<sup>205</sup> Interview, Sahnoun, *op. cit.* and J. Hirsch and R. Oakley, *op. cit.*, 19. See also M. D. Abdullahi, *op. cit.*, 21. Egyptian geopolitical policies sought, *inter alia*, a unitary Somali state as a counterweight to Ethiopian power in the region. Boutros Boutros-Ghali refers to false stories circulated about him, especially regarding an alleged confiscation of a farm in Somalia by Aided, but he makes no reference to this old animosity, Boutros Boutros-Ghali, *op. cit.*

<sup>206</sup> This demanded strict respect for Lebanon's territorial integrity and called upon Israel immediately to cease its military activity and withdraw its troops. It also authorised the establishment of UNIFIL for the purpose of confirming the withdrawal of Israeli forces; restoring international peace and security; and assisting the Government of Lebanon in ensuring the return of its effective authority in the area. For the full text of Security Council Resolution 425 (1978) see Appendix A.

the formal proposal to establish a peacekeeping force.<sup>207</sup>

The Lebanese government's strategy at this time was to internationalise and highlight the problem and thereby extricate itself from the regional conflict taking place in Lebanon between Israel, the Palestinians and Syria.<sup>208</sup> With this in mind it successfully obtained UN support for the establishment of a peacekeeping force in the south. The various contributions to the debate in the Security Council showed that while there was general support for the establishment of a peacekeeping force, there was no general consensus on what the mandate of such a Force should be or how the Force should carry out this mandate. Furthermore, all parties involved were critical of various aspects of Resolution 425 (1978) itself. Even at this very early stage in the creation of the Force, the lack of political consensus within the Security Council, which was to hinder the effective functioning of the Force thereafter, was already apparent.<sup>209</sup> UNIFIL's mandate looked good on paper, but had remarkable little to do with the cruel realities of the presence of the PLO in southern Lebanon and the Israeli determination to occupy part of this by proxy.<sup>210</sup>

The fact that the whole debate and Resolution 425 (1978) ignored the central element of the crisis in the Middle East, a resolution of the Palestinian problem and the need for a comprehensive settlement of the overall Middle East question, caused many members to vacillate in their express support for the establishment of the Force. In the event, the establishment of a peacekeeping

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<sup>207</sup> S.C.O.R., 33 year 2074 Mtg. , 19 March 1978. For general background on United States policy in the UN, see D. Puchala, 'American Interests and the UN', 97 (4) *Political Science Quarterly*, (Winter 1982/83), 571-588; and G. L. Sherry, 'The UN, International Conflict and American Security', 101 (5) *Political Science Quarterly*, (1986), 753-771.

<sup>208</sup> See G. Tueni, *Une guerre pour les autres*, Paris: Jean Claude Lattes, (1985), 200-204. Mr. Tueni was Lebanon's Ambassador to the U.N. at the time.

<sup>209</sup> S.C.O.R., 2074 Mtg., *op. cit.*

<sup>210</sup> See B. Urquhart, *A Life in Peace and War*, London: Weidenfeld and Nicolson, (1987), 289.

force with ambiguous and unrealistic objectives and terms of reference was agreed to hastily in order to solve the immediate crisis.<sup>211</sup>

The urgency of reaching some agreement on the crisis precluded the Security Council from considering a more long term solution. It is hardly surprising therefore, that UNIFIL has encountered major difficulties in implementing its mandate. This same urgency was also the main determinant in deciding the extent to which the United States consulted the other members of the Security Council and the parties involved in the conflict. The exact extent of the consultations with Israel is not known. However, it is almost certain that as the United States strongest and most reliable ally in the region, it was both informed and consulted on the initiative. It is also evident that Israel was not happy with all its aspects but was forced to succumb to American pressure, as a result Resolution 425 was greatly resented in Israel.<sup>212</sup>

At this time the United States' primary concern in the Middle East was the Camp David Accords and concluding the Egyptian-Israeli peace treaty.<sup>213</sup> The Lebanese government had requested the United States to sponsor the peacekeeping initiative as it realised that America was the only country likely to

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<sup>211</sup> In this regard, the Secretary-General had this to say; 'when a peacekeeping operation is firmly based on a detailed agreement between the parties in conflict and they are prepared to abide by that agreement, it is relatively easy to maintain ... (e.g. UNEF and UNDOF) ... when, however, an operation is mounted in an emergency with ambiguous or controversial objectives and terms of reference, and on assumptions which are not wholly realistic, it is likely to present far greater difficulties. This is undoubtedly the case with UNIFIL'. K. Waldheim, *Building the Future Order*, Robert L. Schiffer (Ed), London: Collier Macmillan, (1980), 45.

<sup>212</sup> See C. Cruise O'Brien, *The Siege: The Saga of Israel and Zionism*, London: Weidenfeld and Nicolson, (1986), 584. See also N. A. Pelcovits, *Peacekeeping on Arab-Israeli Fronts*, Boulder and London: Westview Press/Foreign Policy Institute, School of Advanced International Studies, (1984), 18.

<sup>213</sup> President Carter was later to identify this as his most significant foreign policy achievement; J. Carter, *Keeping Faith: Memoirs of a President*, New York & London: Bantam Books, (1982). See also B. Reich, and R. Hollis, 'Peacekeeping in the Reagan Administration' in *Peace Making in the Middle East - Problems and Prospects*, P. Marantz and J.G. Stein, (Eds). London: Croom Helm, (1985), 133-155.

be able to bring about sufficient Israeli co-operation. This premise was certainly true, however, they seem to have overlooked the dilemma that the United States would face in the Security Council, as guardian both of Israel's and of Lebanon's interests. The Lebanese appeared to have exaggerated their own importance to the United States and Lebanon's significance in American foreign policy. American policy, regarding Lebanon was rooted in domestic, regional and global considerations, which did not always coincide with Lebanese interests.<sup>214</sup> Even though relations between Israel and the United States were often turbulent, the Lebanese government may also have under-estimated the influence of the Jewish community in the United States.<sup>215</sup> In many instances it appeared as if the Israel tail was wagging the American dog.<sup>216</sup>

The early years of UNIFIL's deployment and abortive attempts to carry out its mandate, also coincided with a series of crises in American foreign policy. First the Iranian Revolution took place. Then the seizure of the American hostages in Teheran occurred. This series of related events, along with the Soviet invasion of Afghanistan, preoccupied the final fourteen months of President Carter's term in office, much to the detriment of other significant foreign policy issues.<sup>217</sup> In particular, it meant that little attention was paid to the peacekeeping

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<sup>214</sup> See E.E Azar and K Shnayerson, 'United States - Lebanese Relations: A Pocketful of Paradoxes' in *The Emergence of a New Lebanon. Fantasy or Reality*, New York: Praeger, (1984), 219-275.

<sup>215</sup> See H. Kissinger, *Years of Upheaval*, London: Weidenfeld and Nicolson, (1982), 792 and Passim C. Cruise O'Brien, *op. cit.*, 400-403 and *Passim*.

<sup>216</sup> See for example the forced resignation of the US representative at the UN, V *Keesing's Contemporary Archives*, 22956, 2 November 1979 The following year, the United States was forced to do a complete turnaround on a positive vote by it in the Security Council criticising Israeli settlement policy in the occupied Arab territories, VII *Keesing's Contemporary Archives*, 30874, 22 May 1981. The influence of the American Jewish community and the domestic importance to an American President of United States policy towards Israel and the Middle East in general, was further demonstrated by the repeated congressional resistance to, or actual blocking of, certain proposed arms sales to Jordan, see XXXIX *Keesing's Contemporary Archives*, 32412, (September 1983); XXXI, 33691, June 1985; XXXI, 34074-34079, (December 1985), and *International Herald Tribune*, 14/15 February 1987, 1 and 5.

<sup>217</sup> See H. Jordan, *Crisis: The Last Year of the Carter Presidency*, New York: G.P.

Force in Lebanon except during the debates in the Security Council on the renewal of the mandate. Consultation with certain parties was also difficult. While Resolution 425 (1978) specifically mentioned Israel and Lebanon, it did not refer to the PLO as it was not recognised as an official party to the conflict. However, the co-operation of the PLO was necessary to ensure the success of UNIFIL. The PLO's initial reaction to the Resolution was strongly critical of its failure to tackle what it perceived as the real problem in the Middle East, namely the question of Palestine.<sup>218</sup> Nonetheless, the leadership did give certain assurances but serious problems arose later when PLO elements refused to co-operate and clashes occurred when UNIFIL attempted to deploy in and around areas controlled by the PLO.<sup>219</sup>

When the proposal to establish UNIFIL was made, the situation was not unlike that of Somalia in that some senior UN officials expressed strong reservations regarding the Organization assuming such a role.<sup>220</sup> There was grave concern at some of the assumptions that United States policy was based upon. An Israeli withdrawal from all of south Lebanon was central to the success of UNIFIL's mission, yet it was not clear that Israel would co-operate fully. How was a peacekeeping force to restore Lebanese government authority to an area where it was non-existent, when the Lebanese army was divided and the government concerned probably couldn't maintain control for very long anyway? There was no clear policy either on how the peacekeeping Force would deal with the various armed elements in and around its area of operation, or what action the

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Putman's Sons, (1982). B. Reich and R. Hollis, *op. cit.*, 133-134.

<sup>218</sup> Personal interview, Lt Gen Erskine, Dublin, July 1986. Since the conclusion of the so called Cairo Agreement in 1969 between the PLO and the Lebanese army, the PLO had certain military rights in Lebanon. The text of the Agreement is given by W. Khalidi, *Conflict and Violence in the Lebanon: Confrontation in the Middle East*, Harvard Studies in International Affairs No. 39, (Harvard, 1979), 185-187.

<sup>219</sup> Document S/12620/Add 4, 05 May 1978.

<sup>220</sup> See I.J. Rikhye, *The Theory and Practice of Peacekeeping*, London: Hurst and Company, (1984), 109.

Force would take if the Israelis did not withdraw completely. In the end, the urgent necessity to do something to alleviate the immediate crisis while there was some broad consensus in the Security Council meant that such misgivings had to be put aside. A resolution establishing a peacekeeping force in a region of such conflicting American and Soviet interests had to be a delicate balance of political pressure and persuasion. A minor change in emphasis risked causing either superpower to exercise its right of veto. Further prolonged discussion could therefore have jeopardised the whole initiative.<sup>221</sup>

### **Response to the deployment of UN forces in Somalia and Lebanon**

#### *Deployment of UNOSOM I*

As the situation in Somalia during early 1992 continued to deteriorate, the need for some form of intervention to improve the security situation became even more imperative. Aid workers and the general population were being harassed and terrorized, and there were reports of crop failures in the agriculturally rich region to the south.<sup>222</sup> It was against this background that Mohamed Sahnoun was appointed the Secretary-General's Special Representative in Somalia, and soon afterwards the first UNOSOM (UNOSOM I) mission was established.<sup>223</sup> Resolution 751(1992) was the legal basis for the UN attempt to deploy a small number of cease-fire observers and a small force of security personnel for the protection of humanitarian relief operations in the capital.<sup>224</sup> This deployment

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<sup>221</sup> See *The Blue Helmets, A Review of UN Peacekeeping*, (3rd. ed.), New York: UN, (1996), 88-89

<sup>222</sup> The relief effort had begun to generate its own pernicious dynamic and food had become the main item of commerce, see J. L. Woods, 'US Decisionmaking During Operations in Somalia', in W. Clarke and J. Herbst, *op. cit.*, 151-172 at 154.

<sup>223</sup> Security Council Resolution 751(1992), 24 April 1992. It is referred to as UNOSOM I to distinguish it from the later UNOSOM II mission. Sahnoun was an experienced Algerian diplomat. See also XXIX (3), *UN Chronicle*, (September 1992), 14.

<sup>224</sup> Resolution 751, 24 April 1992, para. 4. See also Report of the Secretary-General

was based on traditional peacekeeping premises i.e. the consent of the parties.<sup>225</sup> However, this was a failed state and the application of conventional thinking and methods was not appropriate. Not surprisingly, there was poor cooperation from the factions and outright opposition from others, which led to long delays in the deployment of these units and a consensus that it was completely ineffective.<sup>226</sup> The linking of action to the agreement of the warlords at a time when Somalis were starving damaged the credibility of the Organization in the eyes of Somali people. It was also an abdication by the Security Council of its responsibility, and a lost opportunity for early intervention. Agreement and consensus is preferable, but given the humanitarian crisis, a deadline should have been set for intervention to impose a cease-fire and secure humanitarian aid.

The Bush administration had initially opposed the deployment of 500 armed troops as it was concerned at the escalating cost of peacekeeping in an election year, despite the fact that the overall cost was small in comparison with other operations.<sup>227</sup> This was an untenable position to adopt and in the circumstances, it was not surprising that the Secretary-General grew frustrated at what he saw as the West's preoccupation with 'a rich man's war' in the Balkans, while it was prepared to ignore the plight of the people of Somalia.<sup>228</sup> In the event, Resolution 751(1992) approved in principle the Secretary-General's plan to deploy as soon as possible a 500 person armed security force to escort deliveries of humanitarian supplies to distribution centers.<sup>229</sup> Though such a

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on the situation in Somalia, S/23829, 21 April 1992, esp. paras. 22-33, and 62-63.

<sup>225</sup> *The UN and Somalia 1992-1996, op. cit.*, 17.

<sup>226</sup> T. Farrell, *op. cit.*, 194-214 at 195.

<sup>227</sup> The operation was to be established for an initial period of six months, at an estimated cost of \$23.1 million (S/23829 and Add. 1 and 2). See also *The Globe and Mail*, 'If Sarajevo, Why not Somalia?', 22 July 1992, A18. Bush was also concerned at his perception as having more interest in foreign than domestic policy in an election year, *New York Times*, 26 April 1992.

<sup>228</sup> See Boutros Boutros-Ghali, *op. cit.* 55 and E. Sciolino, 'UN chief has to direct peace efforts at US, too', *The New York Times*, 16 October 1993, A. 1.

move was certainly warranted, it was likely to be considered threatening by Aided and it had not been endorsed by him.<sup>230</sup>

In July, the Secretary-General reported that while the cease-fire had held reasonably well, banditry and looting had become more widespread in Mogadishu, and attacks on UN and non governmental personnel were on the increase.<sup>231</sup> The maintenance of the cease fire was largely a result of Sahnoun's considerable diplomatic effort, but the UN machinery and bureaucracy could not keep up with the pace of the humanitarian disaster.<sup>232</sup> It was evident from the Secretary-General's report that the situation continued to be critical, and in an effort to begin the process of rebuilding the Somali state, the Special Representative had begun negotiations with traditional elders and political leaders.<sup>233</sup> Sahnoun's delegation pursued a strategy of putting the clan system to work for Somalia.<sup>234</sup> Agreements among local elders gradually helped reduce the fighting and allowed food deliveries into the interior of the country. This bottom up approach had much to recommend it and it bore all the hallmarks of

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<sup>229</sup> See XXIX (3) *UN Chronicle*, (September 1992), 13. Sahnoun was appointed head of UNOSOM and its purpose was to monitor the cease-fire in Mogadishu, to provide security for UN personnel and supplies, and to escort humanitarian supplies to distribution centers.

<sup>230</sup> In the Secretary-General report (S/23929, para. 23), he noted 'that under the Agreements [with Aidid] the UN is to consult the parties before determining the number of security personnel required for the protection function'.

<sup>231</sup> Report of the Secretary-General on the situation in Somalia, S/24343, 22 July 1992, paras. 21, 22 and 63.

<sup>232</sup> See J. L. Woods, *op. cit.*, in W. Clarke and J. Herbst, *op. cit.*, 151-172 at 154.

<sup>233</sup> For general background on the situation see Report of the Secretary-General on the situation in Somalia, S/24343, 22 July 1992, esp. paras. 21,22 and 63. The sheer scale of the crisis was evident from Sahnoun's Report to donors' conference convened in Geneva on 12 October, 1992, quoted in M. Sahnoun, *Somalia, the Missed Opportunities*, *op. cit.*, 27-29.

<sup>234</sup> See S. Normak, 'Building Local Political Institutions: District and Regional Councils', paper to the Comprehensive Seminar on Lessons Learned from the UN Operation in Somalia, Lessons Learned Unit, Dept. of Peacekeeping Operations, Plainsboro, NJ, 13-15 September 1995, 3 and W. Clarke, 'Failed Visions and Uncertain Mandates in Somalia', in W. Clarke and J. Herbst, *op. cit.*, 3-19 at 7.

Ambassador Sahnoun's overall strategy to deal with the situation on the ground. It was a means of restoring the political balance in favour of more traditional leadership which had been consistently urged on UNOSOM by the Uppsala Advisory Group.<sup>235</sup>

The slow response of the UN may indeed have been the result of structural rigidity and bureaucracy.<sup>236</sup> But the scale and complexity of the problem did not have a precedent for the Organization to follow. Do you deal with the warlords, and if so in what way? There were no political structures, and the physical infrastructure was almost not existent. In Resolution 767(1992), the Security Council approved the establishment of four operational zones in Somalia with the hope that UN involvement would adapt to the complexity of the situation in the country and enhance the effectiveness of humanitarian operations.<sup>237</sup> This decentralized system made UNOSOM and the relief agencies less dependent on the conditions prevailing in Mogadishu and promoted the new regional leadership which was badly needed by Somalia. Another technical team was sent to assess how best to use UN security guards to protect aid workers, and to convene a conference of national reconciliation. Whether it was strictly necessary to dispatch this additional team is a moot question now, but it is strange that the Secretary-General did not rely more on his own Special Representative in Somalia at this time. Sahnoun had by this time gained the confidence of the non governmental organizations (NGO's) and local elders, though in doing so he was earning the ire of the UN bureaucracy.<sup>238</sup>

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<sup>235</sup> This was based in the Horn of Africa Centre of the Life and Peace Institute of Uppsala. It was comprised of a number social scientists with expertise on Somalia drawn from a number of countries. It consistently urged UNOSOM to adopt a bottom up approach and encourage as much decentralization as possible.

<sup>236</sup> Interview, Sahnoun, 26 November 1993, Dublin.

<sup>237</sup> Resolution 767(1992), adopted 24 July 1992. The four zones were Bossaso, Berbera, Kismayu and Mogadishu. It also called for cooperation in the deployment of the 500 person security force agreed to in Resolution 751(1992), paras 4-5.

<sup>238</sup> Personal interview, International Concern worker in Somalia at the time, Galway, Ireland, January 1999. Sahnoun was particularly critical of the UN relief agency efforts and

The actual plan to establish a traditional peacekeeping operation with the mandate to use force if necessary to protect the food convoys was well conceived. The decentralized concept and the engagement of regional organizations and all Somali factions in control of territory had much merit. Had it been successful it would have cost very little in comparison with what was to follow. The truth was that UNOSOM 1 was never really given a chance to succeed. Several serious problems were created by wrong and unjustified moves of the UN management, both at headquarters and by some agencies' representative in the field.<sup>239</sup> These hampered Sahnoun's efforts which led to strains in relations, but his primary sin in the eyes of the UN hierarchy was to make his views known publicly. After 'arduous negotiations', and with the help of local elders, Sahnoun obtained the consent of Aided, Mhadi and other faction leaders to the deployment of the 500 armed UN 'security personnel' to protect aid coming through Mogadishu port.<sup>240</sup> However, before these even touched down in Somalia, the Security Council agreed to increase the size of the force to 3,500 at the request of the Secretary-General.<sup>241</sup>

There had been an inexcusable delay in deploying the 500 troops agreed in the first instance, and the security environment had worsened as a result. Unfortunately, Sahnoun was neither consulted nor informed of the decision in advance.<sup>242</sup> This undermined his authority and made him appear duplicitous in

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he believed that not done enough had been done to establish the necessary distribution networks. As a result, those who cooperated with his reconciliation efforts could see no tangible improvements in their living conditions, see W. Durch, 'Introduction to Anarchy, Humanitarian Intervention and "State Building" in Somalia' in W. Durch (ed.), *op cit.*, 310-565 at 316.

<sup>239</sup> See M. Sahnoun, 'Prevention in Conflict Resolution: The Case of Somalia', 5 *Irish Studies in International Affairs*, (1994), 5-13, 10. See also S. M. Makinda, *Seeking Peace from Chaos: Humanitarian Intervention in Somalia*, International Peace Academy, (1993), 68-69.

<sup>240</sup> Interview, Sahnoun, 26 November 1993, Dublin. Aided had argued that his forces should be mandated to carry out this and similar tasks.

<sup>241</sup> Resolution 775 (1992), 28 August 1992, para. 3.

<sup>242</sup> Interview, Sahnoun, November 1993, Dublin; and M. Sahnoun, *op. cit.*, 38-39.

the eyes of Aided. From the point of view of the Secretary-General, it was a logical progression given the deteriorating security and general situation in Somalia. Aided was enraged at the lack of any consultation, and it added to his sense of grievance and insecurity at the growing UN involvement. Furthermore, the leaders of the neighbouring countries, who had been supportive to date and kept informed of events by Sahnoun, were also ignored.<sup>243</sup> This was probably the most significant example of the bureaucratic approach of UN headquarters, and its tendency to ignore UNOSOM's advice in regard to sensitive matters, especially related to security.

One other incident that occurred was also to have a profound impact on the trust gained by UNOSOM and the UN up to that point. It became known that a Russian plane with UN markings and chartered by a UN agency had delivered currency and military equipment to Aided's major rival in the north, Mhadi.<sup>244</sup> The agencies concerned were unable to explain how this had happened in the circumstances. It later transpired that the plane was doing some unauthorized moonlighting. A proper investigation should have been held into the incident and appropriate action taken. This added to the difficulties of the UN personnel on the ground. The incident rekindled all the earlier fears about a partisan United Nation's approach to the conflict, and, although false, the rumors and circumstantial evidence were not rebutted in the proper way. The delivery of arms was also in direct contravention of a UN resolution, which imposed a 'general and complete embargo on all deliveries of weapons and military equipment to Somalia'.<sup>245</sup> Unfortunately, the criticism of the UN by Sahnoun did not help his already troubled relationship with headquarters.<sup>246</sup> The episode was another example of the ineptness of the UN policy at the time.

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<sup>243</sup> *Ibid.*

<sup>244</sup> *Ibid.* 39. There was some confusion as to whether the plane was still under lease to the World Food Program. The UN Office for Legal Affairs concluded that the lease contract remained in force at the time of the flight.

<sup>245</sup> Resolution 733 of 23 January 1992.

At around the same time the United States was beginning to take a more active interest in Somalia and this was reflected in the Department of State public statement in favour of dispatching armed UN security elements. This was the first indication of American approval of the need for a more proactive security policy since the crisis began.<sup>247</sup> The Bush administration and public opinion were beginning to come around to the point of view that something radical needed to be done. The sequence of events leading to the first dramatic humanitarian intervention led by the United States in Somalia was set in motion.

### *Options facing the Secretary-General and the Deployment of UNITAF*

UN intervention in Somalia arose from the urgent need to respond to the famine and appalling suffering of the Somali people in their war-ravaged country. The response was slow and deliberate; each Security Council resolution expanded and modified the role of UNOSOM. As the situation deteriorated and the operation floundered in late 1992, the Secretary-General faced up to the dilemma and outlined five options.<sup>248</sup> The first was to continue with a peacekeeping, i.e. consensual and non-forceful mission. This option did not seem viable, given the nature and scale of the problems confronting the UN in Somalia. A second option was to withdraw, but this would have been an unacceptable public admission of failure by the UN, the Secretary-General and the international community. A further option was to be more assertive and forceful in the capital, in the hope that this would have an influence in the country as a whole. Alternatively, a UN enforcement mission could be launched under its own command and control. However, it is unlikely that the UN possessed either the capability or capacity to do so, then or now. Not surprisingly, when the United States indicated that it would be prepared to spearhead a UN sanctioned forceful mission to

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<sup>246</sup> Sahnoun resigned after losing the confidence and support of the Secretary-General, Personal interview, Sahnoun, 26 November 1993, Dublin. See also M. Sahnoun, *op. cit.*, 40. For a less sympathetic perspective see Boutros Boutros-Ghali, *op. cit.*, 56.

<sup>247</sup> H. Cohen, *op. cit.*, 60.

<sup>248</sup> Document S/24868 dated 30 November 1992.

establish a secure environment for humanitarian operations, the Security Council agreed.

At first the United States was reluctant to become involved. Then American public opinion changed to favour intervention. The Secretary-General Boutros-Ghali also put pressure on President Bush pointing out, among other things, the growing perception among the countries of the South that the United States manipulated the UN only when it served United States interests, as in the Gulf War.<sup>249</sup> While the United States was prepared to act unilaterally, they were understandably anxious to have international support on the ground and in the Security Council.<sup>250</sup> As there was to be no dilution of United States command and control of the operation, the Secretary-General declined to permit the forces deployed wear the 'blue helmets' traditionally worn by peacekeepers, and the troops that participated in the Korean war. It seems that the actual decision to intervene was taken by the President Bush. No doubt this decision was influenced by criticism from non-governmental agencies, Capitol Hill and the Clinton camp. But it was probably a conclusion by the military that they could 'do the job' if called upon that had most influence on the President.<sup>251</sup> The decision was generally popular with the American public and with Congress, and President-elect Clinton endorsed it.<sup>252</sup> Nevertheless, even before the operation was mounted there were those who questioned whether it was appropriate or necessary.<sup>253</sup>

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<sup>249</sup> Brent Snowcroft, National Security Advisor to President Bush, 'Mission Impossible', Assignment, BBC 2, 15 March 1994.

<sup>250</sup> I. Lewis and J. Mayall, 'Somalia', in J. Mayall(ed.), *op. cit.*, 94-225 at 111.

<sup>251</sup> J. Hirsch and R. Oakley, *op. cit.*, 43.

<sup>252</sup> James L. Woods, 'US Decision making During Operations in Somalia', in W. Clarke and J. Herbst, *op. cit.*, 158.

<sup>253</sup> Africa Rights, *Operation Restore Hope: a Preliminary Assessment*, London, May 1993. OXFAM - America, OXFAM - UK, and CONCERN Worldwide supported it, while Medecins Sans Frontier and Save the Children opposed it-see STC press release 'Imposing troops could destroy the effort', 26 November 1992; interview, Concern Worldwide worker in Somalia at the time, Dublin, 1999.

In any event, it should have been evident from the beginning that the conflict in Somalia was not going to be of the short, sharp, overwhelming kind that politicians and military planners, especially in the United States, believe is vital to sustain a public consensus for involvement.

In December 1992, acting under Chapter VII, the Security Council unanimously adopted Resolution 794(1992) and determined that 'the magnitude of the human tragedy [mass starvation] caused by the conflict in Somalia, further exacerbated by the obstacles being created to the distribution of human assistance, constituted a threat to international peace and security'.<sup>254</sup> In authorising UNITAF, a large multinational force led by the United States, to use 'all necessary means to establish as soon as possible' a secure environment for humanitarian relief operations, the Security Council took an important step in redefining its role in the maintenance of international peace and security.<sup>255</sup> This was a familiar UN euphemism for authorising the use of force and it was in stark contrast to the UN intervention in Lebanon, which occurred along traditional peacekeeping lines and for which there were established precedents. According to the preamble to Resolution 794(1992), the scale and complexity of the situation in Somalia was unique, and it required an immediate and exceptional response. Implicit in the resolution was a recognition that the situation was beyond that to which the normal rules of peacekeeping would apply. Its adoption reflected a new consensus on what constituted a 'threat to peace' justifying military enforcement action under Article 42. Article 39 was interpreted as including a humanitarian disaster caused by mass starvation. This was a significant precedent from the more traditional approach to the use of force under Article 42.<sup>256</sup>

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<sup>254</sup> Security Council Resolution 794, 3 December 1992, third paragraph of the preamble. See also T. Mockaitis, *op. cit.*, 36-42.

<sup>255</sup> N.D. White and O. Ulgen, 'The Security Council and the Decentralized Military Option: Constitutionality and Function', XLIV (3) *Netherlands International Law Review*, (1997), 378 - 413 at 398; see also M.R. Hutchinson, 'Restoring Hope: UN Security Council Resolutions for Somalia and an Expanded Doctrine of Humanitarian Intervention', 34 *Harvard International Law Journal*, (1993), 624-640.

<sup>256</sup> Although the resolution was adopted by a unanimous vote, there was not the same unanimity among the members regarding the significance of the vote. Some seemed reluctant to recognise that they were creating a precedent that could be followed in the future. They

Like the enabling resolution in respect of UNIFIL, Resolution 794(1992) was the result of both political and pragmatic considerations, and as such it was not a perfectly crafted document. It would have been preferable if the objectives of the mandate had been precisely defined and limited in time in order to prepare the way for a return to peacekeeping and post conflict peace building.<sup>257</sup> It was ambiguous in certain important respects, but it was clear that like Resolution 425(1978), it also required the co-operation of the parties in Somalia in order to be effective. It was also evident from correspondence from the Secretary-General to the Security Council and to President Bush, that he perceived one of the primary objectives as being to neutralise the heavy arms of the regular forces of the factions, and to disarm irregular forces.<sup>258</sup> In the final draft of the resolution this objective was dropped in favour of more neutral language, which was more acceptable to all members of the Security Council.<sup>259</sup> This was a significant omission that subsequently contributed to the most important difference in interpretation of the objectives of the mandate by the United States and the Secretary-General i.e. the issue of disarming the factions.

The Secretary-General had also recommended that the mandate be defined to include a country wide intervention to be carried out under UN command and control; and a specific time limitation within which disarmament would take place, after which the operation would be handed over to UN peacekeeping forces.<sup>260</sup> The Security Council instead opted to authorise a 'unified command and control system' that would reflect the offer made by the United States to manage the operation. In this regard the Council had little option, as the United States would not accept UN command in

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stressed the unique nature of the situation in Somalia, and special emphasis was placed on the lack of any government. See S.C.O.R., 47th Session, 3 December 1992.

<sup>257</sup> See the Secretary-General's recommendation, Document S/24868 dated 30 November 1992.

<sup>258</sup> Document S/24868 dated 30 November 1992; and letter from the Secretary-General to President Bush dated 8 December 1992, reproduced in *The UN and Somalia 1992-1996, op. cit.*, p216.

<sup>259</sup> Hutchinson, *loc. cit.*, 632.

<sup>260</sup> Document S/24868 dated 30 November 1992

almost any circumstances, and certainly not when leading enforcement operations under Chapter VII.<sup>261</sup> For this reason, despite the fact that the UN approved the UNITAF mandate, the Organization neither organised nor commanded the troops that were sent to fulfil it.<sup>262</sup> This was one of the most significant differences between UNITAF and the UNOSOM I and II missions. It was also a feature that distinguished it from the traditional model of command and control adopted for UNIFIL and other peacekeeping operations.<sup>263</sup>

Although there was liaison between the existing UNOSOM force and the Secretary-General's representative on the one hand, and UNITAF, it was evident that the United States was in the driving seat and it would determine policy and strategy. This was not as unreasonable an arrangement as first might appear. The United States was supplying the majority of the troops and the bulk of the military hardware at its own expense. Furthermore, there had been no misrepresentation by the United States of the terms under which it would command the operation. Resolution 794(1992) placed emphasis on establishing a secure environment so as to enable the Security Council to make the necessary decision for a prompt transition to continued peacekeeping operations, and there was no mention of a plan or terms of reference as to how this could be achieved.<sup>264</sup> In this regard the long term strategic goals of both the UNIFIL and UNITAF operations were anything but clear from their respective enabling resolutions.

The process of implementation was bound to give rise to varying interpretations that inevitably lead to political difficulties at the highest level and

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<sup>261</sup> See J. Hirsch and R. Oakley, *op. cit.*, esp. 45-49; and generally, I. Daalder, 'Knowing when to Say No: The Development of US Policy for Peacekeepers', and W. Durch 'Keeping the Peace: Politics and Lessons of the 1990's' in W. Durch (ed.), *op. cit.*, 1-34 and 35-68 respectively.

<sup>262</sup> *The UN and Somalia 1992-1996*, *op. cit.* 33 and Makinda, *op. cit.*, 72.

<sup>263</sup> It is also noteworthy that the costs of the operation were borne by the countries supplying troops and by the countries that contributed to a voluntary trust fund set up by the Security Council.

<sup>264</sup> Resolution 794(1993), para. 18.

military dilemmas on the ground. The difference between the approach adopted by the United States, and that proposed by the Secretary-General, were all too apparent in the latter's first report on UNITAF to the Council.<sup>265</sup> These constituted fundamental differences that could not be glossed over at a later stage. The United States did not seem to appreciate the nature of UN peacekeeping operations, and the political and military constraints under which any UN led operation must function. Nor did it appreciate that a force cannot operate under a peace enforcement mandate, even if motivated by humanitarian considerations, and later revert to a traditional peacekeeping role with the consent of the parties. This was even more evident during the offensive operations conducted by the United States troops as part of the UNOSOM II mission.<sup>266</sup>

As part of a strategy to alleviate the fears of developing states about major powers interference in the internal affairs of other states, the United States was not mentioned by name in Resolution 794(1992).<sup>267</sup> While this was indicative of the level of political compromise, it amounted too little more than a cosmetic exercise that could only prove counter productive in the long term. It was also contrary to an open and transparent system of decision making. As '*Operation Restore Hope*' was getting into full swing, Boutros-Ghali promised the people of Somalia that the Force would 'feed the starving, protect the defenceless and prepare the way for political economic and social reconstruction'.<sup>268</sup> The Security Council also authorised the United States to deputise on its behalf, and significantly, linked human rights issues to a threat to international peace and security. Expectations of what might be achieved by American involvement were high in New York and on the ground in Somalia, but though successful in ensuring delivery of foodstuffs to the starving, UNITAF failed to

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<sup>265</sup> S/24992, 19 December 1992.

<sup>266</sup> See *infra.*, Chapter 7. For an excellent discussion of the deficiencies in US Army peacekeeping doctrine at the time T. Farrell, *op. cit.*, 194-214.

<sup>267</sup> Hutchinson, *loc. cit.*, 632.

<sup>268</sup> UN Press Release SG/SM/4874, 8 December 1992, and *UN Chronicle*, New York: UN, (March, 1993), 16.

seize the opportunity to achieve much more at the time.

*The dilemma of disarmament and the creation of a safe environment in Somalia*<sup>269</sup>

The UNITAF stage of the overall Somalia operation was generally considered successful.<sup>270</sup> Despite UNITAF's Chapter VII mandate, the United States relied heavily on traditional peacekeeping principles. This would have been admirable in another context, but neutralising the clan's heavy weapons and disarmament was essential to creating a secure environment, and achieving the long-term strategy of handing over to a peacekeeping force. It is easy to portray an operation that sets itself limited goals as an unqualified success when it fulfils these limited objectives. The reality may be somewhat different, especially if the force has the capability to achieve much more. UNITAF was such an operation and in its execution of the mandate it avoided the main obstacles to a long-term restoration of peace.<sup>271</sup>

The American refusal to live up to the consequences of its intervention was especially damaging to this critical issue.<sup>272</sup> With around 30,000 troops, under a unified system of command, UNITAF certainly had the capacity to disarm the warlords.<sup>273</sup> But the political rhetoric did not translate into effective action on the

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<sup>269</sup> For a general discussion on disarmament and demobilisation in Africa see C. Alden, 'The Issue of the Military: UN Demobilisation, Disarmament and Reintegration in Southern Africa', in J. Ginifer (ed.), *op. cit.*, 51-69.

<sup>270</sup> See J. Hirsch and R. Oakley, *op. cit.* esp. 149-173; *The UN and Somalia 1992-1996*, *op. cit.*, 35; and James L. Woods, 'US Decision making During Operations in Somalia', in W. Clarke and J. Herbst, *op. cit.*, 151-172 at 159; W. Durch, 'Introduction to Anarchy, Humanitarian Intervention and "State Building" in Somalia' in W. Durch (ed.), *op. cit.*, 310-565 at 325; and T. Farrell, *op. cit.*, (n.15), 194 and Makinda, *op. cit.*, 74.

<sup>271</sup> Boutros Boutros-Ghali, *op. cit.*, 59-60. Boutros-Ghali believed that three critical steps were needed; disarming the warring groups, establishing a secure environment and creating a working division of labour between the US and UN on the ground.

<sup>272</sup> See W. Clarke and J. Herbst, 'Somalia and the Future of Humanitarian Intervention', *Foreign Affairs*, (March/ April 1996), 70-85 at 75 and Clarke and Herbst, *op. cit.*, 239-253.

<sup>273</sup> It had a number of well trained and 'elite' units from European armies such as the French Foreign Legion, Belgian Para Commandos, and Italian paratroopers.

ground. In President Bush's own words 'Our mission is humanitarian, but we will not tolerate armed gangs ripping off their own people...[troops] have the authority to take whatever military action is necessary to safeguard the lives of our troops and the lives of Somalia's people.'<sup>274</sup> Instead, it chose to evade this difficult task by requesting that weapons be moved out of the areas 'controlled' by UNITAF to other locations. This was a fatal error as a concentrated effort to remove and destroy the Somalis' heavy weapons was an achievable goal that would have laid the ground rules for the subsequent UN operation that was planned to follow. It would also have been an ideal way of showing serious intent to restore order. The UN and the Somalis themselves had expected disarmament to take place. UNITAF could also have used the clan leader's agreement to disarm in the Addis Ababa Accords of March 1993 to argue that it was an impartial force facilitating this agreement. While it is fair to argue that Mogadishu could no more be disarmed than urban areas in Western countries, in order to create a secure environment in which some degree of normality was restored, it was necessary to confiscate weapons carried openly and seize the infamous 'technicals'.<sup>275</sup> Failure to do so ultimately ensured that those with the most weapons retained the power.

One of the main determinants of how United States military operations abroad are conducted is the avoidance of incurring casualties at almost any cost, and as a matter of policy the United States decided not to disarm the factions as this may have led to exposure to risk. In fact, the United States may be said to operate a zero casualty policy.<sup>276</sup> The United States marines commanded the operation, and the experience with the Multi National Force in Lebanon was an important influence on

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<sup>274</sup> See G. Bush, 'Humanitarian Mission to Somalia: Address to the Nation, Washington DC, December 4, 1992', *US Dept. of State Dispatch* 3(49), (December 7, 1992).

<sup>275</sup> Ambassador Oakley makes this point with regard to Mogadishu, see J. Hirsch and R. Oakley, *op. cit.*, 105.

<sup>276</sup> Interview, Michael Sharf, former Attorney Advisor to the UN, US Dept. of State, with special responsibility for, inter alia, Somalia 1991-93, Yale, USA, July 1999.

their thinking.<sup>277</sup> Such a policy would not have been possible if Resolution 794(1993) had not been the result of political compromise and ambiguous in regard to the crucial issue of disarmament. It may be the case that the United States considered that this issue could be dealt with by the planned UN force intended to succeed UNITAF, but it is hard to accept that they could have been that naive. The warlords, in particular Aided, realised that they would not face a serious challenge from UNITAF and that by biding their time, it would be replaced by a militarily weaker UN force. There were no long-term strategic or political objectives that might threaten the warlords supremacy, and it soon became apparent that adopting a wait and see policy was the most prudent response until UNITAF left. By the time the United States formally acknowledged that disarmament of the clans was necessary, it was too late.<sup>278</sup> Of the false promises made by UNITAF, it was the claim that it had created a secure environment that really angered the aid agencies.<sup>279</sup> It seemed that despite pleas by the UN to remain longer, UNITAF wanted to ensure the mission was deemed a success and that the situation was ripe for a handover to UNOSOM II in May 1993. Although a much less militarily capable force, the mandate of UNOSOM II was much wider and sufficiently imprecise to 'offer many hostages to fortune'.<sup>280</sup> Acting under Chapter VII, the new force would not be constrained by the issues of consent or the use of force in self-defence. The 'demands' on disarmament, and 'requests' for national reconciliation and the 'consolidation, expansion and maintenance of a secure environment throughout Somalia' contained in Resolution 814(1993) were easy to make but later proved impossible to achieve in the circumstances.<sup>281</sup>

One of the main problems with disarmament was the related issue of

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<sup>277</sup> For background to the MNF mission see R. Thakur, *International Peacekeeping in Lebanon*, Boulder: Westview Press, 1987, esp.79-107.

<sup>278</sup> See W. Clarke and J. Herbst, 'Somalia and the Future of Humanitarian Intervention', in W. Clarke and J. Herbst, *op. cit.*, 244.

<sup>279</sup> Interview, Concern Worldwide worker, Dublin 1999.

<sup>280</sup> Resolution 814, 26 March 1993. The quote is from I. Lewis and J. Mayall, 'Somalia', in J. Mayall(ed.), *op. cit.*, 94-225 at 94.

consent and confrontation. Any task of this nature is a delicate balance between cooperation and confrontation.<sup>282</sup> The risks are high, and there is the added dimension of national contingent interpretation of the rules of engagement and differing contributing states' policy. UNOSOM II showed that some national contingents are not prepared to take part in enforcement operations.<sup>283</sup> Later, delay in weapons control implementations eroded the trust between UNOSOM II and the parties, and led to increased boldness of the warring factions.<sup>284</sup> There are many potential pitfalls in the use of limited force, the most obvious being the likelihood of escalation and loss of any real control. The Somalia case illustrates how quickly a UN force can slide into combat when enforcing compliance.<sup>285</sup> The more strict rules regarding disarmament enforced by UNOSOM II led to tense relations between UN and the clans, especially when contrasted with the more lax policy of UNITAF. Insecurity and suspicion replaced consent and trust, and when to the organizational confusion surrounding the handover from UNITAF to UNOSOM was added to the overall situation, the 'Somalia cease-fire disarmament concept declined rapidly.'<sup>286</sup>

### *Security Council fails to support UNIFIL*

When the Security Council requested the Secretary-General to report on the implementation of Resolution 425(1978), the response was almost immediate as

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<sup>281</sup> Resolution 814, 26 March 1993, Section A, para 4 and section B, paras 7-14.

<sup>282</sup> See F. Tanner, 'Weapons Control in Semi-permissive Environments: A Case for Compellance', in M. Pugh, 3 (4) *The UN, Peace and Force, International Peacekeeping*, (Winter 1996), 126-145 at 140.

<sup>283</sup> See G. Anderson, 'UNOSOM II: Not Failure: Not Success', D. Daniel, & F. Hayes, (eds), *Beyond Traditional Peacekeeping*, New York: St. Martins press, (1995), 274.

<sup>284</sup> See questionnaires on Somalia, analyzed by J. W. Potgieter in *Managing Arms in Peace Processes: Somalia*, DCR – Project, UNIDIR, (1995), 135-231.

<sup>285</sup> F. Tanner, *op. cit.*, 140.

most of the groundwork was already completed.<sup>287</sup> In addition to setting out the terms of reference of UNIFIL, the Secretary-General outlined the three essential conditions which must be met for the Force to be effective.<sup>288</sup> These could be said to be essential conditions for any peacekeeping force, whether in Somalia or Lebanon. The fact that the Secretary-General felt constrained to expressly state them in this manner indicates that he was concerned that some of the conditions might not be fulfilled in respect of UNIFIL.

The most important of the conditions to the Secretary-General is that the Force receive the full backing of the members of the Security Council at all times, but in particular the permanent members who proposed or supported its establishment. S/he is responsible for the implementation of the decisions of the Security Council. Once a Force is established and deployed, the overall direction of the operation is also the Secretary-General's responsibility, acting on behalf of and being answerable to the Security Council.<sup>289</sup> The importance to the Secretary-General of proper support and guidance from the Security Council cannot be overestimated. This support has not always been forthcoming and is often too ambivalent in its nature. The serious problems that this can cause were evident during the UN peacekeeping operation in the Congo(ONUC).<sup>290</sup> Within three months of the establishment of ONUC, the consensus among the permanent

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<sup>286</sup> *Ibid.*, 140-141.

<sup>287</sup> The Council then met to approve the report and authorise the establishment of UNIFIL in accordance with its provisions. Document S/12611, 19 March 1978, was approved by Security Council Resolution 426 (1978), 19 March 1978.

<sup>288</sup> *Ibid.*, para 3. First, it must have at all times the full confidence and backing of the Security Council. Secondly, it must operate with the full co-operation of all the parties concerned. Thirdly, it must be able to function as an integrated and efficient military unit

<sup>289</sup> See *The Peacekeeping Handbook*, New York: International Peace Academy, (1984), Chapters 2 and 3, esp.33-35.

<sup>290</sup> See D. W. Bowett, *UN Forces*, London: Stevens, (1964), 160.

members of the Security Council had disintegrated.<sup>291</sup>

Fortunately, the Secretary-General has not found himself placed in such an untenable position with regard to UNIFIL to date. Nonetheless, he did not receive the degree of support needed from the Security Council. As late as 1986, he declared that this condition identified in 1978 as essential for the Force to be effective, i.e. the full confidence and backing of the Security Council, had not been fully met.<sup>292</sup> This unusual step of openly criticising the organ to which he himself is responsible, indicates the despair and frustration felt after so many years of trying to make UNIFIL more effective, particularly when the reasons for the failure lie outside his control.<sup>293</sup>

The Secretary-General has refrained from criticising any particular member of the Security Council by name. However, the Soviet Union abstained from voting on every resolution concerning UNIFIL from 1978 until April 1986.<sup>294</sup> From the beginning the Soviet Union stated that it was not satisfied with the mandate. It disagreed with UNIFIL's function in assisting the return of effective Lebanese government authority in the area and the absence of a time limit on the Force's stay in Lebanon.<sup>295</sup> However in an attempt to regain some of its lost credibility, the Soviet Union did a U-turn in the Security Council in 1986

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<sup>291</sup> At one stage, in answer to criticism of his handling of ONUC, he reminded the Security Council that it was their responsibility to 'indicate what you want to be done ... but if no advice is forthcoming ... then I have no choice but to follow my own conviction'. G.A.O.R., 15th Session, 871st Plenary Mtg, p.96.

<sup>292</sup> Report of the Secretary-General on UNIFIL, S/17965, 09 April 1986. para 51.

<sup>293</sup> *Ibid.*

<sup>294</sup> The Soviet Union voted in favour of Resolutions 508 (1982), 509 (1982), 512 (1982), 513 (1982), 515 (1982), 516 (1982), 517 (1982), 518 (1982), 520 (1982) and 521 (1982) which condemned Israel and called for a withdrawal from Lebanon. However, it continued to abstain on the vote for a renewal of the UNIFIL mandate during this period when Resolutions 511 (1982), 519 (1982) and 523 (1982) were adopted.

<sup>295</sup> S.C.O.R., 2074 Mtg., *op. cit.* The Soviet Union also consistently refused to contribute to the financing of the Force, as it considered this 'should be defrayed by the aggressor - Israel'.

and announced that the Force had an important role to play in confirming the Israeli withdrawal.<sup>296</sup> It saw an opportunity to play a more meaningful role since the decline in United States fortunes in Lebanon and the Middle East. The United States support for the Israeli Lebanon Agreement of 1983 and the debacle of its involvement in Lebanon, weakened the American position.<sup>297</sup> The key to United States influence in the area, especially since 1973, had been the American role as mediator in the Arab-Israeli peace process. A central element in the Soviet Union's policy at the time was the reconvening of an international conference in Geneva, where it could occupy a position equal to the United States, and all parties to the Middle East conflict, including the PLO, could attend.<sup>298</sup>

The Soviet Union's influence in the region had been in decline for some time, and it declined even further as a result of the 1982 Israeli invasion of Lebanon, when its credibility was undermined by the failure to respond to appeals from the PLO and Syria for aid.<sup>299</sup> Its warnings to the United States not to commit its forces had been ignored and Soviet weaponry once more proved qualitatively inferior to its American equivalent. In a lame response during this period, the Soviet Union attempted to exploit the propaganda value of resorting to the Security Council to bring pressure upon the Israelis to withdraw. In this way, they achieved the optimum result. They avoided the danger of direct involvement, while at the same time drawing attention to American support for

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<sup>296</sup> S.C.O.R., SIPV.2681, 18 Apr 1986, pp.6-10. Furthermore, the Soviet Union declared its willingness henceforth to take part in the financing of the Force.

<sup>297</sup> See K. Nakhleh, and C.A Wright, *After the Palestine Israel War - Limits to U.S. and Israeli Policy*, Institute of Arab Studies, U.S.A., (1983).

<sup>298</sup> The three basis elements in the Soviet peace plan for the Middle East were: the total withdrawal of all Israeli forces from territories captured since June 1967, the establishment of a Palestinian State on the West Bank and Gaza strip, and the acknowledgement of the right to exist of all states in the region, including Israel. R.O Freedman, *Soviet Policy Toward the Middle East Since 1970*, (3rd Ed), New York: Praeger, (1982), and by the same author 'The Soviet Union and a Middle East Peace Settlement: A Case Study of Soviet Policy during the Israeli Invasion of Lebanon and its Aftermath' in B. Reich, and R. Hillis, (eds), *op. cit.*, 156-168.

<sup>299</sup> *Ibid.*

Israel and United States vetoes of certain resolutions in the Security Council.<sup>300</sup>

The situation after the Israeli redeployment in 1986 could have allowed the Soviet Union further erode the role of the United States in the region, and thereby enhance its own prestige and influence. However, Soviet policy in the Middle East has been overtaken by events in Eastern Europe and what is now Russia. It is probable that the Soviet Union's conversion to the cause of UNIFIL in 1986 did not stem from a genuine interest in the plight of Lebanon. In this regard, its policy was similar to that of the United States. Lebanon was perceived by both superpowers not as an end in itself, but as a means to gaining influence and power in the region as a whole. The American attitude within the Security Council and its Middle East policy has been no less opportunistic than that of the Soviet Union. The constraints on United States policy were already outlined. Even if the political will existed to bring pressure to bear on the Israelis to co-operate with UNIFIL, it is doubtful that the backlash from the American Jewish community could have been endured by any United States President for a sufficient period to allow this pressure to be effective.

*Lack of co-operation from the parties in Lebanon*

In regard to the second of the conditions identified by the Secretary-General as being essential for the effective operation of the Force i.e. that it receive the full co-operation of the parties concerned, unfortunately, many of the parties did not co-operate as anticipated or as promised in some cases. In particular, the Israelis and their allies in south Lebanon, known generally as the *de facto* forces and more recently referred to as the 'South Lebanon Army', have not only failed to co-operate, but have deliberately harassed UNIFIL and prevented it from carrying out its mandate. Some of the problems that have arisen in this regard are directly

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<sup>300</sup> Ibid. and R. O. Freedman, 'Soviet Middle East Policy After the Invasion of Lebanon' in R.O. Freedman, (ed), *The Middle East After the Invasion of Lebanon*, Syracuse University Press, (1986), 3-68.

related to other assumptions made concerning the deployment of the Force. The ill defined reference to an area of operation was the most serious such flaw.<sup>301</sup> However, it was impossible to be more specific at the time, as discussions in the Security Council and consultations with the governments of Israel and Lebanon revealed profound disagreement on the subject.<sup>302</sup> It caused major problems when the Force attempted to deploy in certain areas where the PLO maintained strongholds and in areas where the Israeli Defence Forces withdrew from without handing over to UNIFIL.

The dangers of not defining the precise area of operation became all too evident when UNIFIL troops from the French contingent attempted to deploy around key PLO strongholds.<sup>303</sup> The PLO put up strong resistance to the French presence in this area and this was combined with a diplomatic campaign in New York by Arab States on their behalf. The PLO objected to UNIFIL's deployment in these areas because they had never been occupied by the Israeli Defence Forces. During the invasion this area known as the 'Tyre pocket' was bypassed by the Israelis. The PLO therefore considered that UNIFIL should not be deployed there either. The matter was complicated by the so called 'Cairo Agreement' which legitimised the PLO's presence in Lebanon and supposedly governed its activities there.<sup>304</sup>

At the time, the Force Commander and the Lebanese government were in favour of taking stronger action against the PLO within UNIFIL's area of operation.<sup>305</sup> However, UNIFIL was not a combat or enforcement mission, and

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<sup>301</sup> Personal interview, Lt Gen Erskine, *op. cit.*

<sup>302</sup> *Ibid.* The Force Commander at the time was later to identify this as one of the basic and fundamental flaws in the deployment of UNIFIL.

<sup>303</sup> Document S/12845, 13 September 1978, paras 36-38 and *The Blue Helmets, op. cit.*, 88- 89.

<sup>304</sup> The text of the Agreement is given by Khalidi, *op. cit.*, 185-187.

<sup>305</sup> Personal interview, Lt Gen Erskine, *op. cit.* See also G. Tueni, *op. cit.*, 203-204 and S/12620/Add.5, 13 June 1978, para 13.

the PLO stronghold had been bypassed by the much more militarily capable Israeli Defence Forces. Furthermore, UNIFIL was a very precarious political creation and it is almost certain that the Soviet Union, and the pro-Palestinian lobby at the UN, would have strenuously objected. The Soviet Union had the power to veto any further mandate renewals. UNIFIL was a peacekeeping mission, not a peace enforcement mission. It relied totally upon the co-operation of the parties concerned. Any problem of this nature which arose had to be solved by negotiation, however unsatisfactory a subsequent agreement arrived at in his manner turned out to be. It is no surprise that deployment in the area 'was not pressed'.<sup>306</sup> Later, the Secretary-General was able to report that relations with the PLO in the area had not created major problems.<sup>307</sup> But the agreement did have its drawbacks and propaganda value to those opposed to UNIFIL. It also provided the *de facto* forces with an ideal excuse for refusing to allow UNIFIL to deploy in the area under their control.

In the circumstances the Secretary-General had no option but to reach some negotiated settlement with the PLO. If a firm stance had been taken against the PLO at this stage, it would have been equally important to take similar action against the *de facto* forces. It is probable that neither the United States, nor the Soviet Union, would have been willing to support such a policy in the Security Council. Many of the contributing countries, including Ireland, would have been unwilling to continue supporting and supplying troops to a Force suffering the numbers of casualties that offensive action of this nature would entail. It would also be incompatible with the respective foreign policies of certain of the troop contributing countries, as well as being clearly outside the terms of reference of the Force that it would only act in self-defence.<sup>308</sup>

Initially it appeared that Israel would withdraw fully from Lebanon and that some kind of working relationship could be established with the *de facto*

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<sup>306</sup> Document S/12845, *op. cit.*, para 37.

<sup>307</sup> Document S/12929. 18 November 1978, para 18.

<sup>308</sup> Document S/12611, *op. cit.*, para 4.

forces of Major Haddad. It quickly became apparent to Irish officers serving with UNIFIL that these forces were armed, trained and financed by the Israelis. There was also a suspicion that the Israelis would not co-operate with UNIFIL in their final withdrawal, despite the smooth execution of the first three phases.<sup>309</sup> Unfortunately, the Lebanese government and the UN then made a major error in judgement when Major Haddad was provisionally recognised as *de facto* Commander of the Lebanese forces in his area for the purpose of facilitating UNIFIL's mission.<sup>310</sup> This put UNIFIL in a difficult position and compromised the effort to implement the Security Council mandate.

As events unfolded, it became clear that the Israelis and Major Haddad's Forces would not co-operate with UNIFIL. There were strong objections to the agreements concluded with the PLO.<sup>311</sup> If the UN did not take full control of the PLO territory, then it would not be permitted to deploy in the areas controlled by the *de facto* forces.<sup>312</sup> From their perspective, UNIFIL was allowing the PLO re-establish itself in its area. This was not true, but having backed down from confronting the PLO, it was not unreasonable to assume it would do so again in this case.

By the time the Lebanese government decided to revoke the provisional recognition given to Haddad, much valuable time and ground had been lost.<sup>313</sup> As far as Israel was concerned, it had fulfilled its part in the implementation of

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<sup>309</sup> The fourth and final phase took place on 13 June 1978.

<sup>310</sup> Document S/12620, Add 5, *op. cit.*, paras. 15-17. The Lebanese army command was to issue instructions to Major Haddad to facilitate UNIFIL's mission and deployment.

<sup>311</sup> The situation 'bodes ill for the future', letter dated 13 June 1978, from the representative of Israel to the Secretary-General, Document S/12736. For the Secretary-General's description of the 'accommodation' reached with the PLO see Document S/12845 dated 13 September 1978, paras 39-42.

<sup>312</sup> See the reports in *The Irish Times*, 8 June 1978 and 19 June 1978.

<sup>313</sup> Personal interview, senior Irish officer with UNIFIL at the time, Galway, March 1999.

Resolutions 425 (1978) and 426 (1978), which, it was claimed, did not require control of any area to be turned over to UNIFIL.<sup>314</sup> This was a narrow and erroneous interpretation of the resolutions in question and was not even supported by the United States. In reality Israel had used all means possible to oppose deployment.<sup>315</sup> The scene was now set for further hostilities and confrontation. Over the next number of years, Israeli backed *de facto* forces not only harassed UNIFIL, but also indiscriminately shelled and fired on its positions. They also attempted to seize UN positions, and were indifferent to the safety of both UN and civilian personnel.<sup>316</sup>

## **Problems of military effectiveness in UNIFIL and UNOSOM II**

### *Problems of command and control*

The establishment of the UNOSOM II force had many similarities with that of a traditional peacekeeping force such as UNIFIL. A Turkish General Cevic Bar commanded the force, and he had contingents from a wide political spectrum under his control. The force was established under Resolution 814 (1993), which included a provision to the effect that the force would be supervised closely by the Secretary-General and the Security Council.<sup>317</sup> More importantly, it cited Chapter VII, which expressly authorised UNOSOM II to use force. This was the first such occasion since the ONUC operation in the Congo prevented the attempted

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<sup>314</sup> Document S/12840, letter dated 8 September 1978, from the representative of Israel to the Secretary-General.

<sup>315</sup> The Lebanese Government rightly complained 'that Israel was actively opposing the deployment of both the Lebanese army and UNIFIL by military, political and diplomatic action, Document S/12834, 5 September 1978, para. 5

<sup>316</sup> Major Haddad militia also strongly resisted attempts to deploy elements of the Lebanese army in the UNIFIL area of operation, *The Blue Helmets, op. cit.*, 97-98.

<sup>317</sup> Resolution 814(1993), 26 March 1993, paras. 14 and 18.

secession of the Katanga province that a UN operation of this nature was authorised to use force in this way.

UNOSOM II took over formally from UNITAF/UNOSOM I on 4 May 1993.<sup>318</sup> This was not as early as had originally been planned, but there had been no major crises in the mean time and the United States could claim to be handing over the ship in good shape. A new United States administration was now at the helm, and one of the primary concerns was ensuring President Clinton was not exposed to risk in a foreign intervention handed on from the Bush administration. But the United States had invested a lot of energy and prestige in Somalia and it could not now slip away quietly. Nor could it be seen to allow the follow up operation fail, and in these circumstances the United States continued to play a leading role in every facet of UNOSOM II's organization and mandate.<sup>319</sup> In many ways this suited the UN Secretariat and Boutros-Ghali, who realised that the operation depended on American military and political support. The United States agreed to provide logistical and tactical support under a complex command and control arrangement, but this among other things was later to cause a serious rift between the Clinton administration and the Secretariat<sup>320</sup>

While in theory the United States had handed back control of the operation to the UN, the reality was much different. A convenient mechanism to allow the United States ensure that one of its own officers retained full command of

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<sup>318</sup> In accordance with Resolution 814, 26 March 1993. It provided for a multinational force of 20,000 troops, 8000 logistical and 3000 civilian support staff. The US also agreed to provide a tactical quick reaction force.

<sup>319</sup> Ultimately this caused serious differences between the Secretary-General and the Clinton administration, see Boutros-Ghali, *op. cit.*, esp. 92-102. For an overview of the experience of the larger European armies involved in Somalia, see G. Prunier, 'The Experience of European Armies in Operation Restore Hope', in Clarke and Herbst, *op. cit.*, 135-147. See also *Message from the President of the United States - A Report on the Military Operation in Somalia*, (October 13, 1993), (US Government Printing Office, 1993) for US conditions on participation.

<sup>320</sup> See Boutros-Ghali, *op. cit.*, 93-94, and Jonathan T. Howe, 'Relations Between the United States and the UN in Dealing with Somalia', and H. Johnson and T. Dagne, 'Congress and the Somalia Crisis', Clarke and Herbst, *op. cit.*, 173-190, esp. 179-184 and

United States troops in Somalia was put in place by the appointment of General Montgomery as Deputy Force Commander. It was no coincidence either that an experienced NATO officer would command this 'strange and fragmented operation', or that retired American Admiral Howe would act as the Secretary-General's special representative.<sup>321</sup> The Force Commander reported directly to the Special Representative, who in turn reported to the Secretary-General.<sup>322</sup> This gave significant influence to the United States, even if it did not formally command the mission. In addition, this complex system was made even more cumbersome by the decision of the United States to establish a Quick Reaction Force outside the UN chain of command.<sup>323</sup> This amounted to the establishment of a parallel United States chain of command that was intended to exist alongside, but independent from, the UN command structure. How this was intended to operate in times of crisis in the context of an already complex multi-dimensional operation involving around thirty nations and many non governmental organizations, is a question that must not have been addressed seriously by military planners in Washington and the Department of Peacekeeping Operations in New York. The continued American domination proved to be a mixed blessing for UNOSOM II, and events showed that the structures put in place proved unable to maintain cohesion under pressure and ultimately contributed to the demise of the force.<sup>324</sup>

The issue of command and control was closely linked to the final condition that the Secretary-General considered essential for the effective

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191-204.

<sup>321</sup> This was the description used by Boutros-Ghali, see Boutros-Ghali, *op. cit.*, 93.

<sup>322</sup> Security Council Resolution 814, 26 March 1993, para. 14.

<sup>323</sup> The United States also deployed a specially constituted Task Force Ranger, which remained at all times under the direct command and control of the commander in chief, United States special operations.

<sup>324</sup> See Chapter 5 on Command and Control and R. Murphy, 'Legal Framework of UN Forces and Issues of Command and Control of Canadian and Irish Forces', 4(1) *Journal of Armed Conflict Law*, (June 1999), 41-73, at 56-62; and the Report of the Commission of Inquiry established pursuant to Resolution 885(1993) to investigate armed attacks on UNOSOM II personnel, S/1994/653, (1 June 1994), esp. part v-vii.

operation of UNIFIL i.e. that it function as an integrated and efficient military unit. Many officers who served with UNIFIL since 1978 consider that this condition has not been met, and it is the consensus among participants and commentators that this was not the case with UNOSOM II either.<sup>325</sup> While it would be futile to argue to the contrary in respect of UNOSOM II, the situation of UNIFIL is worthy of further analysis. The Secretary-General's own choice of words were unfortunate in that they may create the impression that the Force established was to be a conventional military unit properly constituted for traditional military operations. This is not the case. The UNIFIL mission, even if unclear in certain respects, was a peacekeeping mission based on well established principles and precedents.<sup>326</sup> Even today, peacekeeping is a relatively novel military concept and the mounting and conduct of such missions is very different from conventional military operations.

#### *Deficiencies in the UN organization and structures*

The UN Organization does not have a military branch.<sup>327</sup> Despite the establishment of the Department of Peacekeeping Operations(DPKO), problems remain at Secretariat level<sup>328</sup>, and the *Brahimi Report* recommended that a number of structural adjustments be made to address current problems.<sup>329</sup> The conduct of peacekeeping operations has been on an *ad hoc* basis to date, and due

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<sup>325</sup> This view is based on interviews with personnel associated with both missions.

<sup>326</sup> See D. W. Bowett, *op. cit.* and *The Peacekeepers Handbook, op. cit.* 22.

<sup>327</sup> While the Secretary-General has a Military Adviser, he does not have sufficient military staff employed in the Headquarters for the planning and organization of operations. Article 47 of the UN Charter provides for the establishment of a military staff committee. No agreements have been concluded to place armed forces at the disposal of the Security Council under Article 43 to date. Nor has the committee been involved in peacekeeping operations. See Bowett, *op. cit.*, 12-18 and *passim*.

<sup>328</sup> See Mats R. Berdal, *Whither UN Peacekeeping*, Adelphi Paper 281, (October 1993), 52-61.

to the inability of members to agree to a comprehensive set of guidelines to govern all UN operations, this is likely to remain the *status quo*.<sup>330</sup> The omission of military personnel from the Secretariat stems from the deliberate policy to maintain the strictest possible control over the military.<sup>331</sup> However, the potential political ramifications of all decisions made by the Force Commander or by any of his subordinates on the ground has also been a major factor in determining the UN reluctance to relinquish any part of its overall control and responsibility for peacekeeping operations. Much more so than in conventional military operations, almost every move in peacekeeping is liable to have political consequences. A seemingly inconsequential initiative in the field may precipitate an international incident. This may cause frustration among the military involved in a peacekeeping force and lead a limited number to conclude that it is not functioning effectively as a military unit. The problem is often exacerbated by the political necessity of implementing a deliberately vague mandate.

In order that the Force be acceptable to the Security Council, to the parties involved and to the international community, it is necessary to ensure that there is a wide geographic distribution and a political balance among the contributing states. This is often detrimental to the smooth operation of the Force as an integrated military unit. There were large differences in training, experience, culture and political background among the states that have contributed to the UN forces in Somalia, and UNIFIL. When these disparities are taken into account, it is remarkable that a peacekeeping Force like UNIFIL does in fact work so well, and this is a reflection of the high standards and professionalism of its officers and men.

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<sup>329</sup> See *Brahimi report, op. cit.*, esp. Summary of Recommendations, paras. 9-18.

<sup>330</sup> In 1965 the General Assembly decided to establish a Special Committee on Peacekeeping. Much progress has been made in drawing up an agreed set of principles to govern peacekeeping operations, however disagreement remains in certain key areas. See *Comprehensive review of the whole question of Peacekeeping Operations in all their aspects*. New York, UN, (1976), (Doc A/31/337) and *supra.*, 29.

<sup>331</sup> This is not unlike what is required in a democratic state and there are various techniques of control used, see Bowett, *op. cit.*, 359.

There were more serious problems in respect of UNOSOM II. The command and control mechanism was complex.<sup>332</sup> When this was applied to a multinational force with a difficult mandate in a failed state like Somalia, the overall effect was a recipe for disaster. The problem of double allegiance has arisen in respect of UNIFIL and the UNOSOM II mission. However, it was much more acute in the case of UNOSOM.<sup>333</sup> The Commander of a peacekeeping Force has both civilian and military functions, and the troops are usually considered international civil servants for the duration of their UN service. Nevertheless, they continue to remain part of the armed forces of their respective countries. It is now accepted that contingents will consult their national armies and governments on decisions which may not conform to national defence or foreign policy directives back home.<sup>334</sup> Serious problems did arise in the course of the operation in the Congo, when contributing states disagreed with UN policy, in particular its apparent reluctance to take stronger action to resolve the situation in Katanga.<sup>335</sup> In the case of UNIFIL, no similar problems have arisen and the successive Force Commanders do not appear to have been unduly hindered by this factor in the proper exercise of command and control over the Force.<sup>336</sup> Unfortunately, one of the practical lessons from UN involvement in Somalia is that the organization 'cannot manage complex-political military operations'.<sup>337</sup> This is confirmed by involvement in other war torn societies in the former

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<sup>332</sup> See Boutros-Ghali, *op. cit.*, 93-94 and R.Murphy, *op.cit.* and Chapter 5 *supra*.

<sup>333</sup> See C. Brady and S. Daws, 'UN Operations: The Political - Military Interface', 1 (1) *International Peacekeeping*, (Spring 1994), 59-79 at 68-71.

<sup>334</sup> Personal interviews, Lt Gen Walghren, Naqoura, October 1989 and Lt Gen. Callaghan, Dublin 1986, UNIFIL Force Commanders.

<sup>335</sup> R. Higgins, *The UN Operation in the Congo (ONUC) 1960 -1964*, London: Royal Institute of International Affairs (1980), Chapter 8, 'Relations with Contributing States', 97-124.

<sup>336</sup> Personal interview, Lt Gen W. Callaghan, Dublin, January 1987.

<sup>337</sup> See Chester A. Crocker, 'The Lessons of Somalia: Not Everything Went Wrong', 74 (3), *Foreign Affairs*, (May/June 1995), 5.

Yugoslavia.

However, the well publicised differences between the commander of the Italian contingent and the UNOSOM II force commander show how serious this problem was in Somalia.<sup>338</sup> It caused serious operational difficulties on the ground and seriously hindered the effectiveness of the Force at a critical period. Other contingents had less publicised difficulties in this regard also. As contingents are usually placed under the operational control, and not under the full command of a force commander of multi-national forces, this is a problem that will inevitable reoccur.<sup>339</sup> One possible solution is to involve all nations, but especially the larger powers, in some form of committee or group for the purpose of resolving differences over political and strategic direction.<sup>340</sup> It will be argued that this will undermine the integrity and command system. But it must be preferable to a the situation that arose in Somalia, and which led to some contingents accusing others of not responding to calls for assistance when needed, and thereby contributing to the casualties sustained. Such events pose a far greater risk to the integrity of any force than a consultative system designed to minimise differences and misunderstandings.

There have still been occasions when national governments, most notably the French, have interfered in the operational affairs of UNIFIL. The most serious occasion for the Irish contingent occurred in 1989 when the French government prevented members of the French contingent assisting in the search for three Irish soldiers who had been kidnapped.<sup>341</sup> The French were probably

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<sup>338</sup> The Secretary-General considered that the Italians were a 'mistake' and that as a former colonial power they pursued their own agenda, see Boutros-Ghali, *op. cit.*, 96. See also Christopher Brady and Sam Daws, *op. cit.*, 59-79 at 68-71. See *supra*. Chapter 5 and R. Murphy, *op. cit.*

<sup>339</sup> See Chapter 5 *supra.*, and R. Murphy, *op. cit.*, 48-55.

<sup>340</sup> See also J. Whitman and I. Bartholomew, 'Collective Control of UN Peace Support Operations: A Policy Proposal', 25 (1) *Security Dialogue*, (1994), 72-92.

<sup>341</sup> Personal interview, senior UNIFIL Staff Officer, Naqoura, Lebanon, October, 1989.

afraid of becoming embroiled in another clash with Shiite fundamentalists similar to that which occurred in 1986.<sup>342</sup> Whatever the reason behind the French decision, it indicates the problems which can arise in an international UN Force. The military effectiveness of UNIFIL was also hampered by the location of its headquarters, which was situated in the enclave controlled-by the de facto forces.

The need for a comprehensive political and military briefing for all personnel prior to commencing duty with a peacekeeping force is of vital importance. Many regular officers, in particular those from large countries accustomed to a more aggressive conventional military role, must be given the opportunity to adjust to such restrictions as the use of force only in self-defence and the lack of a proper military intelligence network. Taking into account the essential nature of UNIFIL and the many constraints under which it must operate, its success as an integrated and efficient military unit has been remarkable. In any event, a peacekeeping mission must be judged primarily by how it fulfils its political purpose and not solely on its military efficiency. If this is applied to the Somalia operations, then the intervention in all its manifestations must be judged a failure. Although financial concerns should not be allowed to dictate the pace or scale of intervention, the reality is otherwise. For this reason it is worth keeping in mind that the Operation Restore Hope component of the operation cost six or seven times more than the total United States development assistance to Somalia for three decades and more than the total assistance to sub Saharan Africa in 1994-95.<sup>343</sup>

### **Reconciliation and mediation efforts in Somalia and Lebanon**

A criticism sometimes made of UN peacekeeping and military intervention is that it 'freezes' the problem but does not solve the underlying causes of conflict. In

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<sup>342</sup> S/18348, 18 September 1996. See R. Murphy, 'UN Peacekeeping in Lebanon and the Use of Force', 6 (2) *International Peacekeeping*, (Summer 1999), 38-63 at 52-55.

<sup>343</sup> This piece of information is cited in T. Weiss, 'Rekindling Hope in UN

recent times operations tend to be multi-dimensional in nature, and may include a nation building and national reconciliation policy. In this regard the mandate(s) governing the UNOSOM mission in Somalia was significantly different from UNIFIL.<sup>344</sup> UNOSOM II was, as Boutros-Ghali had pointed out, the first operation of its kind. It was not constrained by the issue of consent, or by the rules governing the use of force in peacekeeping operations. The mandate for fostering national reconciliation was contained in Resolution 814(1993) that authorised UNOSOM II, under Chapter VII, 'to assist the people of Somalia to promote and advance political reconciliation.'<sup>345</sup> In fact, national reconciliation was an integral part of UNOSOM'S mandate from the beginning.<sup>346</sup> There was no similar mandate in respect of Lebanon, and while assisting the government there in restoring its authority in the area could be interpreted broadly, it did not mean nation building or even facilitating national reconciliation.

The conflict in Lebanon also had to be seen in a regional context, and it was inextricably linked to the wider security and geopolitical concerns in the Middle East. This made finding a resolution to the conflict very difficult and it prevented the UN from playing a significant role in a resolution of the underlying causes of the conflict. For this reason the UN was effectively excluded from the negotiations leading to the first serious attempt to resolve the conflict since the establishment of UNIFIL i.e. the Israeli-Lebanon Agreement of 1983. Not surprisingly, the military and other concessions granted to Israel were inconsistent

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Humanitarian Intervention', in W. Clarke and J. Herbst, *op. cit.*, 207-228, at 216.

<sup>344</sup> See generally Omar Halim, 'A Peacekeepers Perspective of Peacebuilding in Somlia', in Jeremy (ed.), *op. cit.*, 70-86 and J. Drysdale, *op. cit.*, 133-134.

<sup>345</sup> Resolution 814, 26 March 199, para. 4(c). This was a broad mandate which included: political reconciliation; the building of political and administrative structures; disarmament and demobilization of fighters; enforcement of the arms embargo from within Somalia; the re-establishment of the Somali police and justice system; the return of refugees and internally displaced persons; demining and rehabilitation and reconstruction. See generally O. Halim, 'A Peacekeepers Perspective of Peacebuilding in Somalia', in J. Ginifer (ed.), *op. cit.*, 70-86.

<sup>346</sup> Resolution 751, 24 April 1992 and *The UN in Somalia*, *op. cit.*, 9-20 and *passim*; and S/23693, 11 March 1992, paras. 43-54.

with UNIFIL's mandate and continued presence in the south.<sup>347</sup> By assigning a very minor role to UNIFIL, it appeared to grant a significant victory to Israel.<sup>348</sup> Israeli policy was consistent and well known, but what was surprising and difficult to understand was the role of the United States in the whole affair. The United States representative at the UN had supported UNIFIL's continued existence in January.<sup>349</sup> Now it appeared to play a major part in an Agreement that effectively excluded the UN from any real role in southern Lebanon.

A proposal to ensure the safety of Palestinians in camps was fraught with difficulty and had the potential to involve UNIFIL in Lebanon's factional war in a similar way to that of the Multi National Force.<sup>350</sup> What would UNIFIL do in the event of rival Palestinian factions fighting one another in the camps to gain control? Would UNIFIL be responsible for ensuring that no militant groups operated from the camps, and who would protect those outside the camps? Any request to protect the camps would first have to be made by the Lebanese government. UNIFIL would be there at the behest of the government, but it could lead to the absurd situation where UNIFIL might well be protecting the camps from attacks by legitimate Lebanese Forces or forces allied to the government. The plan and agreement in general was not properly thought out, and the exclusion of Syria was bound to backfire on the United States by precipitating a Soviet veto of any mandate change in the Security Council.

The United States believed it could convince Syria to accept the

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<sup>347</sup> The full text of the agreement was published in XII (567) *Monday Morning*, week of May 23-29, 1983. An abridged version was printed in XXIX Keesing's, 32409-32410. See also N. A. Pelcovits, *op. cit.*, 142-153. Para 4 of the Annex on Security arrangements provided for a minor role for one battalion in the Sidon area.

<sup>348</sup> Israel had repeatedly called for the withdrawal of UNIFIL in the months leading up to the agreement. H. Goodman, *The Jerusalem Post*, 8 May 1993. The Israelis let it be known that they wanted the Netherlands and/or Norway to supply troops for the Sidon area. See also Security Council Official Records, 2411 Mtg., 18 January 1983.

<sup>349</sup> Security Council Official Records, 2411 Mtg., 18 January 1983

<sup>350</sup> Opposition to the Multi National Force grew during 1983, see N.A. Pelcovits, *op. cit.* 44-66 and R. Thakur, *op. cit.*, 79-106 and 171.

agreement, an optimism not shared by UN personnel.<sup>351</sup> The Agreement called for the withdrawal of all foreign forces, thus linking Israeli withdrawal with that of Palestinian and Syrian forces. Syria objected to having its forces equated with those of Israel, and probably feared the Agreement would diminish in some way its chances of recovering the Golan Heights.<sup>352</sup> The Agreement came to symbolise for Syria and the Lebanese opposition the political advantages gained by the Phalangists as a result of the Israeli invasion.<sup>353</sup> In this way, the failure to acknowledge Syria's vital interests was naive and amounted to a rebuke to the Syrians. Many of the preconditions set for its implementation were unrealistic.<sup>354</sup> The minimum price Syria would have demanded for co-operation was similar concessions in the Bekaa valley to those given Israel in the south and the withdrawal of Israel from the Golan Heights. Syria's co-operation was essential to the success of the Agreement, but unlike Israel, it was under no pressure to comply. Its lines of supply in Lebanon were relatively short, its army was not suffering casualties from hostile forces behind enemy lines, there was no strong domestic or international pressure to withdraw, and other states such as Saudi Arabia continued to give financial support.<sup>355</sup>

The United States regarded the conclusion of the Agreement as an

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<sup>351</sup> Interview, Lt. Gen. Callaghan, Force Commander UNIFIL, Dublin, January 1987.

<sup>352</sup> J. W. Jabbra and N. W. Jabbra, 'Lebanon, Gateway to Peace?', 38 *International Journal*, (Autumn 1983), 606 and D. Gilmore, *Lebanon-the Fractured Country*, London: Sphere Books, (1984), 188. It was also suggested that Syria could only be induced to leave if the United States gave a commitment to persuade the Israelis to withdraw from the Golan Heights and the West Bank.

<sup>353</sup> Pelcovits, *op. cit.*, 39.

<sup>354</sup> Israel required the prior withdrawal of Syria, the return of prisoners held by Syria, and the return of Israeli soldiers buried in Syria. Israel was also given rights of intervention and flights over Lebanese territory while these were specifically denied to Syria. The Syrian representative at the UN stated that the 'agreement must be overturned' since it was imposed under the shadow of occupation. G.A.O.R. A/38/PV9 28 September 1983 and S.C.O.R., 2496 Mtg., 11 November 1983.

<sup>355</sup> For the pressures on Israel at the time see C. Herzog, *The Arab Israeli Wars*,

important aspect of its policy in Lebanon, while Syria saw its failure as an opportunity to embarrass the Americans and as a means of achieving a diplomatic victory over them. A combination of factors worked against the Agreement from the start. In the course of 'national reconciliation' talks held in Geneva later that year, it was agreed to 'freeze' the Agreement.<sup>356</sup> United States efforts in tatters, the UN was permitted to play a more central role in the second significant round of negotiations to secure an Israeli withdrawal which were convoked by the Secretary-General in late 1984 and early 1985.<sup>357</sup>

The Israeli position during the 'Naqoura talks' can be summarised as attempting to gain advantages through negotiations that they were unable to gain militarily, a strategy that was not acceptable to other parties. The Lebanese position was unrealistic and even irresponsible given the obvious consequences of a unilateral Israeli withdrawal.<sup>358</sup> The outbreak of communal violence would lessen the capability of any factions to attack Israel, and might even reduce pressure on them to withdraw from all of Lebanon. An influx of pro-Israeli Christians to the south could also help Israel's security along the frontier in the predominantly Shia south. In addition to war reparations, the Lebanese insisted on an unconditional Israeli withdrawal. There were to be no arrangements for Israel's security apart from UNIFIL and the Lebanese army.<sup>359</sup> Israel accepted UNIFIL had a role to play after the withdrawal, but this was not the same as agreeing to rely exclusively on the UN to secure Israel's northern frontier.

In the event, neither the Naqoura talks nor the 1983 Agreement produced

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London: Arms & Armour, (1985), 356-359.

<sup>356</sup> See XXX *Keesing's*, 32646. This eventually led to President Gemayel announcing in February 1994 that he had agreed to its abrogation.

<sup>357</sup> See *The Blue Helmets, op. cit.*, 104-105. Security Council Resolution 555(1984), 12 October 1984 and Resolution 549(1994), 19 April 1984, had contained a paragraph requesting the Secretary-General to continue consultations with the parties concerned.

<sup>358</sup> The outbreak of communal violence was widely predicted at the time, Interview, Capt. G. Humphries, Military Information Officer 1984, UNIFIL Headquarters, Dublin, July 1999.

<sup>359</sup> *Ibid.*

any agreement on an Israeli withdrawal acceptable to all parties. While the failure of UN efforts can be attributed in part to unrealistic demands made by the Lebanese at the behest of Syria, certain of the Israeli conditions were inconsistent with Security Council resolutions since 1978. These conditions amounted to a demand for approval by the UN for the continued occupation of part of Lebanon and recognition of their surrogate militia there. This would have made a mockery of UNIFIL's original purpose and the intentions of the Security Council, in particular the proposal to deploy around Sidon. Such a move would have shifted responsibility from the Israelis to the UN for inter communal violence. It seemed the Secretary-General was misled by the parties prior to the negotiations and that from the beginning there was little hope of finding agreement.

The UN efforts at reconciliation in Somalia were more proactive than those in Lebanon, but they too failed to achieve any long-term success.<sup>360</sup> Among the factors militating against success was the initial controversy such efforts generated, not least because they failed to take cognisance of the post Barre Somalia and they found support among those who no longer held power and influence in the country.<sup>361</sup> Conventional analyses at the time tended to blame deficiencies in policies and personalities within the United States and the UN, and the Somali body politic.<sup>362</sup> These may have underestimated the complexity of the factors adversely affecting efforts at reconciliation, but the policies and mistakes of the UN exacerbated this situation. UNOSOM I might have succeeded if the

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<sup>360</sup> The UN sponsored several major peace conferences and a number of national reconciliation meetings, but despite two significant national accords, the Somali parties failed to honour the commitments they had made. See *The UN and Somalia, 1992-1996*, New York: UN, 1996, 6-7.

<sup>361</sup> The leader of the major faction, Aided, was suspicious and antagonistic from the beginning. On the other hand, Ali Mhadi saw an opportunity for self advancement and he supported the UN presence. See also M.D. Abdullahi, *op. cit.*, 31-32.

<sup>362</sup> For a comprehensive overview of this aspect of the UNOSOM operation see K. Menkhaus 'International Peacebuilding and the Dynamics of Local and National Reconciliation in Somalia', 3 (1) *International Peacekeeping* (F.Cass), Spring 1996, 42-67 and also published in W. Clarke and J. Herbst, *op. cit.*, 42-63.

intervention had been earlier and the strategy advocated by the Secretary-General's special representative, Sahnoun, was pursued. He had succeeded in gaining the confidence and co-operation of all parties, and his efforts should have been allowed time to bear fruit.

The approach of rebuilding a society from the 'bottom up' had much to recommend it. If it had been combined with an even handed and firm policy on disarmament from an early stage, and the resources were applied to restoring the police and justice system in particular, then matters might have worked out quite differently. As it turned out, Sahnoun's term was short-lived and ultimately overtaken by events.

Later, the focus of what UNOSOM termed the 'bottom up' approach for political reconstruction was the district council.<sup>363</sup> While the idea was good, the implementation was not well thought out. There were criticisms that it was too neo-colonial in style.<sup>364</sup> There was also criticism of the haste with which each council was established and the lack of consultation with traditional authorities in each district.<sup>365</sup> Part of this was due to the fact that insufficient attention was paid to demographic changes, and in some places the warlords ensured that their person was selected. A counter argument could be made that the assessment of the crisis was so serious that it required rapid and drastic measures immediately to prevent matters worsening. The result was that the regional councils, from which it was intended to select representatives for the Transitional National Council, were seriously flawed.<sup>366</sup> There were differences in the UNOSOM II and Somali

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<sup>363</sup> See Ghali, *op. cit.*, 94. This model was intended to permit a form of proportional representation so that councils reflected the composition and interests of the local population.

<sup>364</sup> See J. Hirsch and R. Oakley, *op. cit.*, 158.

<sup>365</sup> See Human Rights/Africa, 7 (2), *Somalia Faces the Future-Human Rights in a Fragmented Society*, (April 1995) and 32-33.

<sup>366</sup> An example of the insensitive approach of the UN was provided at the third UN coordination meeting held in Addis Ababa and signed on 27 March 1993. The agreement provided for a 'transitional system of governance' which included a Transitional National Council that was to be 'the repository of Somali sovereignty'. This was offensive to the representatives of the self-proclaimed Somaliland Republic in the relatively peaceful north

interpretations of how to form some of the proposed political institutions, and a lack of resources to support them that proved crucial.<sup>367</sup> The attempt to adopt the policies of Sahnoun were ill conceived, and indicated the inconsistencies in the overall UN policy of nation building in Somalia in which warlords vacillated in stature from national leaders with whom the UN could work, to international war criminals and terrorists deserving the odium of the international community.

Closely linked to the reconciliation process was the need to rebuild the Somali police and justice system. But this was handicapped from the beginning by the requirement that resources for this programme be obtained from voluntary contributions.<sup>368</sup> This was almost certain to assure its failure and showed the lack of commitment to a comprehensive strategic plan to achieve nation building. In recent years the international community has been actively engaged in promoting the rule of law in many countries emerging from internal conflicts and complex political emergencies through a range of international organizations, bilateral agencies and non-governmental organizations.<sup>369</sup> One of the consequences of the involvement of so many actors is that there has been a serious lack of co-ordination and harmonisation between actors and programmes. In addition, there has been inadequate sensitivity to the political context and a failure to recognise that it must be built on indigenous traditions and involve the local population.<sup>370</sup>

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west who had left the conference before the agreement was signed and who subsequently disassociated themselves from this provision.

<sup>367</sup> See O. Halim, 'A Peacekeepers Perspective of Peacebuilding in Somalia', in J. Ginifer (ed.), *op. cit.*, 70-86 at 73.

<sup>368</sup> Resolution 865, 22 September 1993, paras. 9,12 and 13. See also W. Clarke, 'Failed Visions and Uncertain Mandates in Somalia', in W. Clarke and J. Herbst, *op. cit.*, 3-19 at 9.

<sup>369</sup> The empirical evidence emerging from a range of post conflict countries strongly suggests that an essential starting point for the proper establishment of the rule of law is the society itself, both its people and its culture. See R. Mani, 'Conflict Resolution, Justice and the Law: Rebuilding the Rule of Law in the Aftermath of Complex Political Emergencies', 5 (3) *International Peacekeeping* (F. Cass), (Autumn 1998), 1-25 at 16.

<sup>370</sup> See W. Clarke, 'Failed Visions and Uncertain Mandates in Somalia', in W. Clarke and J. Herbst, *op. cit.*, 3-19 at 14-15.

In regard to Somalia, problems in re-establishing the police and justice system derived primarily from the failure of the UN to treat the matter with urgency<sup>371</sup>, ensure proper consultation and funding, and implement a UNOSOM Justice Division's programme.<sup>372</sup> This was despite the urgent need to prioritise civil affairs and re-establish the rule of law. Because of the security situation, re-establishing a viable police force was one of the key elements to restoring normalcy. Unfortunately, even Sahnoun failed to capitalise on what every report on the police noted, i.e. that the Somali police were well trained, disciplined and non-tribal.<sup>373</sup> It is also worth noting that there was no proposal for the establishment of an International Criminal Tribunal for Somalia. Somalis expected that the United States would call for a war crimes tribunal, especially given the evidence of, *inter alia*, crimes against humanity by the Siad Barre regime.<sup>374</sup> One interpretation of this is that the political will did not exist to do so, and that African lives were not equated with European lives. A less benign interpretation is that independent investigation might point to United States and European and regional powers complicity with the Barre regime and others in Somalia.<sup>375</sup>

Resolution 814(1993) placed the UN at the centre of reconciliation in

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<sup>371</sup> It is noteworthy that the *Brahimi report* emphasized the importance of civilian police personnel and civilian specialists in peace support operations, and recommended a 'doctrinal shift' in their use, *Brahimi, op.cit.*, esp. Recommendations, paras.2, 9, 10 and 16.

<sup>372</sup> See M. Ganzglass, 'The Restoration of the Somali Justice System,'3 (1), *International Peacekeeping* (F.Cass), (Spring 1996), 113-138 and also published in W. Clarke and J. Herbst, *op. cit.*, 20-41. See also O. Halim, 'A Peacekeepers Perspective of Peacebuilding in Somalia', in J. Ginifer (ed.), *op. cit.*, 70-86 at 81. For general background see *The Irish Times*, 17 February 1994.

<sup>373</sup> See Ganzglass, *op. cit.*, 115. After the fall of Siad Barre, the police numbered about 15,000. They were poorly equipped, and with the outbreak of hostilities many returned to their own clan areas for safety. But they had remained relatively independent, and as such they constituted a potential resource for rebuilding the institution of the state. For other problems restoring the police and judicial system, see O. Halim, *op. cit.*, 70-86 at 74-76.

<sup>374</sup> M. D. Abdullahi, *op. cit.*, 18.

<sup>375</sup> *Ibid.* The US had supported the Barre regime for over a decade before its fall.

Somalia.<sup>376</sup> But Somalia was crowded for a time with those interested in peace building, and not all the camps agreed among themselves or with each other what the appropriate strategy should be. Given the lack of any central government or administration, it is not surprising that a survey of numerous reconciliation strategies in Somalia found the most successful were at local level, using traditional Somali social mechanisms.<sup>377</sup> This was also the view of NGO's working in the country.<sup>378</sup> The one important exception to this general finding concerned areas that had been conquered by clans during the conflict. It was predictable that local reconciliation was bound to have most impact. In essence, all politics is local. Any observer with experience of conflict situations will testify to the relevance of the local situation to the detriment of the national. It is difficult for villagers to identify with national efforts if these efforts do not translate into meaningful gains in personal security and well being on the ground. None of the reconciliation conferences had any long-term impact on the causes of the conflict. It may be that many factions did not want to compromise and reach a negotiated solution, but the 'gravy train' of expenses associated with participation gave the process an artificially extended lifespan.<sup>379</sup> In the end, any consideration of the efforts at national reconciliation in Somalia must take cognisance of many factors, but especially be aware of the centrifugal social, economic and political forces prevalent in Somalia that undermined the process at every level.

## Conclusion

The UN has been criticised for its failure to fulfil the mandate in Lebanon, and for

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<sup>376</sup> During the period from 1991 until early 1995, there were 17 known national level and 20 known local level initiatives. Not all of these were sponsored by UNOSOM, and regional actors as well as the US played a significant role.

<sup>377</sup> K. Menkhaus, *op. cit.*, 47-54.

<sup>378</sup> Personal interviews with Concern Worldwide and GOAL workers, Ireland, 1999.

<sup>379</sup> K. Menkhaus, *op. cit.*, W. Clarke and J. Herbst, 46-47.

the failure of the operations in Somalia. An often overlooked factor in this criticism is the fact that the Organization is resorted to by states most often when it suited their purposes and the problem otherwise seems insoluble. This is not to say the organizational failures such as those identified by the *Brahimi Report* did not contribute to the difficulties, but this was just part of the problem.<sup>380</sup> The situation created by the 1978 invasion of Lebanon was such an instance. The establishment of UNIFIL was primarily sponsored by the United States to facilitate a speedy withdrawal of Israel from Lebanon in 1978, and to ensure that the so called Camp David Accords were not further jeopardised by Israeli actions. The Force would also help prevent the outbreak of another major conflict between Syria and Israel. Israel and the United States, despite their otherwise strong links, did not always share perceptions as to what constituted a common threat in the Middle East region. Co-operation from the Israelis was vital to the success of UNIFIL. When it became clear that it was not forthcoming, the United States never brought sufficient pressure to bear on the Israelis to ensure that they would succumb. In the Security Council, the normal political divisions underlying any agreement of this nature to establish a peacekeeping force were temporarily put aside by its members due to the urgency of the crises. Nonetheless, the mandate agreed upon for UNIFIL was unrealistic and lent itself to different interpretations by opposite parties. Many elements of the overall plan for the deployment of UNIFIL had obvious deficiencies. In this way, its success has remained dependent on factors outside its control.

A number of recent multinational interventions, whether under the banner of the UN or an independent coalition, have often failed to make a long-term improvement in the crisis situation.<sup>381</sup> There has been a tendency to rely on short-term political expediency to the detriment of long-term strategic policies at the

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<sup>380</sup> See *Brahimi, op. cit.*, n. 3.

<sup>381</sup> See J. MacKinlay & R. Kent, 'A New Approach to Complex Emergencies', 4 (4) *International Peacekeeping*, (Winter 1997), 31-49 at 36. For an analysis of the neglect of developmental components of peace operations, see J. David Whaley, 'Improving UN Developmental Coordination within Peace Missions', in J. Ginifer, *op. cit.*, 107-122.

operational level. In general, the military component of multi-dimensional operations have developed a doctrinal approach that largely ignored the realities of the crisis environment and instead sought to rely on the limited version of the problem that could be resolved by military means.<sup>382</sup> This is a natural response from conventional military that perceives its role as essentially limited to the provision of security, and even then, its first priority will always be its own security

The Somalia experience shows that military establishments need to re-examine their role in complex political and humanitarian emergencies. In particular, there is considerable mistrust between civil and military components, and each must rethink its relationship with the other and co-ordinate their functions for the common good.<sup>383</sup> The humanitarian agencies felt increasingly marginalized as the chain of command and decision making became predominantly military and political. For a multi-dimensional peace operation to be effective, humanitarian and developmental aspect must be accorded equal status.<sup>384</sup> Attempts at co-ordination by the military were interpreted as attempts at control. There is a need for the military to expand its concept of security to consider much more than 'keeping the lid' on things and embrace the security of the local population, reconstruction and rehabilitation. The failure to disarm the clans was a serious flaw in the

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<sup>382</sup> See J. MacKinlay & R. Kent, *op. cit.* 45 & 46. See also A. de Waal & R. Omaar, 'Can Military Intervention Be 'Humanitarian''? *Middle East Report*, (March-June 1994), at 5-8; and T. Weiss, 'Military -Civilian Humanitarianism: The 'Age' of Innocence is Over', 2 (2) *International Peacekeeping*, (Summer 1995), 157-174. For a military perspective see S.L. Arnold, 'Somalia: An operation Other Than War', *Military Review*, December 1993, pp. 26-35 and W.D. Freeman, 'Operation Restore Hope – A US Centcom Perspective', *Military Review*, (September 1993), 61-72.

<sup>383</sup> See P. Diehl, 'With the Best of Intentions: Lessons from UNOSOM I and UNOSOM II', 19 *Studies in Conflict & Terrorism*, (1996), 153-157 at 159-161. See also Kevin M. Kennedy, 'The Relationship between the Military and Humanitarian Organizations in *Operation Restore Hope*,' 3 *International Peacekeeping*, (Spring, 1996), 92-112 and also published in W. Clarke and J. Herbst, *op. cit.*, 99-117. For a report on ways to improve this relationship see George A. Joulwan and Christopher C. Shoemaker, *Civilian-Military Cooperation in the Prevention of Deadly Conflict*, a report to the Carnegie Commission on Prevention Deadly Conflict, New York, (December 1998.)

<sup>384</sup> See H. Slim, 'The Stretcher and the Drum: Civilian Military Relations in Peace Support Operations', in J. Ginifer, *op. cit.*, 123-140 at 134.

implementation phase of the UN operations, but even this would have been insufficient without the creation of a safe environment. If you want to create a secure environment, then peace must be made with all the parties. The narrow focus on the humanitarian and military issues meant the underlying political problems did not receive sufficient attention. One of the primary causes of this was an ambiguous mandate and objectives.<sup>385</sup>

Somalia was certainly a war torn society, but despite media and other reports to the contrary, it was not anarchic. Nor were the Somali people warmongers with a predisposition to violence and self-destruction.<sup>386</sup> The long-term strategy was unclear at the time of inception, but by the end of the operation it was non-existent. What efforts were made at rebuilding the war torn society were inept and imposed without sufficient attention to indigenous political, cultural and social traditions. Instead of seeking to marginalize all the major warlords, the UN targeted Aided. The problem was essentially political and not a result of the phenomena associated with the end of the cold war, and lessons learned in the Congo during the ONUC operation in the 1960's and elsewhere were ignored. It was the neo-colonial attempts to shape and mould future Somali political arrangements that led to disaster. The unfolding events showed that the United States and the UN forces failed to appreciate the contradictions and inconsistencies in their confused roles of peacekeeping, peacemaking and peace enforcement. When this was combined with United States domination, and key positions held by difficult personalities, it was hardly surprising that UNOSOM II became a major protagonist in a conflict it was supposed to help resolve. Nor is it true to say that the UN broadened the mandate against the wishes of the United States, in fact the United States drafted many of the resolutions, especially Resolution 814(1993) on

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<sup>385</sup> For a comparison with Mozambique and Angola, see A. Malaquias, 'The UN in Mozambique and Angola: Lessons Learned', in J. Ginifer, *op. cit.*, 87-103.

<sup>386</sup> See the handbook produced for the US military, 'Somalia: Hopeful Handbook,' 34 (8), *Africa Confidential*, 16 April 1993. For an alternative view see I. M. Lewis, 'Priorities in Somali Actions', *Guardian Weekly*, 13 December 1992, 2 and I. M. Lewis, *A Modern History of Somalia: Nation and State in the Horn of Africa*, London: Longmans, (1980).

nation building, and presented them to the UN for implementation.<sup>387</sup>

These issues did not arise in the case of UNIFIL, as this was an operation with an almost exclusive military focus. The political objectives were clear, but they were never intended to be the responsibility of UNIFIL, the Force would merely facilitate their achievement by international diplomacy. Nor was there a civil component to the mission. In the case of both missions, the Security Council acted as if the mandate would be self-executing once the troops were deployed. When the UNIFIL mandate proved impractical, the *de facto* mission of the force became the provision of a secure environment for the local population. This it did except on those occasions when the parties to the conflict decided to flout the will of the international community, and disregard the safety of the UN personnel and the local population.<sup>388</sup> It took nearly twenty-three year for UNIFIL to implement the mandate, but its ultimate success in achieving this may be said to have vindicated the role or traditional peacekeeping. The same may not be said of the intervention in Somalia. Apart from the loss of life on all sides, the tragedy of Somalia is the failure to learn the right lessons from a situation where the UN was called upon to do a range of impossible and confused tasks. Unfortunately, the response to the crises in Kosovo and East Timor are the most recent examples of the application of this flawed analysis.

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<sup>387</sup> Sharf, interview, *op. cit.* and Clarke and Herbst, *op. cit.*, 241.

<sup>388</sup> There are many documented incidents when this occurred, one of the most serious occasions in recent years was during 'Operation Grapes of Wrath' in April 1996, and again in June 1999. See also *The Irish Times*, 22 & 23 June 1999 where shelling of Irish and other UNIFIL positions was reported.

## Chapter 7

### UNITED NATIONS PEACEKEEPING IN LEBANON AND SOMALIA, AND THE USE OF FORCE

#### Introduction

The principles governing the use of force are fundamental to peacekeeping forces, and one of the characteristics that distinguish peacekeeping from enforcement operations.<sup>1</sup> Although the UN Charter does not specifically provide for peacekeeping operations, their establishment and development is now based upon a number of fundamental principles, adherence to which may well determine the success or otherwise of a peacekeeping mission.<sup>2</sup> One of these, the prohibition on the use of force except in self-defence is an essential characteristic of traditional peacekeeping operations that is based on practical and doctrinal considerations.<sup>3</sup> The publication of the *Brahimi*

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<sup>1</sup> For a historical overview of the use of force by states see A. Clark Arend & R. J. Beck, *International Law and the Use of Force*, Rutledge, (1993); I. Brownlie, *International Law and the Use of Force by States*, Oxford: Oxford University Press, (1963); C. Greenwood, 'The International Court and the Use of Force' in A. Lowe & M. Fitzmaurice, (eds.), *Fifty Years of the International Court of Justice*, (1996), 373-388; and J. E. Fink, 'From Peacekeeping to Peace Enforcement: The Blurring of the Mandate for the Use of Force in Maintaining International Peace and Security', *19 Maryland Journal of International Law and Trade*, (1995), 1-46. See also C. Greenwood, 'Self-defence and the Conduct of International Armed Conflict' in Y. Dinstein (ed.), *International Law at the Time of Perplexity*, Dordrecht: Kluwer, (1989); P. Rowe, *Defence – The Legal Implications*, London: Brassey's, (1987), Chapter 7; *Right v. Might - International Law and the Use of Force*, Council on Foreign Relations Press, (1989), esp. L. Henkin, 'The Use of Force: Law and US Policy', 37-70; and J. Mrazek, 'Prohibition of the Use and Threat of Force: Self-Defence and Self-Help in International Law', *The Canadian Yearbook of International Law*, (1989), 81-111.

<sup>2</sup> See the *Peacekeepers Handbook*, New York: International Peace Academy, (1984), 55. The principles include the following:

- (a) negotiation is the primary means of finding solutions;
- (b) suggestion, advice and objective response to courses of action taken by the parties to the dispute rather than direction, imposition and coercion;
- (c) non-use of force except in self-defence, or as a last resort in carrying out the mandate;
- (d) impartiality; and
- (e) recognition of the authority of the host country(s).

<sup>3</sup> See M. Goulding, 'The Use of Force by the United Nations', 3 (1) *International Peacekeeping*, (1996), 1-18, F. T. Liu, *United Nations Peacekeeping and the Non-Use of Force*, New York, International Peace Academy, (1992), 11 and G. van Hegelsom, 'The Law of Armed Conflict and UN Peace-Keeping and Peace-Enforcement Operations', *6 Hague Yearbook of International Law*, (1993), 45-58.

*Report*<sup>4</sup>, and the report on events that led to the fall of Srebrenica<sup>5</sup>, have questioned the traditional response of UN forces to the use of force and advocated the formulation of a more robust doctrine. The experience of UN forces in Somalia and Lebanon show that the non-use of force except in self-defence principle has proved controversial and difficult to apply in practice, not least because of its correlation to the other characteristics, especially the need to maintain impartiality.<sup>6</sup>

The basic rules for the use of force were established during the first stages of the UNEF I in 1956 and these set a precedent for several later peacekeeping operations.<sup>7</sup> The Secretary-General originally envisaged that the basic precept of UN operations would always include 'a prohibition against any initiative in the use of armed force'.<sup>8</sup> After the controversy surrounding the operation in the Congo (ONUC), there was a lot of discussion about the use of force.<sup>9</sup> However, there was a significant

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<sup>4</sup> See the *Report of the Panel on UN Peacekeeping Operations*, UN, 23 August 2000 (*Brahimi Report*, A/55/305-S/2000/809 available from <<http://www.un.org>>).

<sup>5</sup> See 'Lessons for the future', in Report of the Secretary-General pursuant to General Assembly resolution 53/35 – The fall of Srebrenica, General Assembly A/54/49, 15 November 1999, esp. paras. 502 and 505.

<sup>6</sup> See generally, M. von Grunigen, 'Neutrality in Peacekeeping', in A. Cassesse (ed.), *United Nations Peacekeeping – Legal Essays*, Dordrecht: Sijthoff and Nordhoff, 125 –153 esp. 137-138, (1978).

<sup>7</sup> H. Wiseman, 'United Nations Peacekeeping: An Historical Overview', in Wiseman, (ed.) *Peacekeeping: Appraisals and Proposals*, New York/Oxford: Pergamon Press, (1983), 19- 58, esp. 33. For a more general discussion on the use of force see A. James, *The Role of Force in International Order and United Nations Peacekeeping*, Report of a Conference at Ditchley Park, (16-19 May 1969), Ditchley Paper No.20, Ditchley Foundation, Oxfordshire.

<sup>8</sup> Summary Study of the Experience Derived from the Establishment and Operation of the Force, UN Doc. A/3943 of 9 October 1958, para. 179 – see R. Siekmann, *Basic Documents on United Nations and Related Peace-Keeping Forces*, 2<sup>nd</sup> enlarged ed, Dordrecht: Martinus Nijhoff, (1989), 53.

<sup>9</sup> See for example, A. James, 'The Congo Controversies', 1 *International Peacekeeping* (F. Cass), (1994), 44-58, esp.51-52; D. W. Bowett, *United Nations Forces*, London: Stevens, (1964), 200-205; M. Harrington Gagnon, 'Peace Forces and the Veto: The Relevance of Consent', 21 (4) *International Organization*, (1967), 812-836; A. Eide, 'United Nations Forces in Domestic Conflicts' in P. Frydenberg (ed.), *Peacekeeping: Experience and Evaluation – the Oslo Papers*, Oslo, NUPI, (1964) 251-252; N. T. Kassar, 'The Legal Limits to the Use of International Force Through the United Nations Practice', 35 *Revue Egyptienne de Droit International*, (1979), 163-234 esp. 195-218, and C. F. Amerasinghe, 'The Use of Armed Force by the United Nations in the Charter Travaux Préparatoires', 5 *Indian Journal of International Law*, (1965), 305-333.

evolution of the guidelines since UNEF I<sup>10</sup>, and it was the arrangements for UNEF II that marked a turning point in the official UN language,<sup>11</sup> where the authority to use force in self-defence was said to include resistance to attempts by forceful means to prevent it from discharging its duties under the mandate. This significantly broadened definition of self-defence gave considerable latitude to Force Commanders than previously was the case, and it became the precedent for all major UN peacekeeping operations, including UNIFIL, thereafter.<sup>12</sup> It also allowed the Security Council give almost any task, however ill thought out or unrealistic, to a peacekeeping force, in the expectation that it could use force under the guise of self-defence and still retain its peacekeeping status.

There are two aspects to the use of force in peacekeeping doctrine. The first is minimum use of force, and the second is the use of force for self-defence only.<sup>13</sup> These are not synonymous, in that the first permits the use of force to achieve the military mission or mandate, while the latter restricts the use of force to protection of persons or property. Most of the debate has focused on the use of force for other than reasons of self-defence. This is one of the more problematic and controversial issues associated with UN military operations, and it proved especially so in Somalia and Bosnia. It is noteworthy that none of the public statements or documents refers to the duty of UN forces to protect persons or property entrusted to their care.<sup>14</sup> In fact,

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<sup>10</sup> T. Findlay, 'The Use of Force in Self-Defence. Theory and Practice', in A. Morrison, D. Fraser & J. Kiras (eds.) *Peacekeeping With Muscle: The Use of Force in International Conflict Resolution*, Clementsport Nova Scotia: Pearson Peacekeeping Centre, (1997), 51-75 at 55.

<sup>11</sup> Hegelsom, *op. cit.*, 50.

<sup>12</sup> S/12611, 19 March 1978, para 4. The paragraph dealing with the use of force stated: 'The Force will be provided with weapons of a defensive character. It will not use force except in self -defence. *Self -defence would include resistance to attempts by forceful means to prevent it from discharging its duties under the mandate of the Security Council* (Italics added). The Force will proceed on the assumption that the parties to the conflict will take the necessary steps for compliance with the decisions of the Council', and T. Findlay, *op. cit.*, at 55.

<sup>13</sup> D. Last, *Theory, Doctrine and Practice of Conflict De-Escalation in Peacekeeping Operations*, Clementsport Nova Scotia: Canadian Peacekeeping Press, (1997), 46.

<sup>14</sup> For discussion on this and related issues under international humanitarian law, See Chapter 8, *infra* and R. Marx, 'A Non-Governmental Human Rights Strategy for Peacekeeping, 14 (2) *Netherlands Quarterly of Human Rights*, (June 1996), 126-145. *Brahimi Report, op. cit.*, n.4, recommended that UN peacekeepers –troops or police – be authorized to

during the Bosnian war, the political imperative to be seen to do something led to the creation of 'safe havens', but ignored the wider military implications of the duty to protect those havens.<sup>15</sup> It was not a role that lightly armed peacekeepers could realistically undertake. Although Resolution 836 (1993) delegated to member states, acting individually or through regional arrangement, the power to take military action in Bosnia-Herzegovina to protect safe areas, it remained unclear who should decide when force should be used and for what purpose.<sup>16</sup> The UN will only acknowledge such a duty if member states agree to provide the support and means to fulfil this duty. The experience of UNIFIL shows that this has also been a difficult problem for traditional peacekeeping operations.<sup>17</sup> In the case of Somalia, the dynamic nature of the humanitarian assistance mandate gradually expanded the authority to use force. As the objectives changed and the authority to use force altered, the mission became increasingly less impartial.

Since the establishment of UNIFIL in 1978, this Force has been involved in a number of confrontations involving the use of force.<sup>18</sup> Guidelines governing the use of force have usually been very general in nature leaving considerable room for interpretation.<sup>19</sup> This is necessary in the operational environment in which a peacekeeping mission must perform its sometimes unclear and unrealistic tasks. Recent UN military operations have blurred the distinction between peacekeeping and

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stop violence against civilians, within their means, in support of basic UN principles.

<sup>15</sup> Y. Akashi, 'The Use of Force in a United Nations Peacekeeping Operation: Lessons Learnt from the Safe Areas Mandate', 19 *Fordham International Law Journal*, (1995), 312-323. See also Report of the Secretary-General pursuant to General Assembly resolution 53/35 - The fall of Srebrenica, General Assembly A/54/549, 15 November 1999.

<sup>16</sup> See D. Sarooshi, *The United Nations and the Development of Collective Security*, Oxford, Clarendon Press, (1999), esp., 72-7583-85 and 254-263.

<sup>17</sup> See R. Murphy, 'UN Peacekeeping in Lebanon and the Use of Force', 6 (2) *International Peacekeeping* 2 (F. Cass), (1999), 38-63 and N. D. White, *The United Nations and the Maintenance of International Peace and Security*, (2<sup>nd</sup>. Ed.), Manchester: Manchester University Press, (1997), 241.

<sup>18</sup> Liu, *op. cit.*, 27-35. For the background to the establishment of UNIFIL see Chapter 6 and A. James, *Peacekeeping in International Politics*, London: International Institute for Strategic Studies, (1990), 339-351 and E. A. Erskine, *Mission with UNIFIL, An African Soldiers Reflections*, London: Hurst, (1989), 5-30.

<sup>19</sup> N.J. Weinberger, 'Peacekeeping Options in Lebanon', 37 (3) *The Middle East Journal*, Summer (1983), 341 to 369, esp. 344.

enforcement, and a broad interpretation of self-defence may amount to permitting enforcement of the mandate, even when the operation is authorised under Chapter VI rather than Chapter VII of the Charter.<sup>20</sup> If a peacekeeping force is denied limited *de facto* enforcement powers, this could have the effect of rendering it ineffective for the purpose of fulfilling the mandate. This was especially evident in the case of UNIFIL, and the instances where the use of force or enforcement measures were resorted to were, for the most part, as a last resort to prevent the Force being rendered completely ineffective in the face of lack of cooperation from the parties to the conflict.

This chapter examines the experience of UNIFIL<sup>21</sup> and UNOSOM II. The premise of the analysis is that strict adherence to the principle of the use of force in self-defence is the only option available on traditional peacekeeping operations, and that the nature of the UNOSOM II mission meant that the coercive enforcement measures adopted inevitably led to its role as third party UN force being converted to that of factional participant. The identification of one of the factions as an enemy, and the use of force in pursuit of limited military goals designed to neutralize this enemy, will ultimately escalate rather than decrease the level of conflict. In general a peacekeeping force should not rely on the use of force to achieve its ends.<sup>22</sup> If it does so it will lose its status as a peacekeeping mission and cease to be above the conflict it was intended to resolve.<sup>23</sup> However, when a party to the conflict fails to give the required level of co-operation, a decision must be made regarding what degree of force, if any, may be resorted to in the circumstances. In this way, peacekeeping involves novel approaches to crisis resolution that can be difficult for regular soldiers recruited from conventional armies to understand and apply.<sup>24</sup>

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<sup>20</sup> N.D. White, *op. cit.* 224-244 and Fink, *op. cit.*, 37-44.

<sup>21</sup> For a list of incidents involving UNIFIL and the use of force, see Liu, *op. cit.*, 25-35.

<sup>22</sup> B. Urquhart, 'Peacekeeping: A view from the Operational Centre' in H. Wiseman, *op. cit.*, 165.

<sup>23</sup> *Ibid.*

<sup>24</sup> This was particularly true of the French contingent, see *infra*. 237-238. Irish troops serving at home are governed by similar rules on the use of force in self-defence as U.N. peacekeepers. For this reason they have little difficulty accepting and applying the rules in Lebanon. See *The Irish Times*, 31 May 1985 for a comment to this effect by an official army spokesman.

## The establishment of peace support operations in Lebanon and Somalia

In the case of the initial peace enforcement mission to Somalia, the authorisation to use force was quite novel as the operation was not in response to an act of aggression.<sup>25</sup> There was no clear precedent for the type of operations envisaged and the non-consensual intervention by the UN in the affairs of Somalia. The Security Council determined that the situation constituted a threat to international peace and security, and express reference was made to action under Chapter VII to establish a secure environment to secure humanitarian relief.<sup>26</sup> Similar to other Chapter VII resolutions, Resolution 794 (1992) did not make express reference to the use of 'force', but referred to the right to 'use all necessary means'.<sup>27</sup> Nevertheless, it was clear that the intent was to permit states to use force if necessary to ensure that the relief efforts were successful.<sup>28</sup> The actual wording of the resolution is remarkably vague in this and other respects. In contrast to Resolution 84 (1950) in respect of the Korea operation,<sup>29</sup> although unified command is mentioned in paragraph 12, it seems that the Security Council gave blanket approval for whatever the Secretary-General and the United States subsequently agreed to.

The authorization to use all necessary means is a typical UN euphemism for the use of force. Despite this, it is still not clear what it means in practice. A great deal of authority seems to have been delegated to very few to act on behalf of the international

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<sup>25</sup> For background on the deployment of UNOSOM I, which was based on traditional peacekeeping premises, see Chapter 6, *supra* and XXIX (3) *UN Chronicle*, September 1992, and Resolution 751 of 24 April 1992, para. 4. See also Report of the Secretary-general on the situation in Somalia, S/23829, 21 April 1992, esp. paras. 22-33, and 62-63 and VIII *The United Nations and Somalia 1992-1996*, (3 edn.), United Nations Blue Book Series, New York: United Nations, (1996), 4.

<sup>26</sup> *Ibid.*, and Resolution 794 (1992), para. 7. For a discussion of Chapter VII and Article 39, see generally L. Goodrich, E. Hambro and A. Simmons, *Charter of the United Nations*, (3rd. ed.), London: Columbia University Press, (1969), 290-353 esp. 293-302, and B. Simma (ed.), *The Charter of the UN*, Oxford: Oxford University Press, (1995), 605-678.

<sup>27</sup> Resolution 794 (1992), para. 10 (Appendix B). See for example, Resolution 678 (1990), discussed in Chapter 3, *supra*. 64-69.

<sup>28</sup> Arend and Beck, *op. cit.*, 56.

<sup>29</sup> Adopted 7 July 1950.

community in a way that required little or no accountability.<sup>30</sup> One of the consequences of the language used was that it led to uncertainty regarding the UN objectives under the resolution.<sup>31</sup> This was immediately evident from the Secretary-General's letter to President Bush, when he referred to the need for disarming the factions. A more detailed resolution with clearer aims and objectives, setting down definite parameters for the use of force, and clarifying the nature and extent of United States command, would have been preferable.

Although UNITAF did adopt a fairly aggressive stance towards disarming various factions and opening up humanitarian aid routes<sup>32</sup>, there was no concerted or evenhanded policy.<sup>33</sup> The situation varied from area to area, depending on the national origin of UN forces. This restrained policy was to change with the deployment of UNOSOM II in March 1993. Somalia then became the testing ground for new peacekeeping and peacemaking by the UN, acting under enforcement powers under Chapter VII.<sup>34</sup> In contrast with UNITAF, UNOSOM II interpreted the mandate as not merely authorizing but requiring it to disarm the factions.<sup>35</sup> This involved the selective use of force against one of the factions, Aided's Somali National Alliance. In adopting such a policy, UNOSOM II broke the cardinal rule when resorting to the use of force when it failed to maintain an even-handed and impartial approach to the factions involved, and in so doing it relinquished any pretence of impartiality.

In the case of UNIFIL, one of the major problems confronting the Force was the fact that the deployment was based on a number of assumptions, many of which

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<sup>30</sup> For a comprehensive overview of the delegation by the Security Council of its Chapter VII powers, see D. Sarooshi, *op. cit.*, esp., 81-82, 187 - 191 and *passim*.

<sup>31</sup> For general background see Chapter 6, *supra.*, esp. 181-187, and Sarooshi, *op. cit.*, 214.

<sup>32</sup> White, *op. cit.*, 120.

<sup>33</sup> 7 (2) *Human Rights/Africa Watch*, 'Somalia Faces the Future', (April 1995), 58. In fact many weapons were moved from the presence of UN troops, with a consequent rise in violence in areas remote from the capital.

<sup>34</sup> Makinda, *op. cit.*, 76.

<sup>35</sup> See *Report of the Commission of Inquiry* established pursuant to Resolution 885 (1993) to investigate attacks on UNOSOM II personnel, S/1994/653, 1 June 1994, reprinted in *The United Nations and Somalia, 1992-1996*, New York, United Nations, (1996), 368, esp. 376-377 (hereafter '*UN Commission of Inquiry*'), para. 193.

were never fulfilled.<sup>36</sup> In particular, the necessary co-operation of the parties was far from forthcoming.<sup>37</sup> Any decisive action against one of these was liable to escalate and draw UNIFIL into the Lebanese conflict itself. This is in fact what happened to UNOSOM II, and not surprisingly, the volunteer contributor states withdrew their contingents and by March 1995 the Force ceased to exist.

In the early years of UNIFIL's existence, the Lebanese government looked for a stronger show of force and suggested it be armed with medium and heavy weapons. This was despite the fact that it possessed a number of heavy weapons that were sufficient to meet the threat from the *de facto* forces and other armed elements.<sup>38</sup> These proposals were not supported by the troop contributing countries.<sup>39</sup> In these circumstances, it was not surprising that the Secretary-General chose a cautious policy and adopted guidelines on the use of force applied to previous peacekeeping operations in the region.<sup>40</sup> It is unlikely that the guidelines would have been any different had they been the subject of critical examination and debate as the Secretary-General had little choice in this matter owing to the urgency of getting UNIFIL deployed in the first place.<sup>41</sup>

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<sup>36</sup> S/13026, 12 January 1979, para 34.

<sup>37</sup> A. James, 'Painful Peacekeeping: the United Nations in Lebanon, 1978-1982', 38 *International Journal*, (Autumn 1983), 613-634, esp. 624; J. F. Murphy, *The United Nations and the Control of Violence*, Manchester: Manchester University Press, (1983), 106 and 57-60, and N.J. Weinberger., *op. cit.*, 344.

<sup>38</sup> UNIFIL already possessed a range of 120mm mortars up to 120mm. The Irish battalion and the French had a number of 90mm cannons mounted on armoured cars, and the Dutch had T.O.W. missiles.

<sup>39</sup> J.O.C.Jonah, 'Peacekeeping in the Middle East', 31 *International Journal*,(1976), 100-122, esp..155-166. In any event UNIFIL already possessed a number of relatively heavy weapons such as 90mm guns mounted on armoured cars and 120mm mortars.

<sup>40</sup> S/12611, 19 March 1978, para 4. See also N.T. Kassar, *op. cit.*, 163-236, esp.214-218. The Secretary-Generals outline of the principles of Force were more comprehensive for UNFICYP, S/5653, 11 April, 1964. The guidelines for UNEF 11 are outlined in *The Blue Helmets*, (3 Edn.), (UN 1996), 60-61. The principles and guidelines for UNEF (S/11052/Rev 1) were approved by the Security Council on 27 October 1973 (Resolution 341 of 1973).

<sup>41</sup> Personal interview, Lt. Gen. Erskine, former Force Commander of UNIFIL, Dublin, July 1986.

## Standing Operating Procedures and Rules of Engagement (ROE)<sup>42</sup>

Despite the fact that the principle of non-use of force is a long established element of peacekeeping operations, it is still couched in very general terms.<sup>43</sup> This can sometimes give rise to controversy regarding its interpretation, although its use under the mandate is subject to the principles of legality, necessity and proportionality.<sup>44</sup> The guidelines for UNIFIL contained no definition of force or of self-defence, but the UN has taken a broad view and self-defence was said to include resistance to attempts by forceful means to prevent it from discharging its duties under the mandate.<sup>45</sup> This was open to conflicting interpretations, and a great deal of responsibility was placed on the Force Commander in deciding what degree of force to use when presented with obstacles to implementing the mandate.

In order to overcome the difficulties of applying the guidelines to the everyday situation on the ground, a set of standing operating procedures was compiled for UNIFIL that covered, *inter alia*, the use of force.<sup>46</sup> These provided detailed guidelines for the conduct of day-to-day peacekeeping operations, and also normally granted the military commander on the ground a wide degree of flexibility and discretion in this regard.<sup>47</sup> The policy is to demonstrate maximum show of force to ensure a minimum

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<sup>42</sup> See generally, 'Peace Support Operations', *Model Manual of the Law of Armed Conflict*, Geneva: ICRC, paras. 2024-2027; G. Bowens, *Legal Guide to Peace Support Operations*, US Army Peacekeeping Institute, (1998), 185-202, J. Simpson, *Law Applicable to Canadian Forces in Somalia 1992/93 – a study prepared for the Commission of Inquiry into the Deployment of Canadian Forces in Somalia*, Public Works and Government Services Canada, (1997), 35-39; P. Rowe, 'Maintaining Discipline in United Nations Peace Support Operations: The Legal Quagmire for Military Contingents', *5 (1) Journal of Conflict and Security Law*, (2000), 45-62 at 59; and T. Findlay, *op. cit.*, 51-75 at 52 and 55.

<sup>43</sup> *S/12611*, 19 March 1978, para 4.

<sup>44</sup> *Model Manual of the Law of Armed Conflict*, *op.cit.*, para. 2022.

<sup>45</sup> *Ibid.* See the results of a survey of Irish personnel with UNIFIL in 1998 in Appendix C, which found that 55% of the troops considered the UNIFIL ROE as clear as could be in the circumstances.

<sup>46</sup> For a discussion on Standing Operating Procedures see *The Peacekeepers Handbook*, *op. cit.*, 81. For a copy of the 'Guide to the Use of Force by UNIFIL Personnel', see D. Loomis, *The Somalia Affair - Reflections on Peacemaking and Peacekeeping*, Ottawa: DGL Publications, (1996), at 340-342.

use of weapons.<sup>48</sup> In conflict resolution terms this could be described as a combat or management technique intended to control a violent situation.<sup>49</sup>

From a legal perspective, the early guidelines provided were incomplete and deficient in many regards. They contained inherent ambiguities and did not define certain vital concepts such as 'force' or what constitutes 'an immediate threat to life'.<sup>50</sup> In order to address these deficiencies, the UNIFIL ROE were modified as follows:

'Use of Armed Force

3. The use of armed force is authorized only:
  - (a) in self-defence; or
  - (b) in resisting attempts by forceful means to prevent UNIFIL from discharging its duties,

Circumstances under which force may be used

4. Only minimum force necessary is to be used. The only circumstances under which fire may be opened are:
  - a. Self-defence, including defence against attempts by force to disarm UNIFIL personnel or to prevent it by forceful means from carrying out its

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<sup>47</sup> Personal interviews with senior UNIFIL civilian and military officers from April to October 1989, and personal experience of writer during a tour of duty with UNIFIL at that time. UNIFIL standing operating procedures on the use of force do not define what is meant by armed or unarmed force. There is, however, a brief description of self-defence that repeats part of the guideline laid down by the Secretary-general in 1978. This goes on to say UNIFIL personnel are authorised to use their weapons to defend themselves against direct attacks or threats on their lives, to resist attempts at being disarmed, forcing of UNIFIL positions or forceful entry of the UNIFIL area. The paragraph describing the general guidelines states, *inter alia*, that when fired upon UNIFIL should as a rule, return fire immediately, though whenever possible inflicting casualties should be avoided. However, weapons should not be used unless no other means are available or they have been exhausted. See also, Lt. Col. Vogt, 'Experiences of a German Legal Adviser to the UNOSOM II Mission, XXXV *Military Law and Law of War Review*, (1996), 219 at 223-225.

<sup>48</sup> Personal interview, Lt. Gen. Walgren, Force Commander UNIFIL, October 1989. The standing operating procedures are continuously being examined and re-assessed in the light of experience and changing circumstances.

<sup>49</sup> C. Dobbie, 'A Concept for Post Cold War Peacekeeping', 36 (3) *Survival*, (Autumn, 1994).

<sup>50</sup> Personal experience of writer from two six month tours of duty in 1981/82 and 1989 respectively. On the other hand, vague concepts such as the '*minimum force*', '*flexible response*' and '*the emergency situation*' have been omitted. These latter concepts were referred to in the 1980 Standing Operating Procedures and Guidelines on the use of force. The 1990 Guidelines also avoided earlier unrealistic instructions to the effect that fire should be

tasks;

b. In the defence of UNIFIL posts, premises or vehicles under armed attack; and

c. In support of other troops of UNIFIL under armed attack’.

These were relatively simple and direct guidelines, and they were much less restrictive than those adopted in respect of UNPROFOR, which for their part stated:

‘UNPROFOR personnel may use their weapons:

- To defend themselves, other UN personnel, or persons and areas under their protection against direct attack, *acting always under the order of the senior officer/soldier at the scene*: (emphasis added)
- To resist attempts by forceful means to prevent the Force from discharging its duties, *acting under the personal authority of the Force Commander only*; and
- To resist deliberate military and non-military incursions into the United Nations’.<sup>51</sup>

In the case of UNIFIL, the standing operating procedures were similar to the Secretary-General’s guidelines, as their general nature allowed the respective contingent commanders considerable latitude in deciding what is an appropriate response to a situation.<sup>52</sup> Not surprisingly, it was difficult to ensure their uniform interpretation and application, and practice indicated that these depended very much upon the contingent involved.<sup>53</sup> For this reason, subjective factors such as the personality and training of individual commanders are also of importance when examining responses to operational situations involving the use of force.<sup>54</sup>

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directed low at the legs of the attackers, or that *‘minimum casualties and minimum injury to casualties will be called’*.

<sup>51</sup> Loomis, *loc. cit.*

<sup>52</sup> Personal interviews with a number of former UNIFIL battalion commanders. All operational personnel are briefed on the policy regarding the use of force to resolve any misunderstandings or ambiguities arisen from the general nature of the guidelines.

<sup>53</sup> Personal interview, Lt. Col. P. Keogh, Chief Operations Officer UNIFIL, August 1989.

<sup>54</sup> An examination of the responses of different Irish battalions to harassment and acts

In the case of UNOSOM II, the ROE governing the use of force were contained in an operation plan for the force.<sup>55</sup> Their purpose was to provide guidance and instructions to military commanders, within the framework of political directives.<sup>56</sup> ROE define the degree and manner in which force may be applied and are designed so that the application of force is carefully controlled. They are tantamount to orders, but unless carefully drafted they are prone to varying interpretations. ROE are not law or laws in themselves, and to be lawful they must comply with applicable national and international law, including international humanitarian law.<sup>57</sup> The interpretation of the ROE changed substantially during the operations in Somalia, due in part to their inherent ambiguity and incompleteness.<sup>58</sup> When the security situation changed in May 1993, the Force Commander broadened the ROE, in effect giving UNOSOM II forces a 'blank cheque'.<sup>59</sup> The new rules under Fragmentary Order 39 allowed UNOSOM II to engage without provocation 'any armed militias, technicals and crew served weapons that were considered a threat'.

Peacetime and wartime ROE are mutually exclusive, and apply to different scenarios. When the United States engages in 'non-traditional' operations, these are governed by peacetime rules, or rules derived from peacetime ROE. But if the

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of hostility between 1978 and 1990 indicates that the interpretation of the guidelines on the use of force can differ from battalion to battalion. 'Human and institutional' failings were also considered important factors in the failure of the UN to protect Srebrenica, see 'Lessons for the future', in Report of the Secretary-General pursuant to General Assembly resolution 53/35 – The fall of Srebrenica, General Assembly A/54/49, 15 November 1999, para. 485.

<sup>55</sup> The Commission of Inquiry concluded that no terms of reference or standing operation procedures were to be found in UNOSOM II. The main reason for this critical deficiency seemed to be the almost total lack of peacekeeping experience among UNOSOM II ranks and the understaffing of UNOSOM II Headquarters during the initial period – *UN Commission of Inquiry, op. cit.*, para. 258.

<sup>56</sup> See D. Loomis, *op. cit.*, Annex A-F, 644-681 and J. T. Dworken, 'Rules of Engagements: Lessons from Restore Hope', *Military Review*, (September, 1994), 27-28.

<sup>57</sup> Simpson, *op. cit.*, 39. The ROE for the Canadian Joint Force Somalia – Operation Deliverance, can be found from 73-80.

<sup>58</sup> Interview, Capt. A. O Murchu, Irish platoon commander with UNOSOM II at the time, August 2000. See also C. Clep and D. Winslow, 'Learning Lessons the Hard Way: Somalia and Srebrenica Compared', in E. Schmidl, *Peace Operations Between War and Peace*, London: Frank Cass, (2000), 93-137 at 103.

<sup>59</sup> *Ibid.* See also F. Tanner, 'Weapons Control in Semi-permissive Environments: A Case for Compellance', in M. Pugh (ed), *The UN, Peace and Force*, (F. Cass, 1996), 126-145 at 140.

underlying legal foundation is ambiguous, it may make determining the appropriate action under the applicable ROE difficult to determine.<sup>60</sup> In the circumstances, UN forces in general appeared unsure about what their guidelines allowed in response to Somali actions, and disputes about interpretation were inevitable.<sup>61</sup> At one stage there was a serious dispute between United States and Pakistani troops, when the latter accused the United States marines of being too aggressive and taking too many risks, and thereby violating UN ROE.<sup>62</sup>

Despite the fundamental difference in the nature of UNIFIL and UNOSOM II operations, the general nature of the ROE's governing the use of force were very similar. In fact, the UN Under-Secretary-general Marrack Goulding referred to the UNIFIL guidelines in correspondence relating to ROE for UNOSOM, and to 'the overriding principle that force can only be used by a UN operation as a last resort and when all peaceful means have failed'.<sup>63</sup> Ultimately, ROE are interpreted by the commanders on the ground, and it seems that the overall strategic direction and policies adopted at a senior level can have a significant bearing on this. In the case of Somalia, once the operation was approved under Chapter VII of the Charter, this had a significant impact on how UNOSOM commanders and officials viewed their role. This in turn influenced the application of the ROE, which by their very nature lent themselves to either restrictive or expansive interpretations.

The terms of reference of the *Canadian Report of the Somalia Commission of Inquiry* required an evaluation of 'the extent to which the Task Force Rules of Engagement were effectively interpreted, understood and applied at all levels of the

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<sup>60</sup> S. Turley, 'Keeping the Peace: Do the Laws of War Apply, 73 *Texas Law Review*, (1994), 139 at 166-167

<sup>61</sup> In *R. v. Mathieu*, CMAC 379, November 6, 1995, the commander of the Canadian Airborne Brigade in Somalia was charged with negligently performing his military duty in issuing an order to subordinates to fire on looters/thieves fleeing Canadian camps, and thereby failing to comply with ROE. See also Chapter 38, *Dishonoured Legacy, Report of the Commission of Enquiry into the Deployment of Canadian Forces to Somalia*, Canadian Government Publishing, (Ottawa, 1997), also available at <<http://www.dnd.ca.somaliae.htm>> (english version).

<sup>62</sup> This arose after an incident where US snipers wounded a medical orderly on the roof of a hospital and apparently killed a pregnant Somali tea seller, see 'US pulls Somalia snipers in dispute with Pakistan', *Chicago Tribune*, 13 January, 1994, 1.

<sup>63</sup> D. Loomis, *op. cit.*, 340.

Canadian Force chain of command'.<sup>64</sup> Canadian troops were involved in a number of incidents involving loss of Somali lives.<sup>65</sup> Prior to departure, a government minister was said to have boasted that that soldiers going to Somalia had been provided with ROE that permitted them to shoot first and ask question later.<sup>66</sup> To reinforce instructions from higher ranks and to render the ROE more comprehensible, soldiers on duty in operational theatre normally carry a condensed version of the ROE.<sup>67</sup> There was more than one version of these 'soldiers cards' circulating in Somalia, and they contained a number of discrepancies.<sup>68</sup> The provisions concerning the resort to force were described differently and yielded significantly dissimilar logical interpretations depending on the phraseology in a given version.<sup>69</sup> Typically, the ROE were framed in an abstract manner, with no practical examples of situations to assist soldiers in evaluating the degree of force to use. Several contingents had their own ideas on ROE and quickly established themselves as being trigger happy; a danger to friend and foe alike.<sup>70</sup>

A critical element in the ROE's was the treatment of the phrase 'hostile intent', which was defined as 'the threat of imminent use of force'. Any misinterpretation and misapplication of the rules was likely to have serious consequences as the rules authorised the Canadian Forces to use 'deadly force' in

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<sup>64</sup> See 'Rules of Engagement: Confusion and Misinterpretation', *Dishonoured Legacy, Report of the Commission of Enquiry into the Deployment of Canadian Forces to Somalia op. cit.*, vol. 2, p. 1 of 13, and Vol. 5, Chapter 22 'Rules of Engagement'.

<sup>65</sup> *Ibid.*, vols 4 & 5. See also L. C. Green, 'Peacekeeping and War Crimes', XXXIV *Military Law and Law of War Review*, 247-255 at 253.

<sup>66</sup> This was a reference to Barbara McDougall, Secretary of State for External Trade and International Trade, *Canadian Commission of Inquiry, op. cit.*, 5 of 13

<sup>67</sup> It is normally referred to as an aide-memoir, soldiers card, or 'yellow card' in respect of British Forces in Northern Ireland, see F. Ni Aolain, *The Politics of Force*, Belfast: Blackstaff, Belfast, (2000), 84-85, and 129-130.

<sup>68</sup> On 7 August 1993, Lt. Col. Battisti, SSO Current Ops, wrote to all contingent commanders expressing concern that soldiers on duty were 'not clear about ROE as given in the OPLAN'.

<sup>69</sup> For example, one version affirmed the application of force depended on necessity and proportionality, while other versions did not mention these elements, stating less clearly the preconditions for using force, *Canadian Commission of Inquiry, op. cit.*, p.3 of 13

<sup>70</sup> D. Loomis, *op. cit.*, 470.

responding to a 'hostile act' or when confronting a 'hostile intent'.<sup>71</sup> Thus there appeared to be no difference between a hostile act and a hostile intent, and many soldiers accepted that this was the case.<sup>72</sup> Furthermore, the issue of level of threat and the need for a graduated response depending on the severity of the threat encountered was not addressed adequately. The Irish contingent issues its own 'Scale of Force' document.<sup>73</sup> It specified the following graduated response, but with the rider that there may be circumstances when the firing of Ball Ammunition for effect will have to be undertaken as a first reaction:

'Scale of Force (In Ascending Order)

- a. Physically pushing person(s) away.
- b. Use of Batons.
- c. Use of CS Gas
- d. Firing of warning shots
  - (1) In front of the feet (where there is soft ground).
  - (2) Over the head (where there is no soft ground)
- e. Firing for Effect
  - (1) Firing of ball ammunition for effect (aimed to inflict injury, not death where possible).....'

The UNOSOM II ROE left the impression that the response to unarmed harassment could be the exact same as that envisaged for an armed threat i.e. deadly force.<sup>74</sup> Not surprisingly, a policy of shooting thieves was adopted, and this ultimately had tragic consequences.<sup>75</sup> The role of junior non commissioned officers in the

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<sup>71</sup> See generally R. Crabbe, 'Rules of Engagement', in Morrison, Fraser and Kiras, *op. cit.*, 123-126 at 125 and the testimony of former Deputy Minister Fowler, Canadian Department of National Defence, published by D. Loomis, *op. cit.*, at 332-335.

<sup>72</sup> This is in fact the US position, see Col. C. Dunlap, 'US Legal Issues in Coalition Operations', *Peacekeeping and International Relations*, (September/October 1996), 3-4.

<sup>73</sup> This was a 'Restricted' document dated June 1993.

<sup>74</sup> The ROE were also silent on the issue of disengagement, and what was an appropriate response when an intruder breaks off an incursion, and the implications for handling detainees were equally uncertain.

<sup>75</sup> Members of the German contingent also had to use 'their hand held weapons to prevent unknown native persons from breaking into the German compound secretly', see Lt.

execution of drills and ROE is vital, as it is they that must first react to a problem. As strategic goals were to be achieved by use of force, it became essential to have specific and clear orders available at every level to exercise control over its application. This did not happen.<sup>76</sup>

It is noteworthy that several officers of the First Marine Expeditionary Force (MNF I) felt that shows of force in which ringleaders were shot by snipers had a salutary effect on reducing incidents of violence.<sup>77</sup> But shows of force of this nature did nothing to deter unarmed civilians, who were quick to appreciate their immunity and take advantage of the situation. It is submitted that random acts of violence or theft can never justify firing live ammunition. It is the responsibility of commanders to establish appropriate standing operating procedures, such as the use of sticks or batons. ROE's and the use of force are intended to deescalate and contain the situation<sup>78</sup>, but often, if not clear and resorted to in an undisciplined manner, it can have the opposite effect.

The UN must shoulder some of the responsibility for the confused state of affairs. The difficulties associated with the military integration of multinational forces are enormous. But no real effort was made to ensure uniform adoption and application of ROE among UNOSOM II contingents. Sometimes, differences in interpretation of ROE are more semantic than substantive.<sup>79</sup> The UN should formulate generic rules of engagement for all operations based on international law, especially international humanitarian law, and operational considerations.<sup>80</sup> This is all the more important as

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Col. Vogt, *op. cit.*, 219-227 at 223. See also *The Public Prosecutors Department and 104 Korad Kalid Omar, resident in Kismayo, Somalia v. Paracommando*, available in M. Sassoli & A. Bouvier, *How Does Law Protect in War?*, Geneva: ICRC, (1999), 1062-1067.

<sup>76</sup> For a detailed account to the background on the adoption of ROE for all three operations in Somalia, see D. Loomis, Chapter 10, *op. cit.*, 330-382. The US ROE for Operation Restore Hope are at 349-350.

<sup>77</sup> Last, *op. cit.*, 85.

<sup>78</sup> *Ibid.*

<sup>79</sup> See Col. C. Dunlap, *op. cit.*, 3-4.

<sup>80</sup> A possible example of how this might be done is report on *The Basic Principles on the Use of Force and Firearms by Law Enforcement Officers*, adopted by the Eight Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 28 August to 7 September 1990. See also Report of the Secretary-General on the implementations of the recommendations of the Special Committee on Peacekeeping Operations, A/ac.121/43, 23

the *Brahimi Report* has advocated the adoption of a more 'robust doctrine and realistic mandates', that 'should specify an operation's authority to use force'.<sup>81</sup> Mission specific rules should then be drawn up as the need arises. These should be tested and verified, and disseminated to contributing states, the acceptance of which would be mandatory for participation. At DPKO, the Lessons Learned unit should monitor each operation, and propose modifications or amendments based on practical experience in the field. ROE must be accompanied by scenario based training in the pre or early deployment stages of an operation. A database of ROE from other countries would assist in this process.

### **The dilemma of when to use force to implement the UNIFIL mandate**

The most controversial element of the guidelines laid down by the Secretary-General was that self-defence would include resistance to attempts by forceful means to prevent it from discharging its duties under the mandate.<sup>82</sup> However, the mandate of UNIFIL was itself ambiguous and unrealistic from the beginning.<sup>83</sup> It was therefore very difficult to state with certainty what the duties of the Force were under Resolution 425 (1978). For this reason, deciding when UNIFIL was being prevented from carrying out its mandate was not always a straightforward task either. Closely linked to these problems was the question of consent to the presence of the Force in Lebanon, the lack of any clear definition of the UNIFIL area of operation, and the need to establish freedom of movement. These and other problems were highlighted in the first major confrontation involving UNIFIL and Palestinian forces.<sup>84</sup> In addition to showing up the lack of planning and preparedness in the deployment of UNIFIL, and major

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February 1999, paras. 9 and 63.

<sup>81</sup> *Brahimi Report, op. cit.*, n.4.

<sup>82</sup> *S/12611*, 17 March 1978, para 4

<sup>83</sup> B. Urquhart, 'United Nations Peacekeeping in the Middle East', *The World Today*, (March 1980), 88-93 and 'Peacekeeping: A View from the Operational Centre', by the same author in H. Wiseman, *op. cit.*, 163-174, esp.164.

<sup>84</sup> A group of armed PLO were challenged by French soldiers when they tried to infiltrate a French position. They opened fire on the French who responded by returning fire in self-defence. Two infiltrators were killed and in subsequent clashes three UNIFIL soldiers were killed and fourteen wounded. *S/12620/Add 4*, 5 May 1978 and Chapter 6, *supra.*, 190-193.

weaknesses in the mandate, the confrontation established an important precedent for the future.<sup>85</sup>

It was at this early stage that it became evident the guidelines of the Secretary-General relating to the use of force were to be restrictively interpreted and applied. The question arose whether UNIFIL was entitled to confront the PLO and to use force to deploy in the Tyre area.<sup>86</sup> A literal interpretation of the relevant guidelines indicated that they would.<sup>87</sup> However, there were sound political and military reasons against such action being taken.<sup>88</sup> It was not surprising either that the Lebanese government supported the deployment of UNIFIL in the region as for sometime the PLO were the only real authority in this area.<sup>89</sup> It wanted UNIFIL to adopt a more aggressive policy in order to implement the mandate, especially in relation to assisting the restoration of its authority in the area.<sup>90</sup> There were also calls from members of the Security Council for a firmer stand by UNIFIL and a change in the nature of the mission from one of peacekeeping to peace enforcement,<sup>91</sup> but this was not supported by the majority of the members.<sup>92</sup> The Lebanese interpretation of what constituted

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<sup>85</sup> Immediately following the confrontation, the Secretary-General emphasised the basic principle that the Force was provided only with weapons of a defensive character. They were authorised to use force only in self-defence when attacked or when attempts are made to prevent them performing their duties under the mandate. *Ibid.* para 24. However, at least two force commanders had looked for more offensive weapons i.e. tanks, Liu, *op. cit.*, 41.

<sup>86</sup> The initial plan was for the French contingent to deploy and take control in the Tyre region. Personal interview, French officer who served with UNIFIL at the time, Naqoura, Lebanon, August 1989.

<sup>87</sup> The Secretary-General stated self-defence would include resistance to attempts by forceful means to prevent it from discharging its duties under the mandate. (*S/12611*).

<sup>88</sup> See Chapter 6, *supra*.

<sup>89</sup> Personal interview, Lt. Gen. Erskine, *op. cit.* The Lebanese resented the presence of the PLO in the south and had agreed to this because there was no real alternative, see W. Khalidi, *Conflict and Violence in Lebanon: Confrontation in the Middle East*, Harvard: Harvard University Press, (1979), 41.

<sup>90</sup> See for example *S.C.O.R.*, 2113 MTG., 19 January 1979, paras 185, 208 and 209, *S/13359*, 28 August 1979 and *S/12384*, 5 September 1978.

<sup>91</sup> See, for example, the statements from the representatives of Bangladesh, *S.C.O.R.* 2113 MTG, 19 January 1979, para 104; Kuwait, *S.C.O.R.* 2147 MTG, 12 June 1979, para. 57, and Syria, *S.C.O.R.* 2148 MTG, 14 June 1979, para 110.

resistance to attempts to implement the mandate was broader than any interpretation made by the different Force Commanders of UNIFIL.<sup>93</sup> Their assessment of the role of UNIFIL was flawed, and indicated a failure to appreciate the political and military constraints under which it operated.

In the context of a traditional peacekeeping operation, it was important that the Force should not become involved in functions and duties related to the maintenance of internal law and order. While UNOSOM II had little option due to the complete breakdown of normal state functions, this was not the case with UNIFIL. Such involvement could have had serious repercussions on the impartiality of the Force by involving it in the internal conflict taking place alongside the international crisis caused by the Israeli invasion. In fact, UNIFIL was already bound to be partial to the wishes of the Lebanese government owing to its role in the restoration of the authority of the government in the south.<sup>94</sup> The matter of the PLO presence in the Tyre area was linked to this issue. It appeared the Lebanese wanted UNIFIL to confront the PLO on their behalf while unwilling and unable to do so themselves.<sup>95</sup> Such action was not authorised under the mandate, and would have precipitated a crisis in UN peacekeeping not experienced since the controversy in the Congo. As a peacekeeping force, the strategic use of force to implement the mandate was never considered, but the early attempts to deploy also showed that there was no stomach for the tactical use of force to ensure deployment as planned and required by the mandate. An obvious downside to the approach adopted was that it had a significant effect on the attitude of the Israeli backed *de facto* forces to the deployment of UNIFIL in areas occupied by them.

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<sup>92</sup> Personal interview, Department of Foreign Affairs Official, August 2000. The Fijians, the Dutch and, to a lesser extent the French, supported a stronger response by UNIFIL to threats and harassment.

<sup>93</sup> Personal interviews, Lt. Gen. Erskine and Lt. Gen. Callaghan, both former Force Commanders of UNIFIL.

<sup>94</sup> This was required by Resolution 425 (1978).

<sup>95</sup> The attitude of the Lebanese led to exasperation among certain UN officials, see B. Urquhart, *A Life in Peace and War*, New York: Harper and Row, (1987), 301.

## Escalating the response and the tactical use of force

The next serious test of the creditability of the Force occurred soon after the confrontation, or more accurately, lack of it, with the PLO. Despite concern being expressed regarding Major Haddad's *de facto* forces prior to the deployment of UNIFIL, there was no contingency plan should these fears turn out to be well founded.

<sup>96</sup> The terms of reference for UNIFIL and the guidelines on the use of force were too vague to be of much use in the hostile environment that confronted the Force. The matter was complicated by the provisional recognition given Major Haddad's forces by the Lebanese government.<sup>97</sup>

The effect of this was to deny UNIFIL freedom of movement in a large area that was intended to be part of its area of operation.<sup>98</sup> It appeared to have been lured into this situation by the fact that various parties believed it should only be deployed in areas that the parties themselves occupied and subsequently withdrew from.<sup>99</sup> Because UNIFIL could only deploy with the agreement of the parties, there was no realistic alternative but to accept this situation.<sup>100</sup> Again, a strict literal interpretation of this would seem to justify UNIFIL resorting to whatever limited force was necessary to fulfil the mandate, but this ignores the political and military realities of the situation in which UNIFIL found itself.

Having decided not to confront the PLO and press for the deployment of UNIFIL in the Tyre area, UNIFIL was effectively precluded from confronting the *de facto* forces and deploying in the enclave. The use of force to implement the mandate in this instance would have been interpreted by the Israelis as a hostile and non-

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<sup>96</sup> I. J. Rikhye, *Theory and Practice of Peacekeeping*, London: Hurst, (1984), 104.

<sup>97</sup> *The Blue Helmets*, *op. cit.*, 91. When Major Haddad refused to co-operate with the Lebanese Government and UNIFIL, this recognition was withdrawn, *S/12834*, 5 September 1978, para 6. See also *The Irish Times*, 6, 8, 10 and 13 June 1978.

<sup>98</sup> After the 1982 invasion the Israelis extended this area and it was referred to as the Security Zone. In 1978 the 'enclave' included an area around the town of Marjuyoun that caused a serious gap in the deployment of UNIFIL and separated the battalion deployed in the north eastern sector from the remainder of the force.

<sup>99</sup> Rikhye, *op. cit.*, 121.

impartial policy, and would also have been objected to by the United States. Had UNIFIL forced the issue at the time it would not have succeeded. The co-operation of the *de facto* forces, albeit very limited at times, was essential for the continued existence of the Force. Again it was political and military factors that determined the response adopted by UNIFIL, and not the standing operating procedures and guidelines on the use of force.

The *de facto* forces interpreted UNIFIL's failure to take action as an indication of weakness.<sup>101</sup> They made a number of successful attempts to set up positions within the UNIFIL area, and in particular, in the Irish area.<sup>102</sup> The standing operating procedures and guidelines on the use of force were of limited use in the circumstances.<sup>103</sup> Resort to the use of force was significantly constrained due to the fact that there were a number of vulnerable positions occupied by Irish UNIFIL troops in the 'enclave' controlled by Major Haddad.<sup>104</sup> By using these as hostages in a manner not unlike the situation UN personnel found themselves in Bosnia some years later, the *de facto* forces could prevent the use of force by UNIFIL to stop encroachments.<sup>105</sup>

A number of other factors contributed to the apparent ineffectiveness of UNIFIL and its reluctance to use force. In the case of the Irish battalion, its strength was inadequate for the tasks assigned to it. The boundary with the *de facto* forces was twenty-two kilometres in length. There were seven towns situated within a kilometre and a half of that. All were potential targets for a *de facto* forces incursion and takeover. At the same time the area had to be 'adequately' patrolled and observed to

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<sup>100</sup> According to its terms of reference 'self-defence would include resistance to attempts by forceful means to prevent it from discharging its duties under the mandate', *S/12611*, 19 March 1978, para 4.

<sup>101</sup> There was constant harassment of UNIFIL, and a number of serious incidents occurred, see *S/13384*, 8 June 1979, para 25, and *The Blue Helmets*, *op. cit.*, 94.

<sup>102</sup> Personal interview, senior Irish officer serving with UNIFIL at the time, April 1984, see also J. Theodorides, 'The United Nations Interim Force in Lebanon', *The Military Law and Law of War Review*, (Belgium, 1981), 309-331, esp. 316-317.

<sup>103</sup> *Ibid.*

<sup>104</sup> *Ibid.*

<sup>105</sup> The official UNIFIL policy was also to resolve problems by negotiation. The dilemma facing the Irish UNIFIL troops was evident when the *de facto* forces established a position in a strategic village that was located well within the UNIFIL area. See *S/13691*, 14 December 1979, paras 40-45. The village was known as Bayt Yahoun.

prevent armed elements attempting to infiltrate south towards the Israeli border.<sup>106</sup> This situation permitted the *de facto* forces to pick the time and place of any incursion in the knowledge that UNIFIL did not have sufficient troops to patrol adequately the entire 'front'. Protecting the villages themselves was also difficult. According to a strict interpretation of the mandate, it was not the responsibility of UNIFIL. This interpretation was the only realistic and reasonable policy under the circumstances because it was not possible, in any case, to defend the large number of villages in the area.<sup>107</sup> Despite this, many observers and Irish politicians were critical of UNIFIL and its apparent impotence.<sup>108</sup>

### **The tactical use of force by UNIFIL and the adoption of Resolution 467 (1980)**

As the intensity of the harassment by *de facto* forces increased, they became progressively more aggressive and efforts to expand their area culminated in the attempted take over of the village of At-Tiri in 1980.<sup>109</sup> This led to the most serious confrontation between the *de facto* forces and UNIFIL to date. It would have been a serious political and military setback to UNIFIL if these forces gained control of the village and crossroads. In the words of one Irish officer at the time, had the *de facto* forces taken over the village 'then Irishbatt and the rest of UNIFIL might as well have

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<sup>106</sup> In a conventional situation a brigade level commitment would be required to cover such a large area. The normal level of commitment in a conventional war is a battalion for every one and a half kilometers of front. This would mean that fifteen battalions would have been required to guard the Irish area of responsibility against a full scale Israeli/*de facto* forces invasion. At the time the strength of the whole UNIFIL Force was roughly that of a brigade (i.e. 5,800).

<sup>107</sup> There were just seventy soldiers available to patrol and observe a front of ten kilometers. Within this area there were numerous rocky hills, valleys, tracts and roads. The villages and crossroads required patrols or fixed checkpoints. The *de facto* forces were quick to exploit the weakness in such a situation.

<sup>108</sup> *The Irish Times* and *The Irish Press*, 1 May 1979. *The Irish Times*, 14 July 1979, *Sunday Independent*, 15 July 1979, p.4. See also 315 Dáil Debates, 14, 12 July 1979, 2261-2268.

<sup>109</sup> S/13888, 11 April 1980 and Add 1-3, 16 April and 18 April 1980 respectively. The village at At-Tiri is situated alongside a strategic crossroads. Control of this would have given access to high ground to the north and would have allowed Major Haddad to dominate the whole Irish area.

packed up and gone home'.<sup>110</sup> In reality, Major Haddad already controlled a larger area than the UN cared to admit. In an effort not to legitimise this situation, the official maps published did not reflect the reality on the ground.<sup>111</sup> UNIFIL had never taken control of the full area intended for its deployment in 1978. Instead of gradually gaining ground since then, it in fact lost territory to the *de facto* forces. The situation was now reached where UNIFIL could afford to lose control of no further ground. A firm stance had to be taken if the authority of the peacekeeping force was to have any significance there. The situation that arose in At-Tiri is well documented and reported upon.<sup>112</sup> The level of harassment and shootings escalated to a situation of almost open warfare between UNIFIL and Haddad's forces. Small arms, heavy machine gun, mortar and tank fire was used against the Irish and other UNIFIL troops. UNIFIL returned fire in a restrained and disciplined fashion. There were casualties and many injuries on both sides.<sup>113</sup> At the end of the day, a firm and resolute stand by UNIFIL troops led to the withdrawal of the *de facto* forces from the village and the area immediately around it.

As a result of the confrontation at At-Tiri and the shelling of UNIFIL headquarters by *de facto* forces, the Security Council adopted Resolution 467 (1980).<sup>114</sup> The Resolution commended the Force for its great restraint in very adverse circumstances and called attention to the provisions of the mandate that would allow

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<sup>110</sup> Personal interview with Irish officer serving with UNIFIL at that time.

<sup>111</sup> See the reports by R. Fisk in *The Times*, 23 and 24 May 1980. In particular, a sketch map in the latter edition reflects the situation at the time. The then Irish Army Chief of Staff is also reported to have commented that the situation on the ground bore little resemblance to 'the maps which look good in New York', *The Irish Times*, 2 May 1980.

<sup>112</sup> 'At-Tiri remembered - 6 April to 13 April 1980', *An Cosantoir*, (April 1990), 31-36. *S/13888*, dated 11 April 1980 and Add 1-3 dated 16 April 1981 and 18 April 1980 respectively. See also Erskine, *op. cit.*, 71-87; *S/13994*, 12 June 1980, esp. paras 44-52; R. Smith, *Under the Blue Flag*, Dublin: Aherlow, (1980), 218-216. See also 319 Dáil Debates, 7, 16 April 1980, 1257-1274 and XXVII *Keesing's Contemporary Archives*, 30919-30922.

<sup>113</sup> One Irish soldier, Pte Stephen Griffin, and one Fijian soldier was killed and several wounded. One militia man was also killed and at least three wounded. There was no similar incident involving Irish troops in Somalia, though in one confrontation involving Indian troops and an Irish resupply convoy in March 1994, at least twelve Somalis were killed, see Capt. A. O Murhu, 'Learning from Somalia', *An Cosantoir*, (September 1999), 7-11.

<sup>114</sup> Resolution 467 (1980) was adopted on 24 April 1980. For general background to this resolution and the At-Tiri incident see R. Murphy, 'Background to the 1980 'Battle of At-Tiri' - A Personal Assessment', *An Cosantoir*, (October 1988), 38-44.

UNIFIL use its right to self-defence.<sup>115</sup> This was a very significant provision. It was the first occasion the Security Council found it necessary to make direct reference to the Force's right of self-defence. It constituted retrospective approval of the action taken in At-Tiri. It supported the tactical use of force by the Irish troops and it constituted a reminder to all concerned that this was the appropriate action in the circumstances. It also suggested that a more flexible interpretation of the right to use force in self-defence could be considered.<sup>116</sup>

Resolution 467(1980) could have brought a change in UNIFIL's policy towards the *de facto* forces and armed elements by the Security Council and Secretary-General. The resolution differed from those that had previously been adopted in that the specific reference to UNIFIL's right to use force in self-defence could have provided it with the authority to adopt a more robust policy.<sup>117</sup> However, the apparent authority to use force to implement the mandate was not backed up with the political will to do so. Despite the reaffirmation of this right in Resolution 467(1980), and its potentially broad interpretation, the Secretary-General was constrained by the political realities of a sometimes-ambivalent Security Council,<sup>118</sup> and a clear message from a meeting of the contributing countries that they would not support a stronger show of force.<sup>119</sup>

In 1986, a serious confrontation between French UNIFIL troops and members of the Shiite movement AMAL highlighted the precarious nature of peacekeeping and how even the use of force can create serious problems for the unit concerned.<sup>120</sup> On 11 August 1986, a French sentry shot and killed a local AMAL leader and his bodyguard

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<sup>115</sup> *Ibid.*

<sup>116</sup> *Ibid*, para 6.

<sup>117</sup> *Ibid.*

<sup>118</sup> See *S/13994*, 12 June 1980, para 69, where the Secretary-General found it necessary to refer to UNIFIL's right to use force in self-defence. In 1986 he was openly critical of the lack of support for UNIFIL by the Security Council, see *S/17965*, 9 April, 1986, para 51.

<sup>119</sup> *S/13921*, 2 May 1980. Prior to the meeting of troop contributing countries, the Minister for Foreign Affairs announced that Ireland intended to rely on diplomatic pressure to persuade the Israelis to cease supporting Major Haddad's militia. The communiqué confirmed this policy.

<sup>120</sup> For background to AMAL see R. Wright, *Sacred Rage - The Crusade of Islam*, London/New York: Linden Press/Simon and Schuster, (1985), 66-110 and *passim*.

at a checkpoint.<sup>121</sup> Prior to this UNIFIL had numerous confrontations with local armed elements. These were diffused by negotiation and compromise. The August 1986 incident can be differentiated from others in a number of respects. The French made no real attempt to diffuse the situation. The French sentry that shot the two local AMAL militia followed French and not UNIFIL standing operating procedures.<sup>122</sup> The French always maintained that their own national military doctrine, ethos and training should not become diluted because they were part of a UN peacekeeping operation.<sup>123</sup> Arguably the problem at the time would not have become so serious had it arisen in another battalion area. The French have a professional and well-trained army. However, such a conventional army is not always well suited to peacekeeping. The fact that France was involved politically and historically in the affairs of Lebanon and that it is a major power militates against its suitability for peacekeeping there.<sup>124</sup> It also meant the French were targets for certain Lebanese groups. They were therefore required to take extra security precautions and adopt a more aggressive military posture, though such a posture came naturally to French soldiers anyway. This led to resentment from the local population and a perception that the French were behaving like an occupying force.<sup>125</sup>

Attempts to negotiate a compromise were impeded by the French who appeared unable to admit they made a mistake.<sup>126</sup> UNIFIL's investigation of the incident was also delayed because of French objections. The initial French reaction to the incident and the follow up action illustrate what can happen when the principles normally

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<sup>121</sup> S/18348, 18 September 1986, para 5, Liu, *op. cit.*, 31 and C. Brady and S. Daws, 'UN Operations: The Political-Military Interface', *1 International Peacekeeping* (F. Cass), (1994), 29-79, at 67.

<sup>122</sup> Personal interview, French officer serving with UNIFIL, Naqoura, July 1989.

<sup>123</sup> *Ibid.*

<sup>124</sup> See the report by R. Fisk, 'Will the UN be forced out of Lebanon', *The Times*, 6 October 1986, p.12.

<sup>125</sup> Personal interviews, Lt Col P. Keogh, Chief Operations Officer, UNIFIL, July-September 1989.

<sup>126</sup> Personal interview, senior officer at UNIFIL HQ, October 1989. At one stage they investigated the possibility of using an aircraft carrier, air support and heavy armour to extricate them from the predicament in which they found themselves. This was confirmed by French UNIFIL officers also.

adhered to in peacekeeping operations were not followed. The situation would not have become so serious if a smaller world power had been involved, as it would be more likely to seek a genuine resolution of the crisis and be less concerned with loss of face and national pride. In attempting to diffuse potentially violent situations by using maximum restraint and negotiation, UNIFIL risked being accused of backing down and not enforcing the mandate effectively. Such solutions were preferable to becoming embroiled in the civil strife taking place in Lebanon similar to what happened to UNOSOM II, and then being forced to withdraw.

As a result of the clashes the Force Commander took measures to improve the security of UNIFIL troops.<sup>127</sup> Many of these measures should have been taken after the first few months of its deployment when it became evident that the parties to the conflict were not going to cooperate. The incident showed how a peacekeeping force is at a distinct military disadvantage in such a situation. UNIFIL did not have the equipment, mobility and supplies to engage in any prolonged hostile action. In simple military terms it showed that a peacekeeping force is not suitable for offensive action.

After the serious clashes that occurred, the Secretary-General investigated the question of changing the UNIFIL mandate and/or the means provided to the Force to carry it out. In a special report he repeated the basic principles that a peacekeeping force must rely upon:

UNIFIL cannot use force except in self-defence and is not therefore in a position to enforce the Security Council's will... its effectiveness depends on the voluntary co-operation and consent of the parties to the conflict and of the troop contributing governments, the importance of whose role cannot be overemphasised ...the [Security Council] could in theory revise the Force's mandate or terms of reference. In practice, however, the possibilities are very limited.<sup>128</sup>

This particular report is one of the most realistic assessments of the predicament of the Force and the options available to it in the circumstances. The Force Commander made certain recommendations that centred upon a tactical concept

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<sup>127</sup> These measures included, *inter alia*, a crash programme to provide reinforced shelters, the closure of certain vulnerable and exposed positions, redeployment and special precautions against attack. S/18348, 18 September 1986, paras 16-18.

<sup>128</sup> *Ibid.*, para 24.

of avoiding violence by being able to deploy superior forces if threatened.<sup>129</sup> A number of checkpoints and positions which were of limited operational value and difficult to defend were also closed. This allowed each battalion concentrate its forces into more easily defended posts that were less vulnerable to attack and harassment by armed elements.<sup>130</sup> It also meant the problem of having to man vulnerable positions that could be isolated and threatened during periods of tension was reduced as far as possible. Such positions had impeded seriously the response of Irish battalions to harassment in the early years of UNIFIL's deployment. However, such a plan could not be completely effective, as peacekeeping duty by its very nature required a certain amount of exposure to risk. The crisis also led to the setting up of a Force Mobile Reserve, a sort of rapid deployment force, whose mission is to demonstrate an international willingness to resist attempts by forceful means to prevent UNIFIL from discharging its duties.<sup>131</sup> Having a large reserve, much bigger than usually retained in conventional military operations, is now recognised as a pre-requisite for keeping the peace with force.<sup>132</sup> It may also reduce the incidents involving confrontation, as an immediate show of strength may deter parties from further provocative action. Most of all, the 1986 incident showed up the dangers in even limited use of force on traditional peacekeeping operations. While the tactical use of force at At-Tiri in 1980 may have been the appropriate response then, the experience overall is that lightly armed peacekeepers are not in a position to resort to force except in very rare circumstances.

### **Somalia and the strategic use of force**

UNOSOM II has been described as the first peacekeeping operation in UN history that was given the mandate to use force not only in self-defence but to pursue its mission.<sup>133</sup> While this may not be factually accurate, it does show the degree of confusion surrounding the nature of the operation. It seemed that a peacekeeping force

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<sup>129</sup> *Ibid*, paras 25-26.

<sup>130</sup> *Ibid*.

<sup>131</sup> Personal interview, Lt. Gen. Walgren, Force Commander UNIFIL, October 1989. This was to be the primary means to enable UNIFIL deploy superior forces quickly when threatened.

<sup>132</sup> L. MacKenzie, 'Peacekeeping With Muscle: An Oxymoron?' in Morrison, Fraser and Kiras, *op. cit.*, 133-137 at 136.

with peace enforcement powers was envisaged, along the lines proposed by the Secretary-General in *Agenda for Peace*.<sup>134</sup> The nature and size of the force reflected the complex and unpredictable nature of the mission.<sup>135</sup> The Secretary-General had looked for combat units from countries that had supplied troops to UNITAF. Countries like the United States and Australia, declined to do so. But the United States ensured it had people in key positions to retain control, and it maintained combat ready troops outside the UN chain of command.<sup>136</sup>

The use of force by UN forces in Somalia was a contentious issue before the more publicized confrontations involving UNOSOM II occurred. UNITAF forces were accused of indiscriminate shooting, while the policy pertaining to the use of force by UNITAF forces was described by a United States spokesman as follows: 'American forces...are trained to shoot to kill, not wound, whenever they judge there is a threat'.<sup>137</sup> A United States General also described UNITAF ROE as the 'most liberal' he had ever seen for an UN-sponsored operation since the Korean conflict.<sup>138</sup> What was remarkable is that there was no attempt to introduce a uniform policy of escalation in degrees of force, and the use of weapons in a 'shoot-to-death' policy seemed the reflex action to anything deemed a threat. In an unfamiliar and perceived hostile environment, this was a far from ideal crowd control procedure, and determining what constituted a legitimate threat was fraught with difficulty.

The ROE, as interpreted and applied by the Irish contingent part of UNOSOM II provide an interesting contrast. Although fulfilling a support role to the Indian Brigade, convoys were heavily armed. Stringent guidelines were placed on the use of weapons, and deterrence through high visibility with weapons and unarmed restraint

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<sup>133</sup> Makinda, *op. cit.*, 76.

<sup>134</sup> *Agenda for Peace, op. cit.*, 26.

<sup>135</sup> Resolution 814 (1993) approved a 20,000 force with a logistical element of about 8000.

<sup>136</sup> Chapter 6, *supra*.

<sup>137</sup> Quoted in M. D. Abdullahi, 'Fiasco in Somalia: US-UN intervention', Africa Institute of South Africa, Occasional Paper No. 61, 1995, 18-19. See also Beyond the Warlords: the Need for a Verdict on Human Rights Abuses, *5 Human Rights/Africa Watch 2*, at 17-18.

<sup>138</sup> Maj. Gen. L.S. Arnold, 'Somalia: An Operation Other Than War', *Military Review*,

by weight of numbers being the first line of defence. If this did not work, warning or containing shots were to be fired first, then fire at the 'legs and extremities', lastly, 'shoot to kill'.<sup>139</sup> In a reflection of US dominance of the overall operation, the US UNITAF ROE were accepted, with minor modifications, by all participating countries, and later they played 'a significant part in the transition to UN-led operations'.<sup>140</sup> But UNOSOM II did not have the cohesion, strength or fire-power of its US led predecessor, and there was no critical assessment of the suitability of the transfer of one set of rules for this mission, to that of a wholly different operation supposedly under UN control.<sup>141</sup>

As the situation UNOSOM II found itself in deteriorated, the Force had no alternative but to move beyond humanitarian concerns and this was bound to bring it into conflict with local parties if not managed carefully. Disarmament was to be one of the keys to success but to be effective; the disarmament process would have to be enforceable.<sup>142</sup> It was against an atmosphere of rising tension that the first ever inspection of a SNA weapon site was effected on 5 June 1993, despite strong objections and warnings by the SNA, who considered it provocative.<sup>143</sup> The size and military strength of the inspection teams left no doubt that UNOSOM II had decided to use force if necessary to impose its will. The attempted inspection precipitated a concerted attack against UNOSOM II in Mogadishu that left 24 killed, and many wounded and missing.<sup>144</sup> Lack of coordination between the military and political divisions, and inappropriate political advice contributed to the misjudgements of the

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(December 1993), 26-35 at 32.

<sup>139</sup> Commandant D. Conway, Officer Commanding Irish Transport Company UNOSOM II, quoted by C. Sears, 'Somalia: Faith, Hope and Charity', in 19 *In Dublin*, (May 11-24, 1994), 8-13 at 12.

<sup>140</sup> Maj. Gen. W. Freeman, Capt. R. Lambert and Lt. Col. J. Mims, 'Operation Restore Hope - A US Centcom Perspective', *Military Review*, (September, 1993), 61-72 at 65.

<sup>141</sup> See Chapter 5 *supra.*, on Command and Control.

<sup>142</sup> Security Council Document S/25354, 3 March 1993.

<sup>143</sup> Though the Pakistani contingent were not informed of these warnings. *UN Commission of Inquiry*, paras. 211 and 215. See also T. Mockaitis, 'Civil Conflict Intervention: Peacekeeping or Enforcement?', in A. Morrison, D. Fraser & J. Kiras (eds.), *op. cit.*, 31-50 at 40.

<sup>144</sup> See *UN Commission of Inquiry*, *op. cit.*, paras. 104149; 7 *Human Rights/Africa*

sensitivity and timing of the inspections.<sup>145</sup> The ensuing confrontation was a sobering experience that focused on the enormity of the challenge facing the UN in its efforts to forcibly disarm the factions. It also showed the limitations of increased fire-power and heavy weapons. Italian tanks did not come to the rescue as anticipated, and helicopters proved a blunt instrument with which to deal with an urban situation.<sup>146</sup> The inadequacy of the equipment and the lack of preparedness of UNOSOM II was startling. One of the main problems with disarmament was the related issue of consent and confrontation.<sup>147</sup> The risks are high, and there is the added dimension of national contingent interpretation of the ROE and differing contributing states' policy. Somalia illustrated the many potential pitfalls that can befall a UN force in the use of limited force, the most obvious being the likelihood of escalation and loss of any real control, and how easily a situation can slide into combat.<sup>148</sup> It also reiterated many lessons learned in the Congo, and some new ones as well.<sup>149</sup>

### **Conflicting interpretations of the concept of operations and the slide into combat**

The UN responded to the attack upon UNOSOM II forces by the adoption of Resolution 837 (1993). This prepared the ground for a massive demonstration of force by UNOSOM II, and in what amounted to a direct targeting of the SNA's leadership, the resolution requested the Secretary-General 'to inquire into the incident, with particular emphasis on the role of those factional leaders.' Conclusions were drawn without proper investigation. The Security Council reaffirmed the authority of the Secretary-General 'to use all necessary measures against all those responsible' to implement agreements reached, and to arrest, detain, try and punish those who attempted to hinder the realisation of the mandate.<sup>150</sup> Although Aided was not

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*Watch 2, supra.*, 60-65, Makinda, *op. cit.*, 80

<sup>145</sup> *UN Commission of Inquiry, op. cit.*, para. 221.

<sup>146</sup> Italian helicopters, unable to locate the precise position of machine gun fire, opened fire and injured three UN soldiers. *UN Commission of Inquiry*, para. 116.

<sup>147</sup> F. Tanner, *op. cit.*, 140.

<sup>148</sup> *Ibid.*

<sup>149</sup> See T. Mockaitis, *op. cit.*, at 41.

mentioned, it was clearly directed against him. The effect of this resolution was to authorise punitive action against the SNA militia, which in turn would have the effect of precipitating a 'war' with UNOSOM.<sup>151</sup> This was not a drift into the reprisal, such as occurred with US forces in Beirut a decade before,<sup>152</sup> but a conscious decision to go after Aided.

Aided's reaction to the conflict with the Pakistani troops is hard to assess. He adopted a conciliatory posture and called for an impartial inquiry into the causes of the attacks. Whether this was opportunism or a sincere effort at reconciliation is somewhat academic, as UNOSOM II subsequently launched an all out military operation against Aided and his followers. This in turn brought to a head simmering tensions between the Italian contingent commander and UNOSOM officials.<sup>153</sup> The row involving the Italians is most instructive, and highlighted a fundamental difference of opinion in respect of UNOSOM II's policy regarding the use of force.<sup>154</sup> The Italians favoured a more restrained approach, and sought the approval of the Italian government before taking any significant military initiative.<sup>155</sup> In this way cultural differences between contributing states, or the personality of a particular commander, can be important variables in determining the mode of operation of various missions.<sup>156</sup> Similar differences of policy had occurred with the Italian contingent part of the MNF

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<sup>150</sup> Resolution 837, 6 June 1993.

<sup>151</sup> *UN Commission of Inquiry, op. cit.*, para. 124-261. A comprehensive list compiled by UNOSOM II showing the military action of both sides was given as annex 4, and a synopsis of the main incidents is contained in annex 5 to the report.

<sup>152</sup> R. Thakur, *International Peacekeeping in Lebanon*, Boulder and London: Westview Press, (1987), 181.

<sup>153</sup> See C. O Cleary, *The Irish Times*, 15 July 1993. See also the *New York Times*, and *Washington Post*, 14 July 1993, the *New York Times* backed the Italians and called for a suspension of military operations to allow the international community reassess its goal.

<sup>154</sup> See D. Lorch, 'Rifts Among Forces in Somalia Hamper UN Military Effort', *New York Times*, 12 July 1993, 1 and 6; R. Bernstein, 'Italian General to Leave Somalia', *New York Times*, 15 July 1993, 4; and A. Cowell, 'Italy, In UN Rift, Threatens Recall of Somalia Troops', *New York Times*, 16 July 1993, 1,2. It is noteworthy that the Italian general concerned, General Loi, was also commander of the Italian contingent part of the MNF II operation in Beirut a decade before.

<sup>155</sup> Personal interview, senior Italian army officer with UNOSOM II, Pisa, July 1997. See also Paddy Agnew, reporting from Rome in *The Irish Times*, 16 and 17 July 1993, and C. Brady and S. Daws, *op. cit.*, 69.

in Beirut in the 1980's, and the Italians certainly considered that their approach proved the most successful on that occasion, especially after the attacks on the US and French contingents there.<sup>157</sup> The Italians ultimately refused to go along with the concept of operations as proposed, and this led to an international incident with recriminations on both sides. Of particular interest was the Italian reoccupation of Strong Point 42 in Mogadishu that they had previously vacated under pressure. Now, contrary to what was envisaged, they negotiated with the SNA instead of taking the position by force.

The Italians understood the role of a peacekeeping force, and the continuum from low-level conflict to armed conflict that exists when such a force adopts a peace enforcement role. It seemed that senior UNOSOM personnel did not understand this, and other fundamental principles of peacekeeping operations. Nor was there someone to teach the basics of peacekeeping to them,<sup>158</sup> though it is noteworthy that there was little support for the policy of restraint proposed by the Italians. Among the deficiencies identified as contributing to this state of affairs was the fact that there were no seasoned peacekeepers among UNOSOM military leadership to advise on the modalities for UN disarmament inspections and other useful practices. This was a crucial deficit as the transition from professional soldier to peacekeeper can be difficult, especially for those trained for offensive operations as part of large-scale military forces. The use of force to achieve the objective is central to the ethos of professional soldiering, but in peacekeeping this should only be resorted to after all peaceful means have been exhausted.

The Italians had to receive permission from Rome to use military force. This often caused delays, and was inconsistent with proper command and control doctrine.<sup>159</sup> However, it was hard to blame the Italians for adopting such a policy in the circumstances, and while adding to the multiplicity of chains in the command structure, it did prevent Italy being dragged into a serious confrontation without adequate consideration of the issues or consequences.

Resolution 837 (1993) was interpreted as authorizing the use of force to hunt

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<sup>156</sup> See T. Findlay, *op. cit.*, 56.

<sup>157</sup> Interview, senior Italian military officer, *op. cit.*, and R. Thakur, *op. cit.* 175-202.

<sup>158</sup> UN Commission of Inquiry, *op. cit.*, para. 225.

<sup>159</sup> See P. Diehl, 'With the Best of Intentions: Lessons from UNOSOM I and II', 19 *Studies in Conflict & Terrorism*, 153-177 at 161, (1996).

for the SNA leadership, destroy its power sources, radio base and weapons stores. This was in contrast with the restrained response by UNIFIL to the adoption of Resolution 467 (1980). There was a planned build up to an offensive operation surpassing any similar UN commanded operation up to then.<sup>160</sup> As with all such military operations, once action was initiated the conflict tended to take on a life of its own. This was not the ideal environment for the conduct of such operations. Tanks, helicopters and planes are not weapons for the containment of urban conflict, or the conduct of urban warfare. Attempts to reduce collateral damage were bound to be problematic.<sup>161</sup> When all these factors are combined with the use of special forces under a separate chain of command, it was only a matter of time before this led to catastrophe.<sup>162</sup>

An analysis of the period following the attack on Pakistani UNOSOM forces indicates that the UN initiated almost all the military action, and all casualties occurred as a result of UNOSOM operations. Such a situation could not last indefinitely. From early July, UNOSOM II fragmental orders referred to 'enemy forces', and a watershed in UNOSOM tactics occurred with the attack on the Abdi house on 12 July.<sup>163</sup> Unlike previous such operations, no warnings were given, and there were significant casualties.<sup>164</sup> US helicopters under separate US command attacked the house with missiles and rockets on the grounds that it was a command centre of Aided.<sup>165</sup> This

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<sup>160</sup> Tanks, attack planes, attack helicopters and armored personnel carriers had to be brought in to facilitate this operation. UN personnel had to be relocated to safer areas, *UN Commission of Inquiry, op. cit.*, para. 229.

<sup>161</sup> In one well-publicised incident, Pakistani soldiers shot unarmed demonstrators, and the official version of events was contradicted by eyewitness accounts. The Secretary-General expressed regret, but defended the UN role. See Abdullahi, *op. cit.*, 24. See also U. Mac Dubhgaill and P. Smyth, *The Irish Times*, 14 June 1993; J. Clayton, *The Irish Times*, 15 June 1993, and David Chazan, *The Irish Times*, 8 June 1993.

<sup>162</sup> See Chapter 5 on Command and Control issues, *supra*. And *UN Commission of Inquiry, op. cit.*, paras. 254-247.

<sup>163</sup> See J. Cusack, 'Airborne strike in Somalia endangered Irish aid workers', *The Irish Times*, 13 July 1993, 1, and editorial comment at 13.

<sup>164</sup> UNOSOM estimated the number of dead at 20; the ICRC had figures of 54 killed and 161 injured while SNA put the number of those killed at 73. *UN Commission of Inquiry, op. cit.*, para. 154.

<sup>165</sup> It was reported that 16 anti-tank missiles and 2000 rounds of 20mm canon were fired at the house, which was destroyed. Keith Richburg, 'UN helicopters assault in Somalia targeted Aideed's top commanders', *The Washington Post*, 16 July 1993

attack was criticised as breaching the laws of war and the rules of proportionality in humanitarian law by attacking the house without having confirmed that it was other than it appeared, a civilian villa and not a military command centre.<sup>166</sup> There certainly was a clear alternative to its destruction without warning, a decision that would inevitably cause maximum civilian casualties. The problems with the principle of proportionality and the use of force relate to their practical application to situations of conflict. It is easy to state that there must be an acceptable relation between the legitimate destructive effect and undesirable collateral effects.<sup>167</sup>

The attack was also a major political mistake. It was widely regarded as having targeted civilians, and more significantly, many of who were advocates of reconciliation. An unpublished report by the UN Justice Division was very critical of UNOSOM tactics.<sup>168</sup> It was symptomatic of a change in the level of hostilities; attacks became more systematic and involved the use of heavy weapons. In a later incident in September, US forces may have used disproportionate force in responding to an attack on Pakistani forces. There is evidence that militias used women and children to shield them from attack. A UNOSOM spokesperson is reported to have said '[i]n an ambush there are no sidelines or spectator seats. The individuals on the ground were considered combatants'.<sup>169</sup> Again, this phase of the conflict ended with controversy surrounding the Italian contingent. This centred on the policy in relation to the use of force and the resort to a military solution without exhausting other possibilities. When taking over the Italian position at Strong Point 42, the Nigerian forces were confronted with Somali protestors. The Nigerian response was to open fire, while the Italians

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<sup>166</sup> Human Rights Watch/Africa, *op. cit.*, 63.

<sup>167</sup> See *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, (8 June, 2000), paras. 48-52.

<sup>168</sup> K. Richburg, 'UN report criticizes military tactics of Somalia Peace Keepers', *Washington Post*, 5 August 1993 and personal interview, Irish UNOSOM official, July 2000. When asked to comment on the attack, Mohamed Sahnoun stated: 'How can you shoot from the air at a villa where people are sitting and meeting, even if they were Aided's people?...Its absolutely incomprehensible. There were elders at the meeting who might have been doing something useful. The attack was excessive and unjust. You can't explain it to the Somali people or the international community', quoted in Abdullahi, *op. cit.*, 25.

<sup>169</sup> US army spokesman, Maj. D. Stockwell, UPI, 10 September 1993. Aided claimed 125 were killed, including women and children. This could not be confirmed, but UNOSOM sources accepted that at least sixty people died, 7 *Human Rights/Africa Watch 2*, *op. cit.*, 65.

began conducting negotiations.<sup>170</sup> The overall picture that emerges from these and other incidents is of a sometimes nervous and even ‘trigger-happy’ force. UNOSOM found itself in a hostile and confusing environment, and its leadership seemed intent on finding a solution by resort to ever increasing degrees of force. The policies adopted were at variance with those applied in the case of UNIFIL, where successive Secretary-Generals eschewed resort to the use of force and the military option.

The significance of Resolution 837 (1993) cannot be overstated. Nevertheless, it is arguable whether it justified the nature and intensity of the military campaign pursued by UNOSOM II forces in its aftermath. The attack by US commanded forces culminated in an operation on 3 October that led directly to the US decision to withdraw from Somalia.<sup>171</sup> This was the turning point for US involvement, and it ultimately led to the break up of UNOSOM II as other countries followed suit. The outcome of the attack was not as surprising as an intelligence assessment in July 1994 noted that operational control of the guerrilla war had passed from the militia leaders to professional soldiers, many of who had been trained abroad.<sup>172</sup> Aided’s strategy against UNOSOM II forces had been to use isolated attacks around the capital to pin down troops and discourage UN patrolling. Targets tended to be opportunistic, the overall strategy being to put pressure on individual contingents to prevent UNOSOM II launching a cohesive reaction to SNA actions. The US policy left itself open to being depicted as the root cause of all problems in Somalia, and to being responsible for punitive attacks on other contingents part of UNOSOM II.

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<sup>170</sup> UN *Commission of Inquiry*, *op. cit.*, paras. 163-165.

<sup>171</sup> The debacle of 3 & 4 October is well documented, see Human Rights Watch/Africa, *op. cit.*, 66/67 and M. Bowden, *Blackhawk Down*, New York: Penguin, (1999). Over 200 Somalis were reported killed, and another 700 or so injured. Eighteen US Rangers died, 84 US troops were injured, and one captured. Two helicopters were shot down and three damaged, and a number of armoured vehicles were destroyed. See also reports by E. O Loughlin in *The Irish Times*, 29 August and 12 September, 1994; and R. Athkinson in the *Washington Post*, January 30 and 31, 1994.

<sup>172</sup> Personal interview, Irish officer with UNOSOM II at the time, Dublin, October 2000. A senior Pakistani officer, remarking on the heavy casualties they suffered, complained that: ‘the US is quick to stir up trouble with air strikes, but it is my men and other third world

## Assessment of tactics and concept of operations adopted by UNIFIL and UNOSOM II.

While the Security Council had no hesitation in giving UNOSOM II a peace enforcement mandate and granting the Secretary-General overall control, in contrast, the Council and the Secretary-General were at all time clear that UNIFIL was a peacekeeping mission. And as such, it would not be permitted to adopt a peace enforcement role, incrementally or otherwise. The adoption of resolutions invoking Chapter VII and phrased in such overtly militaristic terms had the potential to escalate the level of violence unless strictly controlled. This is what happened in Somalia. In operating outside the formal UN chain of command, it could be said that the US 'hijacked' the mission, and pursued an agenda not always consistent with the UN objectives.<sup>173</sup> The abandonment of impartiality, and the consequent loss of credibility by both the US and the UN (it being increasingly difficult to distinguish between them), proved a recipe for disaster. More recently, and by way of contrast, British forces in Sierra Leone were also deployed outside the UN chain of command to, *inter alia*, support the UN mission, however, these forces were not intended to adopt a combat role.<sup>174</sup>

By January 1994, in the eyes of most Somalis, Aided had won the battle for Mogadishu and he was then free to concentrate on outlying areas. In February, the Security Council adopted Resolution 897 (1994)<sup>175</sup>, after which UNOSOM II was no longer permitted to use force to disarm the factions. The pursuit of a robust peace enforcement strategy had not worked, and the price of this lesson was very high for the large numbers of Somalis and UN personnel killed, and the damage done to the concept of UN peace support operations was enormous. The strategy had also left

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soldiers who always draw the tough assignments on the ground', *Time*, 26 July, 1993, 36.

<sup>173</sup> See J. Cox, 'Watershed in Somalia', Morrison, Fraser and Kiras, *op. cit.*, 127-132 at 130.

<sup>174</sup> Though in the case of British Forces in Sierra Leone, the primary task was to train and support the armed forces of the government of Sierra Leone, and evacuate British nationals. See Ministry of Defence Press Release No. 270/00, 10 October 2000 and statement to Parliament by Defence Secretary on Sierra Leone, 15 May 2000; Eight Report of the Secretary-General on the UN Mission in Sierra Leone, S/2000/1199, 15 December 2000, paras. 30-32.

<sup>175</sup> Adopted 15-0-0, 4 February 1994.

many nations with troops in Somalia exhausted, dismayed and even alarmed.<sup>176</sup> Not surprisingly, when a large number of countries were asked to contribute to the reduced UN operation, the Secretary-General received no positive responses.<sup>177</sup> The adoption of Resolution 897 (1994) marked a retreat from the aggressive and sometimes combative peacemaking operation under Boutros Boutros-Ghali. It was ironic that UNOSOM II now adopted a more cautious impartial role similar to that of UNIFIL, which permitted the use force in self-defence only, and closely resembled that of UNOSOM I in the first instance. Unfortunately, by this time it was too late as UNOSOM II forces were regarded as responsible for offences and errors arising from the excessive use of force that thereafter rendered them unacceptable in the eyes of Somalis.<sup>178</sup>

A clear lesson from the Somalia experience is that UN peacekeeping or peace enforcement operations alone cannot end a war, nor will the robust interpretation of a mandate provide the solution to intra state conflict. The use of force by the UN must be resorted to in the context of an overall political strategy with clearly defined political goals. While military force is the best way to achieve exclusively military objectives, using force to obtain a mix of military and political objectives is more problematic. Military elites usually identify narrow concrete objectives that may serve as the focal point for operations<sup>179</sup>, but the situation in Somalia was not amenable to narrowly defined goals. It has been said that disarmament can never be a military option; it must be a voluntary affair.<sup>180</sup> But this argument misses the point somewhat. It was not the use of force that brought the demise of the UN operation in Somalia, but a combination of factors, one of which was the selective and excessive use of force.<sup>181</sup>

While it would be a serious misrepresentation to suggest that the Irish

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<sup>176</sup> See J. Preston, 'UN Scales Down Mission', *International Herald Tribune*, 7 February 1994, 7.

<sup>177</sup> Eur 112, USIA Wireless File, 2/07/94.

<sup>178</sup> See Abdullahi, *op. cit.*, 26.

<sup>179</sup> C. Kupchan, 'Getting In: The Initial Stage of Military Intervention', in Ariel E. Levite et al (eds.), *Foreign Military Intervention*, New York: Columbia University Press, (1992), 249.

<sup>180</sup> Ambassador Jesus of Cape Verde, quoted in and C. Brady and S. Daws, *op. cit.*, 77.

<sup>181</sup> For general background to the operation, see Chapter 6, *supra*.

contribution to UNOSOM II was anything other than miniscule, the contrast between the culture of the US and that of the Irish personnel was startling.<sup>182</sup> On a visit to Baidoa in the weeks prior to the US withdrawal, the US personnel were astounded to find the Irish organising football matches with locals, helping in a local orphanage, and providing welfare services to the local hospital.<sup>183</sup> The difference in approach was obvious, especially to the Americans themselves. They considered the most dangerous part of the mission to be the short drive between various compounds in Mogadishu, and they were openly astonished to learn of the Irish company's weekly convoy schedule to outlying areas. Most US soldiers admitted to never having engaged an ordinary Somali in conversation, not to mind a game of football. The Irish pursued a similar policy in Lebanon, and while it did not bestow any immunity from attack on Irish soldiers, it did facilitate the building of relationships with local community leaders. In Somalia, this helped foster a 'certain grudging tolerance' of the Irish UN presence, as the UN was still regarded by many as just another colonial power.<sup>184</sup> It also meant that in times of crises or confrontation, a basic relationship existed with limited lines of communication. Likewise with the Canadian contingent, who despite the crimes of a few, not all of which were committed in Somalia, performed a difficult task in a restrained manner without engaging in enforcement action and 'over the top' military engagements.<sup>185</sup>

While criticisms regarding earlier incursions by *de facto* forces were valid,<sup>186</sup> the defence of At-Tiri marked a turning point for Irish troops with UNIFIL. The so-called 'kid gloves' approach reportedly favoured by the Irish led to timid

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<sup>182</sup> Irish troops did not play any significant role in any combat activities, their purpose being to support the Indian brigade. In March 1994, No. 2 Transport Company was involved in a major incident in which 9 Somalis were killed by Indian troops escorting the Irish re-supply convoy from Mogadishu to Baidoa.

<sup>183</sup> Personal interview, Capt. A. O Murchú, September 2000, and Capt. A. O Murchú, 'Learning from Somalia', *An Cosantoir*, (September 1999), 7-11.

<sup>184</sup> *Ibid.*

<sup>185</sup> See D. Loomis, *op. cit.*, Chapter 17, 608-634.

<sup>186</sup> F. McDonald, *The Irish Times*, 23 April 1980; R. Fisk, *The Times*, 28 May 1980, *The Irish Times*, 26 May 1980 and *Hibernian*, 3 July 1980. See also the leading article in *The Irish Press*, 2 May 1980.

responses to encroachments.<sup>187</sup> The provision of the UNIFIL mandate that allowed the force to use its right to self-defence gave each member of the force sufficient scope to use force when he or she considered it necessary to do so.<sup>188</sup> It was up to each commander to assess every situation and decide what was the appropriate action in the circumstances. Observers, even with the benefit of hindsight, may not be in possession of all the facts. Furthermore, they have no responsibility and will seldom have experienced the circumstances in which a decision is made at first hand.

The *de facto* forces obviously believed there would be no real resistance to their attempted takeover of the village. They took full advantage of the presence of isolated Irish UNIFIL troops in observation posts inside the 'enclave'. The Secretary-General's report of the incident is misleading in regard to the use of force. It states that often, during intense small arms fire on Irish positions, the Force Commander 'gave permission to return controlled fire'.<sup>189</sup> In fact, the Irish commander in the area was well aware that he could return fire.<sup>190</sup> He refrained from doing so until his troops were in reasonable positions from which they could return fire and when it became evident there would not be a negotiated solution to the impasse. Then restrained small arms fire was resorted to in self-defence. This escalated to the use of heavy weapons and these

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<sup>187</sup> See A. Verrier, *International Peacekeeping*, Harmondsworth: Middlesex, (1981), 118-144. F. McDonald, *The Irish Times*, 23 April 1980. There were other criticisms of the tactics employed by UNIFIL. For example, there was a tendency early on in the mission to rely on fixed positions and firepower and to minimise the value of resolute and constant patrolling. The conventional military deployment on high ground and hills was not always the most appropriate method of preventing encroachments. The occupation of such key terrain did not guarantee control of the ground dominated in the conventional manner by these posts. It was often more effective to deploy troops on open flat and vulnerable ground with the primary purpose of preventing any incursion by the *de facto* forces.

<sup>188</sup> The Secretary-General had stated in the terms of reference that self-defence would include attempts by forceful means to prevent UNIFIL from discharging its duties under the mandate. *S/12611*, 19 March 1978, para. 4(d). When debating the events in south Lebanon in the Dáil, certain Deputies had expressed concern regarding the UNIFIL guide to the use of force and were reassured by the Minister for Defence as follows:  
... the guide to the use of force by UNIFIL personnel issued by the Force Commander, gives ample power to local commanders to deal with any situation with which they may be confronted. The circumstances in which unarmed or armed force may be used are well defined, and the decision to use force ... always rests with the Commander on the spot, see 320 Dáil Debates, No. 7, 8 May 1980, 1144.

<sup>189</sup> *S/13888*, 11 April 1980, para 12.

<sup>190</sup> Personal interview, Irish officer serving with UNIFIL at the time, October 1997.

too were fired on the order of the local commander.<sup>191</sup>

## Conclusion

The litmus test for determining the nature of a UN operation i.e. peacekeeping or peace enforcement remains the ability and willingness to resort to the use of force. Despite this, the dividing line between the use of force in self-defence on traditional peacekeeping operations, and that on peace enforcement operations is not so clear cut in practice. Much will depend on subjective variables that are difficult to predict, and these may influence the way in which a mandate is interpreted and applied. Who, for example, has the authority to determine what defence of the mandate or mission means in practice? For this reason, it is more than a coincidence that the commanders of traditional peacekeeping forces are more often than not selected from neutral or non-aligned nations, and that the first commander of UNOSOM II was a general from a NATO member country.

International law relating to the use of force under the authority of the UN has evolved with the practice of the Security Council during recent conflicts, and the norm for non-intervention under Article 2(7) had been diminished by the intervention in, *inter alia*, Somalia.<sup>192</sup> There was no clear precedent for the type of operations envisaged and the non-consensual intervention by the UN in the affairs of Somalia. *An Agenda for Peace*<sup>193</sup> provided some doctrinal clarity, but it failed to deal with the situation where the peacekeepers right to use force extends beyond the accepted boundaries of self-defence and strays into the realm of peace enforcement. Allowing a force to take positive action in defence of its purpose is little different from allowing it to enforce them.<sup>194</sup>

In a more contrite view in the *Supplement to An Agenda for Peace*, the

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<sup>191</sup> *Ibid.* The heavy weapons in question were the Dutch T.O.W. missiles and the 90mm cannon mounted on a number of Irish armoured cars.

<sup>192</sup> Fink, *op. cit.*, 24 and 33.

<sup>193</sup> *An Agenda for Peace: Preventive diplomacy, peacemaking and peacekeeping: Report of the Secretary-general*, UN Doc. A/47/277, (17 June 1992).

<sup>194</sup> N. D. White, 'The UN Charter and Peacekeeping Forces', in M. Pugh (ed.), *The UN, Peace and Force*, (F. Cass, 1996), 41-63 at 53

Secretary-General noted that in some cases peacekeeping forces are delegated tasks that 'can on occasion exceed the mission of peacekeeping forces and the expectations of peacekeeping force contributors'.<sup>195</sup> It would appear that the Secretary-General's analysis that peace enforcement is a viable option for coalitions of the willing, but not UN controlled missions, is a realistic assessment of the political and military reality of UN peace support operations.<sup>196</sup> The need for the formulation of a doctrinal basis for robust peacekeeping operations is more imperative than ever if the UN is to implement the recommendations of the *Brahimi Report*<sup>197</sup>, and still have a future in the terrain between traditional peacekeeping and war fighting.<sup>198</sup> Action taken by the UN in Somalia could not be considered defensive in nature.<sup>199</sup> It is sometimes claimed that soldiers are not always concerned with legal niceties surrounding the use of force, and the whole debate may be somewhat 'academic', but such assertions miss the point.<sup>200</sup> Although UNIFIL's right to use force in defence of the mandate allowed for flexible ROE, one of the lessons to be drawn from the UNIFIL and UNOSOM II experiences is that the tactical use of force by UNIFIL in self-defence or to defend the mandate was significantly different from the strategic use of force employed by UNOSOM II. Furthermore, permitting one country to determine the nature and extent of the use of force is not always in the best interests of the UN, and it allows a degree of limited liability for that country in the event of things going wrong.<sup>201</sup> When this happened in

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<sup>195</sup> *Supplement to An Agenda for Peace*, New York: United Nations, (1995), para. 35. For an analysis, see M. Reisman, 'Peacemaking', *18 Yale Journal of International Law*, (1993), 415.

<sup>196</sup> D. Daniel, 'Wandering Out of the Void? Conceptualizing Practicable Peace Enforcement', in A. Morrison, D. Fraser & J. Kiras (eds.), *op. cit.*, 1-15 at 10.

<sup>197</sup> *Brahimi Report*, *op. cit.*, n.4.

<sup>198</sup> J. G. Ruggie, 'The UN and the Collective Use of Force: Whither or Whether?' in M. Pugh (ed.), *op. cit.*, 1-20 at 11.  
John Ho

<sup>199</sup> P. Diehl, *International Peacekeeping*, Baltimore: John Hopkins University Press, (1993), 188.

<sup>200</sup> See T. Mockaitis, *op. cit.*, at 47. Such claims also do not take account of potential criminal liability for breaches of international humanitarian law, see *infra.*, Chapter 8.

<sup>201</sup> The term was first used with reference to 'superpower' support for peacekeeping by N. A. Pelcovits, *Peacekeeping on Arab-Israeli Fronts – Lessons from the Lebanon and Sinai*, Boulder Co: Westview, (1984), 84.

Somalia, the US could extricate itself with relative ease while the UN was used as a scapegoat for how events unfolded.

Consent and co-operation of all parties to a conflict remains a fundamental characteristic of traditional peacekeeping operations. Linked to this is the need for impartiality. The British 'Wider Peacekeeping' concept is one of the more lucid explanations on the use of force and it permits its initiation in circumstances other than in self-defence.<sup>202</sup> However, it must be proportional, applied impartially, and have the consent of a majority of the significant parties.<sup>203</sup> It must also contribute to the accomplishment of the mandate in the longer term. The resolutions in respect of UNITAF and UNOSOM II expressly referred to Chapter VII, and while the use of force was not mentioned specifically, the implication of 'all necessary means' to carry out the mandate was clear. It permitted the use of force without further authorisation and it was quasi-enforcement in nature. Even though such action may be legal, it often involves controversy and the foreign policies of contributing states must be taken into account. This is especially so when peacekeepers adopt peace enforcement roles. It also has serious training, operational and logistical implications.<sup>204</sup> The Lebanon and Somalia operations show the need for support from the members of the Security Council, irrespective of the nature of the operation. Both operations also illustrate that problems arise when missions are ill defined, and this uncertainty was compounded in the case of Somalia by a dispute about the authority to use force. What was an acceptable level of force to remain within the parameters set by 'all necessary means'? This may be an impossible question to answer in the abstract, but this does not excuse clearly articulated ROE and authority to use force.<sup>205</sup>

In the course of the UN operation in the Congo, the principle of the non- use of force except in self-defence was also applied.<sup>206</sup> In that instance, some commentators

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<sup>202</sup> See United Kingdom Army Field Manual, *Wider Peacekeeping*, (5th Draft Rev. 1994).

<sup>203</sup> See Last, *op. cit.*, 50-54.

<sup>204</sup> Fink, *op. cit.*, 42.

<sup>205</sup> *Ibid.*, 46.

<sup>206</sup> R. Higgins, *The United Nations Operation in the Congo (ONUC) 1960-1964*, London: Royal Institute of International Affairs, (1980), 44-53, 57-61, 348, 384-387 and *passim*.

concluded that the emphasis on self-defence was too rigid in view of the functions that it had to assume, and that in practice it could not be adhered to.<sup>207</sup> The broad terms of the resolutions dealing with the Congo were somewhat similar to that of UNOSOM II and UNIFIL, in so far as they too gave rise to conflicting interpretations. However, in the case of the Congo and Somalia missions, the lack of clarity as to the specific functions of the Force also gave rise to a serious dispute.<sup>208</sup> The ground rules for the use of force in the Congo changed as the mission progressed and in this way it could be described as the first instance of 'mission creep'. The right to use force was extended but the exact limitations were unclear. However, despite authorisation to use force in the prevention of civil war 'as a last resort', and in the apprehension of foreign mercenaries, the UN still considered itself bound by the provisions relating to domestic jurisdiction.<sup>209</sup> Moreover, unlike UNOSOM II, it was not interpreted or applied as a sanction against the Congolese people. It also allowed the Security Council give almost any task, however ill thought out or unrealistic, to a peacekeeping force, in the expectation that it could use force under the guise of self-defence and still retain its peacekeeping status. The situation with regard to UNIFIL was more straightforward, and the fundamental principle that the only use of force permitted in peacekeeping action is that of self-defence was not altered.

During the Congo operation, the Secretary-General was criticised for his failure to appreciate the essential link between the right of self-defence and the right of freedom of movement.<sup>210</sup> The same criticism might be made in relation to UNIFIL. When the 1978 Israeli redeployment plan was completed, each party either restricted or blocked UNIFIL's movements, sometimes sufficiently serious to jeopardise the mandate.<sup>211</sup> In order to be successful, UNIFIL needed freedom of movement and to

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<sup>207</sup> D. W. Bowett, *op. cit.*, 200-205. G.I.A.D. Draper, 'The Legal Limitation upon the employment of weapons by the United Nations Force in the Congo' 12 *International Comparative Legal Quarterly*, (1963).

<sup>208</sup> R. Higgins, *op. cit.*, and by the same author, *The Development of International Law through the Political Organs of the United Nations*, Oxford: Oxford University Press, (1963), 228-235.

<sup>209</sup> Kassir, *op. cit.*, 208.

<sup>210</sup> Bowett, *supra.*, 203.

<sup>211</sup> Rikhye, *op. cit.*, 107.

achieve this it was entitled to use the minimum force required.<sup>212</sup> This would not have involved taking the military initiative and adopting an offensive strategy. It was said there were a number of occasions when UNIFIL troops sustained punishment, and did not resist violations and thereby proved its weakness.<sup>213</sup> Such criticism did not always take into account the constraints under which the Force as a whole operated. Restraint in the use of force and measured self-protection will generally prevent a situation escalating further.<sup>214</sup> In the circumstances it is easy to understand why UNIFIL headquarters did not encourage an aggressive military posture.<sup>215</sup>

Not all of the criticism of UNIFIL in regard to the use of force is without foundation. There were occasions when UNIFIL threatened and used force as a last resort in self-defence.<sup>216</sup> There are other occasions when it failed to do so and invited further harassment, a situation compounded by different reactions of the various battalions. This highlighted the differences in attitude, policy and training among the contingents participating in UNIFIL. The experience of UNIFIL demonstrated that a peacekeeping force encounters great difficulty when operating in a conflict where the political consensus that marks most frontier peacekeeping operations is absent.<sup>217</sup> This was exacerbated by ambiguities in the mandate, an ambivalent Security Council, and problematic terms of reference.<sup>218</sup>

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<sup>212</sup> See *S/12611*, 19 March 1978.

<sup>213</sup> Rikhye, *op. cit.*, 110.

<sup>214</sup> M. Heilberg, and J.J.Holst, 'Keeping the Peace in Lebanon: Assessing International and Multinational Peacekeeping', Norwegian Institute of International Affairs, *NUPI NOTAT No.357*, (June 1986), 3.

<sup>215</sup> The Force Commander and his staff are well aware that some battalions actually disregard the guidelines on the use of force at times. This is another reason for lack of support from UNIFIL HQ. M. Heiberg, 'Observations on UN Peacekeeping in Lebanon', Norwegian Institute of International Affairs, *NUPI NOTAT No. 305*, (September 1984), 34.

<sup>216</sup> UNIFIL used a limited amount of force on a number of occasions e.g. in the Tyre area in 1978 and to prevent the *de facto* forces incursion in At-Tiri in 1980. The Force also threatened the use of force on a number of occasions e.g. when a number of Finnish soldiers were kidnapped in 1985 the UN Under-Secretary-general, Mr. Urquhart, warned that UNIFIL could consider resorting to 'a military option' to secure the release of the men. XXXII *Keesing's Contemporary Archives*, (January 1986), 34129.

<sup>217</sup> M. Boerma, 'The United Nations Interim Force in Lebanon, Peacekeeping in a Domestic Conflict', 8 (1) *Millennium: Journal of International Studies*, (Spring, 1979), 51-63.

Much of the criticism of the Lebanon and Somalia operations has arisen from unrealistic expectations over what a UN military operation, whether traditional peacekeeping or peace enforcement, can achieve in the context of ongoing hostilities. The UN Secretary-General had overall responsibility for the conduct of the peacekeeping mission in Lebanon, and overall 'command' of UNOSOM II, and in that capacity he had to be mindful of the views of the troop contributing states.<sup>219</sup> Without their support in the first instance, it would not be possible to field or maintain a UN force on the ground. In Somalia, when the US decided to withdraw, this had a knock on effect on the whole operation, and there was little the Secretary-General could do to retrieve the situation.

In 1986 the Secretary-General considered various alternatives in respect of UNIFIL.<sup>220</sup> One of these would have required the Force to control the movement of heavy weapons only, while another was to reduce the Force's area of operation in order to eliminate the overlap between it and the security zone, or converting the Force into an observer group.<sup>221</sup> These proposals, if implemented, would have reduced the risks of confrontation with armed elements. They would also have curtailed the role and ability of the Force in exercising control over the level of hostilities in the area. Reducing the size of the area of operation was likely to be perceived as a victory for the Israelis and their proxy forces in Lebanon. It would also have been inconsistent with Resolution 425(1978) and therefore was unacceptable to the Lebanese and others. When these factors are taken into account, there was little prospect of such changes taking place.

After the 1982 Israeli invasion, the Lebanese government again called for a re-examination of the mandate following the failure to stem the Israeli advance.<sup>222</sup> In the circumstances, UNIFIL had no alternative but to show token resistance as any

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<sup>218</sup> See the Secretary-general's criticism of the Security Council in *S/17965*, 9 April 1986, para 51 and V. Yorke, 'Retaliation and International Peacekeeping in Lebanon', *XX (5) Survival*, (September/October 1978).

<sup>219</sup> *Ibid.* See also B. Skogmo, *International Peacekeeping in Lebanon, 1978-1988*, Boulder and London: Lynne Rienner, (1989), 131-162 and Sarooshi, *op. cit.*, 69.

<sup>220</sup> *S/18348*, 18 September 1986, paras. 23-28.

<sup>221</sup> *Ibid.*

<sup>222</sup> XI (523) *Monday Morning*, Beirut, 28 June-4 July, 1982. In 1985 the Lebanese Government appeared to accept that UNIFIL's role and policy would not be changed *S/17063*, 27 March 1985.

show of force would have been crushed by the overwhelming superiority in numbers and equipment of the Israeli Defence Forces.<sup>223</sup> The question of UNIFIL's freedom of movement was never solved satisfactorily until the Israeli withdrawal in 2001. This indicates that it was not essential in the first place. In the field of UN peacekeeping, there are few absolute rules. The Lebanese government was not alone in calling for firmer action by UNIFIL. However, it wanted action taken against the Israeli backed *de facto* forces, while the Israelis sought action against the PLO.<sup>224</sup> Both were selective and partial assessments of the role of UNIFIL. The Lebanese position was difficult to understand as it expected UNIFIL to take action against those it was unwilling and unable to confront itself.

Peacekeeping operations can be a frustrating experience for the military personnel involved.<sup>225</sup> There are political ramifications to all decisions made by them. Issues are seldom black and white. The Force Commander must ensure his or her interpretation of the mandate and the guidelines on the use of force conform to that of the Secretary-General. The lack of consensus in the Security Council hampered the degree of support given to UNIFIL. This meant the Secretary-General was allowed greater discretion in the day-to-day running of the Force than should have been the case. In this regard, the difficulty of implementing a deliberately vague mandate added to the problem of political control. It was not surprising that the Secretary-General did not undertake any bold or radical initiatives in relation to UNIFIL, and in this regard the policy differed from that adopted in respect of UNOSOM II. But the failed attempt at enforcement through peacekeeping was predictable.<sup>226</sup>

The incidents involving UNIFIL show that the principle of non- use of force has been controversial and difficult to apply in practice. It places an onerous responsibility on military commanders involved in peacekeeping operations to

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<sup>223</sup> B. Skogmo, *op. cit.*, 95-100.

<sup>224</sup> Personal interview, Lt. Gen Erskine, *op. cit.*

<sup>225</sup> M. Heilberg, and J. J. Holst, 'Peacekeeping in Lebanon - Comparing UNIFIL and the MNF', Norwegian Institute of International Affairs, *NUPI NOTAT*, (1986), 399-421, esp. 414-415. The extreme restraint that UNIFIL has generally exercised has often resulted in frustration and bitterness among soldiers who are trained in the offensive spirit of traditional military operations.

<sup>226</sup> J. Ciechanski, 'Enforcement Measures under Chapter VII of the UN Charter: UN Practice after the Cold War', in Pugh, *op. cit.*, 82-104 at 90.

appreciate the wider political and other ramifications of their actions, and shows that the most important considerations can frequently be non-military in nature.<sup>227</sup> In theory, military weakness should be non-threatening and an asset during traditional peacekeeping, in practice, this may not be the case. At an early stage it was decided that operational effectiveness would be curtailed in order to adhere to the principle of non-use of force. This reflected sound judgement by those responsible and derived from the experience of the limitations of the use of force in international peacekeeping. In this regard, the At-Tiri incident involving the use of force in 1980 is best regarded as *sui generis*. In a situation as volatile as Lebanon, the continued existence of the peacekeeping force reflected the realism and political astuteness of the Secretary-General and military commanders on the ground. The debacle of the Multi National Force's (MNF) involvement in Beirut during 1983<sup>228</sup>, and the failure of the more recent robust peacekeeping in Somalia, has vindicated this policy.

The *Brahimi Report* called for more robust ROE in operations involving intra-state/transnational conflicts.<sup>229</sup> While the report acknowledged that this would involve 'bigger forces, better equipped and more costly', it did not seem to take full cognisance of the fact that the use of force must be accompanied by real political will, a willingness to accept casualties (UN and civilian), and a need for an effective command and control mechanism to ensure cohesion and uniform application. It also failed to address the issues raised by regional peacekeepers or coalitions of the willing acting under the authority of the UN. Regular military officers without previous experience of UN peacekeeping tend instinctively to expect and demand maximum freedom to use force.<sup>230</sup> Somalia shows that robust ROE and increased size are not enough, and while it is imperative not to employ an emasculated UN force, it is important to have a clear military and political strategy agreed at the outset. Given the political difficulties that this may encounter, such a policy may prove impossible to

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<sup>227</sup> R. W. Nelson, 'Multinational Peacekeeping in the Middle East and the United Nations Model', 61 (1) *International Affairs*, (1985), 67-89.

<sup>228</sup> See R. Thakur, *op. cit.*, esp. 175-202.

<sup>229</sup> *Brahimi Report*, *op. cit.*, n.4.

<sup>230</sup> A. J. Wilson, *Some Principles for Peacekeeping Operations – A Guide for Senior Officers*, International Information Center on Peacekeeping Operations, (Paris, 1967), 6.

implement, even if the Report's recommended structural reforms are implemented.<sup>231</sup> The recommendations of the Report make interesting reading, but UN controlled forces generally are not given adequate capabilities to intimidate or enforce. Another UN report is unlikely to change this historical fact.

In analysing the respective roles of UNIFIL and UNOSOM it must be borne in mind that the purpose of UNIFIL was not to create a military obstacle to the aims of belligerent parties, but to facilitate a peaceful resolution of an international crisis. This contrasted with that envisaged for UNOSOM II, which all sides acknowledged would involve peace enforcement based on express reference to Chapter VII. While the non confrontational nature of peacekeeping is well established, it is not so clear where peace enforcement fits in the context of traditional peacekeeping and enforcement action, and no clear parameters were set as to when and to what extent the use of force was permissible. In this way, the real controversy in Somalia was not about the right to use force, but how this was interpreted and applied in practice. The US interpreted the UNITAF mission restrictively, and declined to disarm the factions or engage in any significant form of enforcement measures.<sup>232</sup> Later, UNOSOM II embarked upon enforcement measures, but the indiscriminate use of force even in Chapter VII operations can result in crossing the line from that which is acceptable to achieve the mandate, and that which is indistinguishable from all out war.

UNOSOM II's experience provides a salutary lesson on the limits of the use of force, and a willingness to accept the responsibilities arising from such action. While some countries are not prepared to take part in enforcement operations,<sup>233</sup> it is also evident from Somalia that unless the vital interests of the US are at stake, there is little point in committing US forces to combat roles abroad.<sup>234</sup> Most of all, UNOSOM II showed the need to set clear objectives when resorting to the use of force, and for the US and UN, there were lessons on what could or what would work in the future.<sup>235</sup> In

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<sup>231</sup> *Brahimi Report, op. cit.* and D. Daniel and B. Hayes, 'Securing Observance of UN Mandates' in M. Pugh, *op. cit.*, 105- 125.

<sup>232</sup> See Chapter 6, *supra*.

<sup>233</sup> See G. Anderson, 'UNOSOM II: Not Failure: Not Success', in D. Daniel & F. Hayes, (eds), *Beyond Traditional Peacekeeping*, New York: St. Martins Press, (1995), 274.

<sup>234</sup> Thakur, *op. cit.*, 191.

some ways the lessons to be had are contradictory. The use of force by the US was excessive for the nature of any UN peace support operation, but inadequate for the purposes of waging war, and although limited in nature, this ultimately is what the US embarked upon against Aided.

The UN report on the fall of Srebrenica concluded that the cardinal lesson of that awful sequence of events is that 'a deliberate and systematic attempt to terrorize, expel or murder an entire people must be met decisively with all necessary means', and it accused the UN of 'pervasive ambivalence... regarding the role of force in the pursuit of peace; [and] an institutional ideology of impartiality when confronted with an attempted genocide'.<sup>236</sup> This view is consistent with the robust doctrine advocated in the *Brahimi Report*.<sup>237</sup> However, the UN Commission of Inquiry on events in Somalia recommended that the UN refrain from taking peace enforcement actions within the internal conflicts of states.<sup>238</sup> Are these conclusions contradictory? The answer must surely be no. When confronted with crimes of the magnitude of what took place at Srebrenica, there can be no room for ambivalence. This raises the question whether the UN should undertake peacekeeping and peace enforcement as part of the one mission. UNIFIL shows that it is possible to use force in self-defence and retain impartiality. But enforcement action of any kind is inconsistent with the principles of peacekeeping, and Chapter VI operations should not have elements of enforcement in the mandate that could lead to the incremental adoption of a Chapter VII strategy. The quasi-enforcement approach in peacekeeping does not work; apart from its poor track record due to weak judgement and inadequate resources, it is inherently flawed. In this way, when not to use force is as crucial a question as when to use it.

Deploying lightly armed peacekeepers like UNPROFOR creates expectations that cannot be fulfilled. It is also risky for the peacekeepers themselves, and for those that seek their protection. In Bosnia, Serb war aims were ultimately repulsed on the

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<sup>235</sup> R. Oakley, 'Somalia, Lessons of a Rescue', *International Herald Tribune*, 22 March 1994.

<sup>236</sup> See 'Lessons for the future', in Report of the Secretary-General pursuant to General Assembly resolution 53/35 – The fall of Srebrenica, General Assembly A/54/49, 15 November 1999, paras. 502 and 505.

<sup>237</sup> *Brahimi Report, op. cit.*, n.4.

<sup>238</sup> *UN Commission of Inquiry, op. cit.*, para. 270.

battlefield.<sup>239</sup> Yet the UN Secretariat had convinced itself early on that this was not an option. Writing about the predicament of UNPROFOR, Yasushi Akashi remarked that a peacekeeping force will face serious constraints on what it will be able to achieve if it takes place in an area where the interests of the Security Council members (especially the permanent members) are engaged and when there is not a consensus among those members.<sup>240</sup> Somalia, on the other hand, illustrated that a UN force engaged in robust peacekeeping will face serious constraints on what can be achieved if the national interests of the major contributors are not engaged, and the required political will to persevere is not there.

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<sup>239</sup> Report on Srebrenica, *op. cit.*, para. 497.

<sup>240</sup> Akashi, *op. cit.*, 313.

## Chapter 8

### INTERNATIONAL HUMANITARIAN LAW AND PEACE SUPPORT OPERATIONS

#### Introduction

Here is hand to hand struggle in all its horror and frightfulness: Austrians and Allies trampling each other under foot, killing one another on piles of bleeding corpses, felling their enemies with their rifle butts, crushing skulls, ripping bellies open with sabre and bayonet. No quarter is given; it is sheer butchery, a struggle between maddened beasts with blood and fury. Even the wounded fight to the last gasp. When they have no weapons left, they seize their enemies by the throat and they tear them with their teeth. (Henry Dunant, *A Memory of Solferino*).<sup>1</sup>

This quote may seem at first to be somewhat out of place in a chapter dealing with peacekeeping and other military action undertaken by or on behalf of the UN. Since the end of the Cold War, the UN's willingness to pursue its role in the maintenance of international peace and security by the adoption of military solutions has increased significantly. Recent UN operations have had more in common with the operation conducted in Korea, or the enforcement measures carried out in the Congo during the 1960's, than with the more traditional peacekeeping forces prevalent during the 1970's and 1980's.<sup>2</sup> When one looks at the actual combat engaged in by the United States rangers in Mogadishu during their attempt to capture one of the leading warlords, General Aided; or the coalition forces during the Gulf war of 1991, then Dunant's scenario may not be so far from the reality for the soldiers involved at first hand.

This chapter sets out to examine the applicability and relevance of international humanitarian law (humanitarian law) to all types of military action

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<sup>1</sup> H. Dunant, *A Memory of Solferino*, Geneva: ICRC, (1986), 19.

<sup>2</sup> For an overview of peacekeeping see B. Simma (ed.), *The Charter of the UN*, Oxford: Oxford University Press, (1995), 566-603.

undertaken by or on behalf of the UN.<sup>3</sup> Owing to the controversy surrounding action by UNOSOM forces in Somalia, the question of respect for the principles of humanitarian law by UN peacekeeping forces has been the subject of controversy and debate.<sup>4</sup> Although the reasons for this turn of events are a source of regret, the actual result in heightened awareness is welcome. The situation that UNIFIL found itself in after the Israeli invasion in 1982 also raised issues regarding peacekeeping forces and humanitarian law. One of the major stumbling blocks for peacekeeping troops is the relevant principles are enshrined in international instruments governing the conduct of combatants engaged in armed conflict of an international or non-international character. To use a military metaphor, the target of these rules is the combatant or participator, not the peacekeeper or observer.

Although originally there was some doubt about the applicability of humanitarian law to UN forces, it is now generally accepted that UN forces are bound by humanitarian law, whether performing duties of a peacekeeping or enforcement nature.<sup>5</sup> The UN has declared its commitment to the application of humanitarian law to peacekeeping operations, but it has consistently taken the position that UN forces act on behalf of the international community, and therefore they cannot be considered a 'party' to the conflict, nor a 'Power'

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<sup>3</sup> Humanitarian law denotes the whole body of law applicable during armed conflict, often referred to as the law of armed conflict (*jus in bello*). See C. Greenwood, 'Historical Development and Legal Basis', in D. Fleck (ed.), *Handbook of Humanitarian Law in Armed Conflicts*, Oxford: Oxford University Press, (1995), 8-12.

<sup>4</sup> See for example, *Symposium on Humanitarian Action and Peacekeeping Operations Report*, Geneva: ICRC, (1994) (hereafter 'Symposium'); Martin Meijer, Notes on the Conference on 'The UN and International Humanitarian Law', Geneva, 19-20 October 1995, 2 (6) *International Peacekeeping* (Kluwer), (1995), 136-138 at 137; and report on the International Workshop: 'Towards a Future for Peacekeeping: Perspectives of a new Italian/German Co-operation', Pisa, 17-18 November 1995, 2(6) *International Peacekeeping* (Kluwer), (1995), 138.

<sup>5</sup> C. Greenwood, 'Scope of Application of Humanitarian Law', in D. Fleck, *op. cit.*, 39-49 at 46. This is not just a practical necessity, but may arise from obligations of states 'to respect and ensure respect' for the Geneva Conventions and Protocols 'in all circumstances'. See also B. Tittmore, 'Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations', 33 *Stanford Journal of International Law*, (1997), 61-117, at 107

within the meaning of the Geneva Conventions.<sup>6</sup> To accept that peacekeepers were parties to a conflict would at the very least mean a loss of impartiality. The mere presence of UN peacekeeping soldiers in an area of conflict or a theatre of war, while performing a humanitarian or diplomatic mission, does not necessarily mean that humanitarian law binds these troops.<sup>7</sup> The UN, as an international organization, is not in a position to become a party to the Geneva Conventions or Additional Protocols. This would entail binding the Organization to detailed provisions that are aimed at states, and do not fit the role and function of an international organization. Notwithstanding its international legal personality, the UN is not itself a state and thus, it does not possess the juridical or administrative powers to discharge many of the obligations laid down in the Conventions.<sup>8</sup> It also lacks the legal and other structures for dealing with violations of humanitarian law. Nor does it possess the competence to recognise that an armed conflict invoking the application of the Geneva Conventions exists.<sup>9</sup> However, this does not mean that the conduct of hostilities by UN forces will be free from humanitarian constraint or that humanitarian law considerations do not apply.<sup>10</sup>

In addition to the above, another serious obstacle confronting those charged with ensuring compliance with humanitarian law norms is to make the rules establishing such norms accessible and relevant to those most responsible

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<sup>6</sup> See *infra*.

<sup>7</sup> This position has not altered with the Secretary-General's Bulletin on Observance by UN forces of international humanitarian law, ST/SGB/1993/3 of 6 August 1999. See Section 1(1) discussed *infra*.

<sup>8</sup> *Reparations Case* [1949] ICJ Rep., 174. From a formal point of view, the UN cannot become a party to the Conventions because their final clauses do not provide for participation of international organizations, such as the UN, *Symposium, op. cit.*, 43. In addition, 'The UN, as such, had no judiciary system, no legal basis on which it could try individuals', Mr. B. Miyet, Under-Secretary-General for peacekeeping Operations, quoted in the XXXIV *UN Chronicle* 3, (1997), at 39. As a result, UN soldiers involved in child prostitution while part of the UN operation in Mozambique, were repatriated.

<sup>9</sup> S. Turley, 'Keeping the Peace', 73 *Texas Law Review*, (1994), 158.

<sup>10</sup> It is widely accepted that the 'laws of war remain directly relevant to such forces', A. Roberts and R. Guelff, (eds), *Documents on the Laws of War*, (3 rd. ed.), Oxford: Oxford University Press, (2000), 721.

for their implementation i.e. the soldiers on the ground. The language of the international instruments in question is often obtuse and unintelligible. The principles enshrined in these instruments, when combined with a 'dumb down' approach for classroom instruction, are often presented in a half hearted and 'touchy feely' way that makes the instructors and principles involved appear out of touch with reality. Best has described the situation as follows:

It cannot be said that books in this field are lacking. The international law of war...has become something of a boom industry in the legal realm and raises a regiment of professional experts. The way in which those experts write about it and debate it among themselves, however, is not often directly communicable to all the others who also have pressing interests of their own in the subject and who, some of them, also write and confer increasingly about it, conscious that, beyond the legal experts they may happily have contact, are many from whom they are cut off.<sup>11</sup>

In considering the applicability of humanitarian law to UN operations, a number of questions arise for consideration: (i) What international law applies to the conflict or situation in the country where the UN force is deployed? (ii) What international law regulates the conduct of the UN force itself and how is this determined? (iii) And what can or should the UN force do when it becomes aware that parties in the country where it is deployed are violating applicable international law? (The answer to this question will be dependent in part on the mandate of the force). The question may also be posed as to whether there is any useful purpose served in applying humanitarian law to peacekeeping and similar forces whose mission is to restore or maintain a peaceful environment in a crisis area? And if these principles of law have a role, how can this be evaluated and improved to make it an accepted part of the conduct of all those involved, even if not actually participating in, armed conflict that may be either international and non international in character. The answer to these questions is of direct relevance to Irish, Canadian and other troops as it will determine the

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<sup>11</sup> G. Best, *War and Law since 1945*, Oxford, Oxford University Press, (1994), 10. An example of a more accessible read is the Rogers text, '*Fighting it Right*', *Model Manual of the Law of Armed Conflict for Armed Forces*, Geneva: ICRC, (1999).

standards that they will be required to uphold in order to comply with the relevant international obligations.<sup>12</sup> There is also the issue of the appropriate use of force and rules of engagement, and in what circumstances could the use of force constitute a grave or other breach of the Geneva Conventions and/or Additional Protocols. These are real issues confronting today's peacekeepers, but especially those participating in the so-called 'robust' peacekeeping operations similar to that of UNOSOM II in Somalia. A failure to comply with applicable humanitarian law could result in an Irish or Canadian soldier being tried by an appropriate national court, a foreign national court or an international tribunal on criminal charges or for war crimes, irrespective of the categorisation of the conflict as internal or international in character.<sup>13</sup>

### **Human rights and humanitarian law**

Human rights and humanitarian law have different historical and doctrinal origins.<sup>14</sup> Previously, scholars assumed that in conflict situations, one or other regimes was applicable, depending on the categorisation.<sup>15</sup> However, Meron has pointed to a dangerous lacuna that may exist if and when the applicability of both regimes is denied.<sup>16</sup> Although humanitarian law was originally intended

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<sup>12</sup> See J. Simpson, *Law Applicable to Canadian Forces in Somalia 1992/93*, a study prepared for the Commission of Inquiry into the Deployment of Canadian Forces to Somalia, Minister of Public Works and Government Services Canada, (1997), at 23, (hereafter Simpson Study).

<sup>13</sup> See Institute of International Law, 'The application of international humanitarian law and fundamental human rights, in armed conflicts in which non-state entities are parties', Fourteenth Commission, Berlin Session 1999, (25 August 1999), 3.

<sup>14</sup> See T. Meron, 'The protection of the human person under human rights and humanitarian law', *UN Bulletin of Human Rights 91/1*, UN, (1992), 33-45. See also L. Doswald-Beck and S. Vite, 'International Humanitarian Law and Human Rights Law', 293 *International Review of the Red Cross*, (1993), and *Minimum Humanitarian Standards, Report of the Secretary-General*, Doc. E/CN.4/1998/8, (5 January 1998).

<sup>15</sup> See T. Meron, 'On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument', 77 (3) *American Journal of International Law*, (1983), 580-606, at 602.

<sup>16</sup> *Ibid.*, see also T. Meron, *Human Rights in Internal Strife: Their International Protection*, Cambridge: Grotius, (1987), 3-49; T. Meron and A. Rosas, 'A Declaration of Minimum Humanitarian Standards', 85 *American Journal of International Law*, (1991), 375-381 and Commission on Human Rights, 'Minimum

to govern situations of armed conflict between states, it has become increasingly important in the regulation of internal armed conflict.<sup>17</sup> Human rights, on the other hand, originated in the intra-state relationship between the government and the governed, and are intended to protect the latter against the former, regardless of nationality.<sup>18</sup> But humanitarian law is also concerned with protecting basic human rights in armed conflict and other situations of violence. Humanitarian law does not just bind state armed groups, other armed groups and individuals belonging to them are also bound by its provisions.<sup>19</sup> The application of such principles in non-international armed conflicts is not linked to the legitimacy of armed groups.<sup>20</sup> The ICRC position is that humanitarian law principles, recognised as part of customary international law, are binding upon all states and all armed forces present in situations of armed conflicts.<sup>21</sup> In recent years various Security Council resolutions have called

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humanitarian standards - Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities', UN Doc. E/CN.4/1998/87, ( 5 January 1998).

<sup>17</sup> On the issue of internal and international armed conflict, see *infra*. See also C. Greenwood, 'Scope of Application of Humanitarian Law', *op. cit.*, 39-49 and D. Schindler, 'The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols, 163 *Recueil des cours*, Hague Academy, (1979), 153-156.

<sup>18</sup> T. Meron, *Human Rights in Internal Strife: Their International Protection*, *op. cit.*, 29.

<sup>19</sup> See 'Armed conflicts linked to the disintegration of State structures', *Preparatory document for the first periodical meeting on international humanitarian law*, Geneva: ICRC, (19-23 January 1998), 8. See *Infra*. 280, and C. Greenwood, 'International Humanitarian Law and United Nations Military Operations', 1 *Yearbook of International Humanitarian Law*, Dordrecht: Kluwer, (1998), 3-34 esp. 7-9.

<sup>20</sup> It is the identification of the relevant legal prescription in the given context that is of central concern, see H. McCoubrey and N. White, *International Organizations and Civil Wars*, Aldershot: Dartmouth, (1995), 67.

<sup>21</sup> D. Shagra and R. Zacklin, 'The Applicability of International Humanitarian Law to United Nations Peacekeeping Operation: Conceptual. Legal and Practical Issues', *Symposium*, *op. cit.*, 40. The ICRC view is discussed in detail *infra*.312. See also F. Kalshoven, 'The Undertaking to Respect and Ensure Respect in all Circumstances: From Tiny Seed to Ripening Fruit', 2 *Yearbook of International Humanitarian Law*, Dordrecht: Kluwer, (1999), 3-66, esp. 38 onwards; and ICRC Resolution XXXVII of the XXth International Red Cross Conference (Vienna, 1965) in D. Schindler and J. Toman, *The Laws of Armed Conflicts, A Collection of Conventions, Resolutions and Other Documents*, (3 ed.), Dordrecht: Martinus Nijhoff, (1988), 259.

upon 'all the parties to the conflict' to respect humanitarian law.<sup>22</sup> The UN Secretary-General has also issued a Bulletin to the effect that the fundamental principles and rules of humanitarian law are applicable to UN forces when in situations of armed conflict they are actively engaged therein as combatants.<sup>23</sup> However, in situations where that law does not apply, pending the establishment of the International Criminal Court (ICC), the international accountability of such groups for human rights abuses remains unclear (though such acts would be criminalized under domestic criminal law).<sup>24</sup>

The International Court of Justice in the *Advisory Opinion on Nuclear Weapons* looked at the relationship between humanitarian law and human rights law.<sup>25</sup> The Court affirmed that they are two distinct bodies of law, and that human rights law continues to apply in time of war unless a party has lawfully derogated from them. It went on to state the relevance of humanitarian law:

In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the appropriate *lex specialis*, namely, the law applicable in armed conflict.<sup>26</sup>

The effect of this is that humanitarian law is to be used to interpret a human rights rule, and, conversely in the context of the conduct of hostilities, human

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<sup>22</sup> For example, see Resolution 814, 26 March 1993, para. 13 (Somalia), and Resolution 788, 19 November 1992, para. 5 (Liberia).

<sup>23</sup> Secretary-General's Bulletin on Observance by UN forces of international humanitarian law, ST/SGB/1993/3 of 6 August 1999, *infra*.

<sup>24</sup> For a discussion of the ICC and related issues, see *infra*. 346; and also D. Robinson and H. von Hebel, 'War Crimes in Internal Conflicts: Article 8 of the ICC Statute', in 2 *Yearbook of International Humanitarian Law* (1999), *op. cit.*, 193-209.

<sup>25</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, *ICJ Reports* 226 (1996). See generally L. Boisson de Chazournes & P. Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons*, Cambridge: Cambridge University Press, (1999) and a number of articles in *International Review of the Red Cross*, No. 316, (1997), esp. C. Greenwood, 'The Advisory Opinion on nuclear weapons and the contribution of the International Court of Justice to international humanitarian law', 65-75.

<sup>26</sup> *Ibid.*, para. 25

rights law may not be interpreted differently from humanitarian law.<sup>27</sup> In this way there has been a significant overlap and convergence in humanitarian and human rights law, and the strict separation of the two is not always conducive to providing the maximum protection to victims.

Unfortunately, there is now ample evidence that UN forces in Somalia did perpetrate or engage in conduct and practices that were contrary to humanitarian law.<sup>28</sup> Up to the debacle of events in Somalia, Canada had an excellent reputation as a contributor to peacekeeping operations. Although Ireland remains untarnished by its involvement in Somalia and elsewhere, there is an urgent need to highlight this area of international law and ensure that the record remains as is in the future. Human rights are a key issue in guaranteeing consistent and effective peacekeeping.<sup>29</sup> Nothing can be more contradictory that a UN force transgressing international humanitarian law standards that have been gradually and painstakingly agreed upon during the last sixty years.

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<sup>27</sup> L. Doswald-Beck, 'International humanitarian law and the Advisory Opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons', 316 *International Review of the Red Cross*, (1997) 35-55 esp. 45.

<sup>28</sup> See *Dishonoured Legacy, Report of the Commission of Enquiry into the Deployment of Canadian Forces to Somalia*, Canadian Government Publishing, (Ottawa, 1997), also available at <<http://www.dnd.ca.somalie.htm>> (english version); and *Africa Rights Report*, 'Somalia – Human Rights Abuses by the UN Forces', London, (July 1993) and Mark Huband, *Guardian*, 31 December 1993, at 6. The Africa Rights report documents a number of grave breaches of the Geneva Conventions by a number of contingents in Somalia. Most disturbing is the conclusion that these were 'not cases of undisciplined actions by individual soldiers, but stem from the highest echelons of the command structure' (p.i). Italy and Belgium also established inquiries into the conduct of their respective armed forces in Somalia – see *Amnesty International*, 'AI Concerns in Europe: January-June 1997', AI Index EUR 01/06/97 (1997) 1; 'Italy: A Briefing for the UN Committee Against Torture', AI Index EUR 30/02/99, (May 1995) 10; and Brons, M. H., *Society, Security, Sovereignty and the State: From Statelessness to Statelessness?*, Utrecht: International Books, (2001) esp. pp. 238-240.

<sup>29</sup> D. Garcia-Sayan, 'Human Rights and Peace-Keeping Operations', 29 *University of Richmond Law Review*, (1995), 41-65 at 45. This article deals primarily with the UN mission to El Salvador (ONUSAL). See also D. Forsythe, 'Human Rights and International Security: United Nations Field Operations Redux', in Castermans, van Hoof and Smith (eds.), *The Role of the Nation State in the 21<sup>st</sup> Century*, Dordrecht:

## Humanitarian law and armed conflicts

The status of a UN or similar force depends on the underlying authority upon which the force is present in the receiving state, and on the nature and mission of the force.<sup>30</sup> Under existing law, a UN peacekeeping operation is considered a subsidiary organ of the UN, established pursuant to a resolution of the Security Council or General Assembly. As such it enjoys the status, privileges and immunities of the Organisation provided for in Article 105 of the UN Charter, and the UN Convention on the Privileges and Immunities of the UN of 13 February 1946.<sup>31</sup> The legal framework for UN forces is usually made up of the following:

- The resolution of the Security Council or the General Assembly;
- The Status of Force Agreement between the UN and the host state;
- The agreement by exchange of letters between each of the participating states and the UN;
- The regulations for the force issued by the Secretary-General.

However, as UN forces are more often than not deployed in situations of conflict, determining what situations constitute 'conflict' under international law, and the laws governing UN and other forces present or participating as combatants in such situations is a vital issue. Humanitarian law will also provide a certain level of protection to UN forces, depending on the degree of involvement and the nature of the conflict.<sup>32</sup>

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Kluwer, (1998), 265-276.

<sup>30</sup> See W. G. Sharp, 'Protecting the Avatars of International Peace and Security', 7 *Duke Journal of Comparative and International Law*, (1996), 92-183 at 112-143.

<sup>31</sup> In addition, the Secretary-General endeavours to conclude Status of Force Agreements with the host State governments. This is not always possible e.g. none was concluded in Somalia, and it took nearly twenty years to conclude a SOFA in respect of UNIFIL. See generally D. Fleck and M. Saalfeld, 'Combining efforts to improve the legal status of UN peacekeeping forces and their effective protection', 1 (3) *International Peacekeeping* (Kluwer), (1994), 82-84.

<sup>32</sup> This is outlined by Greenwood, 'International Humanitarian Law and United Nations Military Operations', *op. cit.*, 30-31, also see Roberts and Guelff, (eds), *Documents on the Laws of War*, 3rd ed., Oxford, (2000), 623. Article 8, para. 2 (d), iii, of the Statute of the International Criminal Court (ICC) also prohibits attacks on

The norms regulating the conduct of combatants in times of conflict are not only of ancient origin but they are also found in diverse cultures on many continents.<sup>33</sup> This is important when considering the notion of 'customary' legal norms in international law, and the concept of 'universal jurisdiction' over certain violations of humanitarian law. After the piecemeal development of humanitarian law at the end of the 19th century and the start of the 20th century,<sup>34</sup> the experience of the Second World War made the shortcomings in the legal regulation of this field all too apparent. This realisation led to the adoption in 1949 of four conventions in which most of Geneva law is now codified.<sup>35</sup> The adoption of the 1949 Conventions, coupled with the well developed body of Hague law meant that traditional inter-state wars or 'armed conflicts' to use the language of the Geneva Conventions, were now well-regulated, in theory at least.<sup>36</sup> The phrase 'armed conflict' was employed to

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peacekeepers 'so long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict', see O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Baden-Baden: Nomos Verl.-Ges., (1999), 277-278; and ICRC reference document to assist Preparatory Commission to assist in its work on elements of crimes for the ICC, *Droit international humanitaire, 1.3 Cour penale internationale, 1.3.3.4 General points common to the offences under Article 8 (2) (e) of the ICC Statute*, (1999).

<sup>33</sup> Simpson Study, *op. cit.*, at 13. See also C. Greenwood, 'The Relationship of *Ius ad Bellum* and *Ius in Bello*', 9 *Review of International Studies*, (1983); Hans-Peter Gasser, *International Humanitarian Law - An Introduction*, (trans. from German by S. Fitzgerald and S. Mutti, Haupt, Henri Dunant Centre, (1993); S. Nahlik, 'A Brief Outline of International Humanitarian Law', *International Review of the Red Cross*, (July-August 1984) and F. Kalshoven, *Constraints on the Waging of War*, Geneva: ICRC, (1987), 8ff.

<sup>34</sup> 1899 saw the adoption of a treaty that made the principles of the 1864 treaty applicable to the wounded and shipwrecked at sea. In 1906 the 1864 treaty was revised, and in the following year the 1899 treaty was amended along the same lines. In 1926 a convention on the treatment of prisoners of war was adopted. See Kalshoven, *op. cit.*, (1987), 9 - 10.

<sup>35</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 1949 (Geneva I), Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 1949 ('Geneva II'), Geneva Convention Relative to the Treatment of Prisoners of War 1949 ('Geneva III'), and Geneva Convention Relative to the Protection of Civilian Person in Time of War 1949 ('Geneva IV').

<sup>36</sup> Art. 2 common to all four Geneva Conventions of 1949., *The Geneva Conventions of 12 August 1949 - Commentary: IV Geneva Convention*, Geneva: ICRC, (1958), 20-21.

make it clear that the Conventions applied once a conflict between states employing the use of arms had begun, whether or not there had been a formal declaration of war.<sup>37</sup> The Conventions did not provide for the situation where there might be an armed conflict involving the UN and a state, or organised groups within a state.

The UN system was designed carefully to make war illegal and unnecessary.<sup>38</sup> Nowhere in the UN Charter is the concept of war mentioned. If force is used or threatened against the territorial integrity or political independence of any state contrary to the Charter, then there are two possible military options permitted in response i.e. self-defence and police or enforcement action.<sup>39</sup> However, self-defence under Article 51 is only permitted until such time as the Security Council responds and takes the necessary measures to maintain international peace and security.<sup>40</sup> Either response is likely to lead to full-scale conflagration. The system reflects the reality that the advent of the UN did not mean an end to war and international conflict. In particular, the old system of wars of self-defence will remain until the system for global collective action and policing becomes a universal reality. Having rendered the concept of the classical 'war' redundant, it might have seemed unduly pessimistic for the UN to set about regulating that which no longer

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<sup>37</sup> See C. Greenwood, 'Scope of Application of Humanitarian Law', *op. cit.*, 42-43.

<sup>38</sup> T. Franck and F. Patel, 'Agora: The Gulf Crisis in International and Foreign Relations Law: UN Police Action in Lieu of War: "The Old Order Changeth," 85 *American Journal of International Law* 63, 63. See also C. Greenwood, 'The Concept of War in Modern International Law', 36 *International and Comparative Law Quarterly*, (1987). For general background on the UN and humanitarian law, see C. Bourloyannis, 'The Security Council of the United Nations and the Implementation of International Humanitarian Law, 20 (2) *Denver Journal of International Law and Policy*, (1992), 335-355 and G. Abi-Saab, 'The United Nations and International Humanitarian Law- Conclusions', *Actes du Colloque International de l'Universite de Geneve*, (1996).

<sup>39</sup> Article 2(4) of the UN Charter prohibits the threat or use of force, while Article 51 provides for individual or collective self-defence. See Goodrich, Hambro and Simons, *Charter of the United Nations*, (3rd. ed.), London: Columbia University Press, (1969), 43-55 and 342-353 and B. Simma (ed.), *op. cit.*, 106-128 and 661-678 and 605-616.

<sup>40</sup> Article 39 of the UN Charter. Goodrich, Hambro and Simons, *op. cit.*, 293-302 and Simma, *op. cit.*, 605-616.

existed. It was not surprising then that the International Law Commission of the UN declined to do so when it came to considering the codification of humanitarian law in 1949. It was believed that if the Commission at the very beginning of its work were to undertake this study, public opinion might interpret its action as showing lack of confidence in the efficiency of the means at the disposal of the UN for maintaining peace.<sup>41</sup> In this way, the responsibility to codify and improve the principles of humanitarian law fell upon the International Committee of the Red Cross ('ICRC').

As the majority of armed conflicts in the Cold War period did not approximate to inter-state wars of the kind envisaged by traditional humanitarian law, certain obvious gaps in the legal regulation governing armed conflicts remained.<sup>42</sup> The adoption of the Conventions marked a break with the past in that Article 3 which was common to all four Conventions sought to establish certain minimum standards of behaviour 'in the case of armed conflict not of an international character' which reached a certain (undefined) level of intensity. While of modest scope, this was a radical development.<sup>43</sup> Unfortunately, limitations to its application remain as states often deny that internal problems have risen to the required level of 'armed conflict', which term Article 3 does not attempt to define, or that the conflict in question was not intended to be governed by the Conventions.<sup>44</sup> In an attempt to address these and other issues, Additional Protocol I and II were adopted in 1977. These were intended to address some of the more apparent deficiencies in the

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<sup>41</sup> S. D. Bailey, *Prohibitions and Restraints on War*, Oxford: Oxford University Press, (1972), 92.

<sup>42</sup> The 1999 Report of the Secretary-General on the Protection of Civilians in Armed Conflict makes depressing reading, see UN Secretary-General's Report on the Protection of Civilians in Armed Conflict, S/1999/957 of 8 September 1999.

<sup>43</sup> G. Aldrich, 'The Laws of War on Land', *94 American Journal of International Law*, (2000), 42-59 at 59.

<sup>44</sup> See G. Aldrich, 'Human Rights in Armed Conflict: Conflicting Views', *67 ASIL Proc.* 141, 142 (1973) and R. Baxter, 'Some Existing Problems of Humanitarian Law', *The Concept of International Armed Conflict: Further Outlook 1,2* Proceedings of the International Symposium on Humanitarian Law, Brussels, (1974).

current system, but they too did not take into account the deployment of UN forces and multinational forces authorised by the Security Council.<sup>45</sup>

Protocol 1 brought what was often referred to as ‘wars of national liberation’ within the definition of international conflicts.<sup>46</sup> Protocol II, on the other hand, did not apply to all non-international armed conflicts, but only to those that met a new and relatively high threshold test.<sup>47</sup> Despite the time and effort that was involved in drafting and agreeing the Protocols, the result was less than satisfactory, especially from the point of view of classifying armed conflicts to determine which Protocol, if any, applies in a given case. The applicability of Protocol II is far too narrow, and this helps explain in part why so many states are party to it. Whereas prior to 1977, only common Article 3 governed guerrilla or non-conventional wars, after the adoption of the Protocols they might fall into one of three (partly overlapping) categories. Struggles against colonialism, against racist regimes and against alien occupation, as defined in Protocol I, were now subject to the rules of international armed conflict. Other conflicts which met the high threshold of Protocol II were governed both by that Protocol and by common Article 3, while conflicts which reached a certain level of intensity but fell below the Protocol II threshold, were governed solely by common Article 3.

A fourth category can be noted, that of ‘internal disturbances or tensions’ which was mentioned, though not substantively legislated for in Protocol II.<sup>48</sup> This category covers situations involving significant political

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<sup>45</sup> See generally *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva: ICRC, (1987) at 33.

<sup>46</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I), art. 1(4). This saved captured guerrilla fighters who met certain conditions from trial and potential execution for actions committed in the course of liberation wars, by granting such captives prisoner of war status. See generally C. Greenwood, ‘Terrorism and Protocol I’, 19 *Israel Yearbook of Human Rights*, (1989).

<sup>47</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 1(1). See B. De Schutter and C. Van De Wyngaert, ‘Coping With Non-International Armed Conflicts: The Borderline Between National and International Law’ 13 *Ga. J. Int’l & Comp. L.* 279 (1983), 285.

violence such as occurred in Albania<sup>49</sup>, where the threshold of common Article 3 is not reached. Many have considered that a dangerous lacuna can exist in such circumstances where human rights law may be extensively derogated from, and which fall beyond the reach of humanitarian law.<sup>50</sup> In an attempt to address the issue a number of declarations and codes of conduct have been mooted.<sup>51</sup>

If the broader picture of the development of humanitarian law over the last two decades is examined, it is evident that, in addition to their contribution to the regulation of non-conventional warfare, the 1977 Protocols are significant in two other respects. Firstly Protocol I represent the flowing together of Hague law and Geneva law in that it not only includes provisions designed to protect the civilian population and those *hors de combat*,<sup>52</sup> but also sets out new rules on the conduct of hostilities based on the principle of proportionality.<sup>53</sup> Secondly, both protocols represent a degree of merger of humanitarian law with its younger cousin, international human rights law, in that they incorporate detailed and explicit human rights guarantees, drawn

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<sup>48</sup> Protocol II

<sup>49</sup> See D. Kritsiotis, 'Security Council Resolution 1101 (1997) and the Multi-national Protection Force of Operation Alba in Albania', *12 Leiden Journal of International Law*, (1999), 511-547.

<sup>50</sup> See T. Meron, 'On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument', *op cit.*, 589.

<sup>51</sup> See, for example, H.P. Gasser, 'A Measure of Humanity in Internal Disturbances and Tensions: Proposals for a Code of Conduct', *38 International Review of the Red Cross* (1988), 262. See also the 'Oslo Statement on Norms and procedures in Times of Public Emergency or Internal Violence'(1987) and the adoption of the 'Declaration of Minimum Humanitarian Standards' at Turku/Abo, Finland (1990) (sometimes referred to as the 'Turku/Abo Declaration'). The text of the Oslo Statement is included in the pamphlet *Declaration of Minimum Humanitarian Standards*, Abo Akademi University Institute for Human Rights (1991), at 13 - 16. The text of the Declaration is appended to T. Meron & A. Rosas, 'A Declaration of Minimum Humanitarian Standards', *85 American Journal of International Law*, 375, (1991). In 1994 an amended version of the Turku/Abo document was adopted, which received a degree of validation from both UN and OSCE mechanisms. The text of the document is appended to A. Eide, A. Rosas & T. Meron, 'Combating Lawlessness in Gray Zone Conflicts Through Minimum Humanitarian Standards' *89 American Journal of International Law*, (1995), 215.

<sup>52</sup> See for instance, arts. 52 - 56.

directly in some instances from the International Covenant on Civil and Political Rights.<sup>54</sup> As a result, the Additional Protocols have blurred the distinction between what was traditionally seen as humanitarian law that emphasised generic rights determined according to the status of certain participants or other groups caught up in an armed conflict, and the more individual based rights, which form the core of international human rights law.

None of the existing Conventions or Protocols addresses the specific issues of UN forces, or forces acting on the authority of the UN, in situations of armed conflict. It could be said that this situation leaves military forces acting under the control of the UN in somewhat of a limbo. However, the *Institut de droit international* has confirmed that the rules of the 'law of armed conflict' apply as of right and they must be complied with in every circumstance by UN forces engaged in hostilities.<sup>55</sup> If the UN is considered the sum of its parts, then it comprises states. In this way a conflict involving the UN must also engage individual states acting for or on its behalf. The UN is clear that it is capable of being internationally responsible for an internationally wrongful act.<sup>56</sup> While the obligation to comply with the Conventions could be viewed as falling simply on the states concerned, it does not seem correct to allow the Organization under whose control and upon whose authority and behalf the states are acting, to evade responsibility.<sup>57</sup> There should be no doubt that an

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<sup>53</sup> See especially arts. 57 & 58.

<sup>54</sup> For instance the fair trial guarantees in Protocol I art. 75 and Protocol II art. 6 are clearly based upon, though are not identical to those in art. 14 of the ICCPR. For a discussion of this point see S. Stavros, 'The Right to a Fair Trial in Emergency Situations', *41 International and Comparative Law Quarterly*, (1992), 343.

<sup>55</sup> *Annuaire de l'Institut*, 54 Vol. II, (1971), 466, and 56 Vol. II, (1975), 541. See also Institute of International Law, 'The application of international humanitarian law and fundamental human rights, in armed conflicts in which non-state entities are parties', Fourteenth Commission, Berlin Session 1999, (25 August 1999), 4; and D. Schindler and J. Toman, (eds.), *The Laws of Armed Conflicts*, Dordrecht: Martinus Nijhoff, (1988), 903 and 907.

<sup>56</sup> See R. Dupuy (ed.), *A Handbook on International Organizations*, (2nd ed.), Dordrecht: Martinus Nijhoff, (1998), 887 and *Secretary-General's Report on Administrative and Budgetary Aspects of the Financing of United Nations Peacekeeping Operations*, (A/51/389), reproduced in *37 International Legal Materials*, (1998), 702, para. 4.

<sup>57</sup> See generally C. F. Amerasinghe, *Principles of the institutional law of*

organization is responsible for the delictual acts committed by that organization, but not all acts or conduct can be attributable to the organization. Unlike a state, it must be kept in mind that an international organization's capacity to act is functional, not sovereign.<sup>58</sup>

### **International and non-international armed conflicts**

Although it may be argued that the distinction between international and non-international armed conflict has lost much of its significance<sup>59</sup>, it is submitted that this is an overly optimistic assessment and determining whether a conflict can be characterised as internal or international can still be critically important.<sup>60</sup> This arises from the fact that the rules applicable during internal conflicts remain rudimentary and skeletal compared to those that apply to international conflicts.<sup>61</sup> If a conflict can be regarded as international in character, then the whole *ius in bello* of the Geneva Conventions (c. 400 articles) apply. However, the protection afforded under common Article 3 and Protocol II governing non-international armed conflicts is much more limited in scope. The International Court of Justice decision in the *Nicaragua case* illustrates how far the evaluation of conflict status has shifted from dependence on the classification by the sovereign state alone towards neutral external

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*international organization*, Cambridge: Cambridge University Press, (1996), 223-248, and *infra*.

<sup>58</sup> Dupuy, *op. cit.*, 888. For further discussion, especially in regard to 'coalitions of the willing', see *infra*.

<sup>59</sup> See D. Schindler, 'Significance of the Geneva Conventions for the contemporary world', 836 *International Review of the Red Cross*, (1999), 715-729.

<sup>60</sup> See T. Meron, 'War Crimes in Yugoslavia and the Development of International Law', 88 *American Journal of International Law*, (1994), 78-83 at 80; and C. Byron, 'Armed Conflicts: International or Non-International?' 6 (1) *Journal of Conflict and Security Law*, (2001), 63-90.

<sup>61</sup> C. Greenwood, 'International Humanitarian Law and United Nations Military Operations', 1 *Yearbook of International Humanitarian Law*, Dordrecht: Kluwer, (1998), 3-34 at 9 and D. Schindler, 'The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols', 163 *Recueil des Cours*, (1979), 116-163. For an overview of international law applicable to armed conflicts to which non-state entities are parties, see Institute of International Law, 'The application of international humanitarian law and fundamental human rights, in armed conflicts in which non-state entities are parties', Fourteenth Commission, Berlin Session 1999, (25 August 1999), 3-5.

measurement by international bodies.<sup>62</sup> Distinguishing between international and non-international armed conflict in contemporary situations remains difficult<sup>63</sup>, and this is evidenced by the contradictory decisions of the different chambers of the International Criminal Tribunal for the Former Yugoslavia (ICTY) on the nature of the conflict in the former Yugoslavia.<sup>64</sup> But it is two decisions of the Appeals Chamber of the ICTY that are of the most significance in this context, i.e. the decision of the *Tadic case* whereby many principles and rules previously applicable only in international armed conflict are now applicable in internal armed conflicts, and serious violations of humanitarian law committed within the context of such internal conflicts constituted war crimes.<sup>65</sup> Secondly, on the issue of jurisdiction in the same case, it stated, *inter alia*, that a non-international armed conflict occurs whenever there is 'protracted armed violence between governmental authorities and organised

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<sup>62</sup> Military and Paramilitary activities, *Nicaragua v. United States*, 1986 I.C.J. 4, 122 esp. paras. 219 and 220. The ICJ contrasted the conflict between the Contras and the Sandinista Government with that between the US and Nicaragua. The first, as internal, was governed by common Article 3 only; the second, as international, fell under the rules governing international armed conflicts. The Court also affirmed that the fundamental general principles of humanitarian law (common Article 3, in the opinion of the Court), belong to the body of general international law, in other words, that they apply in all circumstances for the better protection of the victims, regardless of the legal classification of armed conflicts. See R. Abi-Saab, 'Humanitarian Law and Internal Conflicts: The Evolution of Legal Concern', *Essays in Honour of F. Kalshoven*, Dordrecht: Martinus Nijhoff, (1991), 209-223.

<sup>63</sup> See generally M. Sassoli and A. Bouvier, 'The Law of Non-International Armed Conflict' *How Does Law Protect in War*, Geneva: ICRC (1999), 201-217, and ICRC reference document to assist Preparatory Commission to assist in its work on elements of crimes for the ICC, *Droit international humanitaire*, 1.3 Cour penale internationale, 1.3.3.3 General points common to the offences under Article 8 (2) (c) of the ICC Statute, (1999).

<sup>64</sup> See T. Meron, 'The Humanization of Humanitarian Law', *94 American Journal of International Law*, (2000), 239-278, esp. 261. See also C. Greenwood, 'The International Tribunal for the Former Yugoslavia', *69 International Affairs*, 1993.

<sup>65</sup> *Prosecutor v. Tadic, Appeal on Jurisdiction*, No. IT-94-1-AR 72 (Oct. 2, 1995), 105 ILR 417, para 70, reprinted in 35 ILM 32 (1996) and available at <<http://www.un.org/icty/judgement.htm>>. See P. Rowe, 'The International Criminal Tribunal for the Former Yugoslavia: The Substantive Jurisdiction of the Tribunal', *45 International and Comparative Law Quarterly*, (1996), 696-701 and C. Greenwood, 'International Humanitarian Law and the *Tadic case*,' *7 European Journal of International Law* (1996), 265-283 esp. 276.

armed groups or between such groups within a state'.<sup>66</sup> In this way the Appeals Chamber has encouraged the blurring of the distinction between international and non-international armed conflicts as the traditional focus on state sovereignty has shifted toward a human rights approach to international problems.<sup>67</sup> One potential problem with this aspect of the *Tadic* decision is that it could have been interpreted as creating another category of armed conflict i.e. where protracted armed violence occurs, and a similar line of reasoning was adopted by the International Criminal Tribunal for Rwanda (ICTR) in the *Akayesu case*.<sup>68</sup> Fortunately, more recent decisions of the ICTY have clarified this potential anomaly.<sup>69</sup>

In all of these developments the impact of humanitarian law on UN forces does not seem to have been given serious consideration.<sup>70</sup> While the intensity and classification of the conflict are fundamental determiners of the application of humanitarian law where UN forces are deployed, they can also be an important determiner of UN military involvement in intra-state conflicts in the first place. As Somalia and Lebanon show, such conflicts are often not amenable to simple 'quick fix' solutions. UN forces can find themselves

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<sup>66</sup> *Ibid.*, para.70. See also T. Meron, 'Classification of Armed Conflict in the Former Yugoslavia: Nicaragua's Fallout', 92 *American Journal of International Law*, (1998), 236-242.

<sup>67</sup> The Statute of the ICC has also tended to blur the distinction, see T. Meron, 'The Humanization of Humanitarian Law', *op. cit.*, at 262 and 275.

<sup>68</sup> *The Prosecutor v. Jean-Paul Akayesu*, ICTR, Case No. ICTR-96-4-T, September 2, 1998, para. 619-621. It is noteworthy that the language of Article 8 (2) (f) of the Statute of the ICC is similar to that used in the *Tadic decision* and refers to 'protracted armed conflict', see O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Baden-Baden: Nomos Verl.-Ges., (1999), 284-286.

<sup>69</sup> For example, *Prosecutor v. Tadic, Judgement*, Appeals Chamber (July 15, 1999), paras.68-162 esp. 80-97. See also *Prosecutor v. Blaskic*, Judgement, Trial Chamber, (March 3, 2000), paras 63-72, 75-123, and *Prosecutor v. Aleksovski*, Judgement, Appeals Chamber, No. IT-95-14/1-A (March 24, 2000), paras. 120-122, available at <<http://www.un.org/icty/judgement.htm>> .

<sup>70</sup> But it is noteworthy that in the *Tadic case* (*Tadic Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, Case no. IT-94-1-AR72, October 2, 1995), the Appeals Chamber referred to the ICJ decision in the *Nicaragua v. US case* (*merits*) that Article 1 of the four Geneva Conventions 'lays down an obligation that is incumbent, not only on states, but also on other international entities including the UN' (para. 93).

deployed in complex political situations where the international legal framework within which they must operate is anything but clear. Despite claims to the contrary, this is all the more so when it is considered that humanitarian law does not apply to most kinds of UN military activities.<sup>71</sup> Recent UN operations have involved authorised and mandated operations mounted in situations of conflict where clashes involving local actors or parties and UN soldiers were inevitable. These have left casualties on both sides, and they have involved both combatant and non-combatant alike. Often the parties to such conflicts have undergone a sustained period of bitter and bloody conflict. Many combatants are not soldiers of regular armies but militias or groups of armed civilians with little discipline and an ill-defined command structure.<sup>72</sup> Fighters of this nature do not always fit easily into the matrix of humanitarian law combatant status. There is also the vexed question of responsibility for the actions or omissions of UN soldiers in the field, and what to do when confronted with human rights abuses on a large scale. In this way, the matter of the applicability of humanitarian law to UN forces is of much more than academic interest. It is directly relevant to states contributing contingents, and to the UN itself, even if it is not formally a party to the relevant international treaties.

#### **The UN and the maintenance of international peace and security.**

It is useful to summarize the role of the UN in the maintenance of international peace and security as it is one of the primary purposes of the Organization, and it has significance for the application of humanitarian law to UN operations. Chapter VI and VII of the UN Charter are significant in this regard, and Chapter VII permits the Security Council to decide on coercive measures or undertake enforcement action against a state or states in response to breaches of

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<sup>71</sup> See P. Rowe, 'Maintaining Discipline in UN Peace Support Operations: The Legal Quagmire for Military Contingents', 5 (1) *Journal of Conflict and Security Law*, (2000), 45-62, esp. 50-58.

<sup>72</sup> *The Blue Helmets- A Review of United Nations Peacekeeping*, (3<sup>rd</sup> Ed.), New York, United Nations, (1996), 4. On the command and humanitarian law, see generally C. Greenwood, *Command and the Laws of Conflict*, Pamphlet published by Strategic and Combat Studies Institute for the Ministry for Defence, 1993

the peace or acts of aggression. The importance attached to the Security Council's power to order military measures did not stem from expectations that it would often be necessary to do so.<sup>73</sup> It was thought that the threat of military action would be sufficient to deter aggression and to induce states to comply with measures deemed appropriate by the Security Council to maintain or restore international peace and security. However, the reality is that although the military agreements envisioned under Article 43 of the Charter did not materialise, the UN has had a significant involvement in military operations of one kind or another since the first major UN authorised operation during the Korean conflict in 1950.

It is important at the outset to make a distinction between peacekeeping and enforcement action. Nonetheless, this distinction can be somewhat blurred in certain instances. This is complicated by the grey area that exists between peacekeeping and so called 'peace enforcement'. With the end of the Cold War this distinction has become further blurred. Prior to 1990, the UN had authorised two enforcement missions, that against North Korea in 1950 and the Congo in 1960 (ONUC).<sup>74</sup> It has since approved a number of major operations with similar characteristics, in Kuwait, Somalia, the former Yugoslavia, Kosovo, East Timor, Albania<sup>75</sup>, the Central African Republic and Sierra Leone. However, some of these are UN mandated forces, while others are merely authorised 'coalitions of the willing'.<sup>76</sup>

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<sup>73</sup> Goodrich, Hambro and Simons, *op. cit.*, 291.

<sup>74</sup> ONUC amounted to at least *de facto* enforcement action, see N. D. White, 'The UN Charter and Peacekeeping Forces: Constitutional Issues', in Pugh (ed.), in M. Pugh (ed.), *The UN, Peace and Force*, London: Frank Cass, (1996), 43-63 at 53. Cf. *Certain Expenses of the UN - Article 17(2)*, Advisory Opinion, July 20, 1962, International Court of Justice Reports, 1962, 177, where the I.C.J. said the 'the operation did not involve "preventative or enforcement measures" against any state under Chapter VII'.

<sup>75</sup> Though Albania had elements of traditional peacekeeping and peace enforcement combined in one mandate, see D. Kritsiotis, *op. cit.*, 511-547.

<sup>76</sup> It is best to view the action by NATO forces in Kosovo during 1999 as *sui generis*, see See B. Simma, 'NATO, the UN and the Use of Force: Legal Aspects', 10 *European Journal of International Law*, (1999) 1-22; K. Ambos, 'NATO, the UN and the Use of Force: Legal Aspects. A comment on Simma and Cassese', 2 *Humanitäres*

In addition, since 1985 there has been a significant increase in the number of peacekeeping missions established, with a corresponding increase in the complexity of the mandates. These are often referred to as 'second generation' peacekeeping operations.<sup>77</sup> The resolution of internal or domestic conflict has been a dominant feature of recent operations that involved the establishment of democratic governments culminating in the nation building attempted for a time in Somalia. Any interventions by UN forces may, intentionally or otherwise, alter the delicate balance of power between the warring parties. The UN may then be perceived as not impartial or even hostile.<sup>78</sup> Maintaining impartiality can present peacekeepers with a dilemma, especially when they confront situations in which civilians are victimised, or when UN forces are themselves the subject of attack.<sup>79</sup> The question of consent to a UN presence is particularly problematic in those situations, and the blue berets involved must be prepared to resort to force rather than be bystanders to large-scale human rights abuses or even genocide. In this way, the continuum from peacekeeping to peacemaking and enforcement can be difficult to track, but when all else fails and the political will exists, the Security Council may resort to the use of force under Chapter VII of the UN Charter.

UN forces can take on many different forms, but the status and nature of a force is important to evaluating the relevance and applicability of humanitarian law principles. The difference between peacekeeping and enforcement action operations is fundamental, but second generation operations, which while not constituting enforcement action as originally envisaged under the Charter,

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*Völkerrecht, Deutsches Rotes Kreuz*, (1999), 114-115; A. Cassese, 'Ex injuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?' 10 *European Journal of International Law*, (1999), 23-30 and C. Guicherd, 'International Law and the War in Kosovo', 41(2) *Survival*, (Summer, 1999), 19-34. See also 'The Kosovo crisis and international humanitarian law', *International Review of the Red Cross*, No. 837, (2000), in which the whole edition is devoted to contributions on the topic.

<sup>77</sup> *The Blue Helmets, op. cit.*, 5.

<sup>78</sup> J. Peck, 'The U.N. and the Laws of War: How Can the World's Peacekeepers be Held Accountable', 21 *Syracuse Journal Of International Law*, (1995), 283-310, at 288.

<sup>79</sup> *The Blue Helmets, op. cit.*, 5.

possess certain of the characteristics of both types of operations. There is also the problem of distinguishing between UN mandated operations and those merely authorised to be carried out by coalitions of the willing. These issues are important in determining the extent, if any, of the application of humanitarian law to UN forces. However, the fundamental question regarding the application of humanitarian law remains the existence of an armed conflict. Ultimately, it is the fact of participation in hostilities, not the existence of authority to do so that is significant.<sup>80</sup>

### **Peace Enforcement Operations**

In more recent years, when the UN has decided to react to international crises but the resources are not available, the Security Council has authorised groups of states to organise 'peace enforcement' operations with specific goals in mind. Again, the United States has been to the forefront of these operations in, *inter alia*, Somalia, Haiti and the former Yugoslavia. The operations in question, while not constituting enforcement action as originally envisaged under the Charter, owed much to the half way house suggested by Boutros Boutros-Ghali in his original *Agenda for Peace* document.<sup>81</sup> In all cases, the relevant resolutions of the Security Council made specific reference to Chapter VII of the Charter. Furthermore, the military action concerned was conducted by states outside their own national borders and in the territory of a foreign country, while being authorised by the UN. In this way it could not be said to constitute aggression or the illegal use of force contrary to international law. The military operations were similar to conventional operations involving coalition forces under a complex but essentially unified operational command structure and intended to be governed by the Geneva Conventions and Additional Protocols, and the international law of armed conflict as a whole.<sup>82</sup>

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<sup>80</sup> Greenwood, 'International Humanitarian Law and United Nations Military Operations', *op. cit.*, 11.

<sup>81</sup> UN document: A/47/277 - S/24111, (June 1992).

<sup>82</sup> Interviews, UN official and senior military officer seconded to UN DPKO, New York, 1998.

In addition, as discussed above, it is an accepted principle of humanitarian law that it applies in equal measure to all parties involved, irrespective of any other consideration, including the issue of the legality and objective of the resort to the use of force. There would seem to be broad agreement that humanitarian law norms do apply to UN military operations.<sup>83</sup> This view is supported by the terms of the relevant Conventions. There is no doctrine of ends and means in the application of humanitarian principles, and the terms of the Geneva Conventions require that 'the High Contracting Parties undertake to respect and ensure respect for the present Convention in all circumstances'.<sup>84</sup> Not every armed confrontation triggers the application of humanitarian law, but states involved are obliged to ensure its strict implementation once the threshold of 'armed conflict' has been reached.

The most contentious missions, both from a legal and political perspective, will probably be those operations where the peace is most precarious. These missions may take place during international or non-international armed conflicts, but in any event the distinction is not crucial to this discussion. Such operations go well beyond traditional peacekeeping precepts and often they slip from peace to conflict and from Chapter VI to Chapter VII of the Charter, even in the course of a single operation. Nevertheless, classifications are needed and standards must be sought.<sup>85</sup> While it is acknowledged that every deployment of troops outside their own territory is subject to international political and legal ramifications, clarification of what

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<sup>83</sup> H. McCoubrey, 'International Law and National Contingents in UN Forces', 12 *International Relations*, at 46; Greenwood, 'International Humanitarian Law and United Nations Military Operations', *op. cit.*, 18 and M. Bothe, 'Peacekeeping' in Simma (ed.), *op. cit.*, 600. See also two resolutions adopted by the Institut de Droit International: Resolution on the Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in which UN Forces may be engaged, adopted in Zagreb in 1971, 54 (II) *Annuaire de l'institut de droit international* (1971) 465; and Resolution on the Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in which UN Forces may be Engaged, adopted in Wiesbaden in 1975, 56 *Annuaire de l'institut de droit international* (1975), 540

<sup>84</sup> Article 1, First Geneva Convention of 1949, and the Preamble to the Additional Protocol I of 1977.

<sup>85</sup> T. Pfanner, 'Application of International Humanitarian Law and military operations undertaken under the UN Charter', *Symposium*, 50.

these are is needed, especially when the UN troops involved are likely to be engaged in hostilities with local actors.

### **Humanitarian law and UN operations.**

Bowett addressed the issue of the application of the law of armed conflict to operations by UN forces by examining two preliminary questions: first, what different types of functions a UN force may assume, and, secondly, the question of the different types of command structure that may be adopted for a UN Force.<sup>86</sup> An analysis of the different types of functions that may be entrusted to UN Forces suggests that the application of the laws of armed conflict may be relevant to certain types of functions, but not to others. The most fundamental difference to identify in the first instance is that between enforcement action under Chapter VII of the Charter and traditional peacekeeping, though as previously stated, in recent years the distinction is less clear. It is still worthwhile making this initial distinction and dealing in the first instance with enforcement action. Bowett's two questions are also inextricably linked, as the command structure will largely depend on the function of the force.<sup>87</sup> A further complication arises by virtue of the kind of operations conducted under Chapter VII and intended to be enforcement action in nature, despite the failure to conclude the requisite agreements with the UN under Article 43 of the Charter.<sup>88</sup> The issue of who commands the force, the UN or the states concerned, is especially relevant in operations involving 'coalitions of the willing'.<sup>89</sup>

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<sup>86</sup> D.W. Bowett, *United Nations Forces*, London: Stevens, (1964), 484-485.

<sup>87</sup> *Ibid.* at 487-88. Bowett identified three types of command structures, i) Command delegated to a State or group of States by the UN; ii) Command entrusted to an individual appointed by and responsible to the UN, but lacking disciplinary authority; iii) Command entrusted to an individual appointed by and responsible to the UN and having disciplinary authority.

<sup>88</sup> Goodrich, Hambro and Simons, *op. cit.*, 317-326 and Simma, *op. cit.*, 636-639

<sup>89</sup> See Dupuy, *op. cit.*, 891.

More significantly, from the point of view of the applicability of humanitarian law, nowhere in Chapter VII, and Article 42 in particular, is 'war' mentioned. It refers to 'such action by, sea, air or land forces as may be necessary... [and] may include demonstrations, blockade, and other operations by air, sea or land forces of members of the UN.' The obvious implication of this is that military action taken by the UN is not to be regarded as 'war', and this was the commonly accepted view of the UN action in Korea.<sup>90</sup> Given the intensity of the hostilities during the conflict, this point may seem somewhat esoteric and academic to the ordinary person on the street, or to the soldier acting under UN 'command'.<sup>91</sup> The tendency to view conflicts of this nature as other than war may also confuse the issues somewhat and have its origins in the old just war theory. The problem with this is that it may justify the use of violence on a massive scale, and indirectly undermine humanitarian law principles by failing to view those against whom the military action is being taken as equally deserving of their protection.

Writing in 1964, Bowett stated that 'there [was] no known case in which the UN Command ever claimed exemption from any of the accepted rules of the laws of war, customary or conventional.'<sup>92</sup> In fact, there appears to be no record of the UN ever claiming that humanitarian law does not apply to operations authorised by or undertaken on behalf of the Organization. But the policy of the UN with regard to the applicability of humanitarian law to forces under its command or operational control is still ambivalent.<sup>93</sup> The end of the Cold War has not brought the realisation of the early optimism associated with that event, and the ambitions for the UN and the Security Council reflected in the Secretary-General's 'Agenda for Peace',<sup>94</sup> did not materialise. A more

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<sup>90</sup> Bowett, *op. cit.*, 53.

<sup>91</sup> See Chapter 5, *supra.*, and R. Murphy, 'The Legal Framework of UN Peacekeeping Forces and the Issue of Command and Control', 4(1) *Journal of Armed Conflict Law*, (1999), 41-73.

<sup>92</sup> Bowett, *op. cit.* 56.

<sup>93</sup> See *infra.*

<sup>94</sup> United Nations document: A/47/277 - S/24111, (June 1992).

sobering and reflective sequel to this was published a short time later in which the Secretary-General acknowledged certain limitations. In particular, the limited ability of the Security Council and office of the Secretary-General, to deploy, direct, command and control enforcement action operations in response to threats to the peace, breaches of the peace or acts of aggression. The consequences of this are well known, but worth restating. International and internal armed conflicts have continued to flare around the globe, and one of the ironies of the end of the Cold War is that local or internal conflicts have increased.<sup>95</sup> With the UN's inability to respond effectively to these crises, the Security Council has left the establishment and management of international forces to individual member states, in particular the United States. These operations are outside the formal framework of the organization, and come under the umbrella of traditional and reciprocal inter power relations to which humanitarian law naturally applies.<sup>96</sup> In some of these cases e.g. the UN has divested itself explicitly of its competence in leading enforcement actions and has instead 'authorised' member states to undertake enforcement measures by use of force. The two most well known instances are the Korean and Gulf conflicts of 1950 and 1991 respectively. Some have described the action by the Security Council as a form of abdication of responsibility, with little or no command and control by the UN, and no strategic direction either.<sup>97</sup> Not surprisingly, the matter of enforcing humanitarian law was left to the contributing states. Given the universal nature of the principles, this should not prove problematic, but a lot will depend on the country concerned and the level of importance attached to dissemination and training among the armed forces. Such an arrangement cannot be regarded as satisfactory, and it raises the issue of UN responsibility for violations of international law in such instances.

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<sup>95</sup> See D. Smith, *The State of War and Peace Atlas*, International Peace Research Institute, Oslo, London: Penguin, (1997).

<sup>96</sup> P. Benvenuti, 'The Implementation of International Humanitarian Law in the Framework of Peacekeeping Operations', 1 *Law in Humanitarian Crises*, (European Commission, 1995), 83-120 at 88.

<sup>97</sup> See N. White, *Keeping the Peace*, (2<sup>nd</sup> ed.) Manchester: Manchester University Press, (1997), 115-128 esp, 117-118.

While there can be no doubt that the UN is a subject of international law and capable of possessing international rights and duties, an analysis of what the International Court of Justice has said and done reveals that it is not possible to give a categorical answer to the question of the legal consequences of personality for international organizations.<sup>98</sup> The UN is, however, a separate legal person from and additional to its member states, and it is not simply an aggregation of those states.<sup>99</sup> Once the existence of international personality and rights is conceded, it is not difficult to infer that this will also entail obligations. In the *WHO Agreement Case* the International Court of Justice specifically referred to the existence of obligations at customary international law for international organizations.<sup>100</sup> There are situations where the UN would be responsible under customary international law for acts of persons or armed forces acting under its control.<sup>101</sup> In fact, there have been claims by states against the UN arising from violations of international law during the ONUC (Congo) operation that were later settled by negotiation.<sup>102</sup>

The UN has generally accepted responsibility for illegal acts that may have been committed by armed forces (belonging to member states) acting under its control.<sup>103</sup> Imputability to the UN is possible when national contingents become organs of the UN by being placed under its authority and control. This does not happen when a country or countries retain control of a military force, as in the Gulf War, even if acting in the execution of a UN

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<sup>98</sup> Amerasinghe, *op. cit.*, 92-93. See also B. Tittermore, *op. cit.*, esp. 92-95.

<sup>99</sup> *Ibid.*, 229.

<sup>100</sup> ICJ Reports (1980), 67 at 90.

<sup>101</sup> Amerisinghe, *op. cit.*, 240 - 241.

<sup>102</sup> See UN Documents A/CN.4/195 and Add. 1 dated 7 April 1967. The principal claimant was the Belgian government. Despite the nature of the authorisation to use force in the ONUC operation, the ICJ found that it 'did not involve "preventive or enforcement" measures against any State under Chapter VII.....', *Advisory Opinion on Certain Expenses of the United Nations*, ICJ Reports, 1962, 177. See Bowett, *op. cit.*, 175-180.

<sup>103</sup> Amerasinghe, *op. cit.*, 242 and Dupuy, *op. cit.*, 891. The UN has acknowledged liability for activities carried out by both UNEF and ONUC.

decision. Where national contingents come together to form 'coalitions of the willing' in such cases, but do not become organs of the UN, or fall under its command and control, then the UN cannot be held responsible for their acts.<sup>104</sup> In such cases, the acts of military forces remain the responsibility of the states concerned. However, definitive statements remain problematic due to the linkage with the complex issues surrounding the command and control of UN forces, and a lot will depend on the facts of a case.<sup>105</sup> In the meantime, the control test retains its central role in determining liability, and in some cases may even allow for concurrent responsibility because of a limbo status involving an ill-defined form of dual control.<sup>106</sup>

### The UN position

In 1994, as Serb troops advanced on the UN declared 'safe area' of Bihac, the municipal hospital stood in the middle of their line of advance.<sup>107</sup> The Canadian Commander of the UN forces was reluctant to intervene. The UN forces civil affairs officer, an American, urged that the hospital should be protected owing to its special status under the Geneva Conventions and that UNPROFOR had a duty to protect it. He drafted a memorandum to this effect to his superior in Sarajevo who then instructed Bangladeshi troops to take up positions with their armoured personnel carriers around the hospital. The Serbs refrained from attacking the hospital, and by passed Bihac in the process.

Two weeks later, the UN Office of Legal Affairs issued a statement to set the record straight and ensure that the 'Bihac incident' did not set any precedents. UN forces are bound only by their Security Council mandate, and they are not legally obliged to uphold the Geneva Conventions. From a strictly

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<sup>104</sup> *Ibid.*, 243 and 891 respectively. See also F. Seyersted, 'United Nations Forces: Some Legal Problems', 37 *British Yearbook of International Law*, (1961), 362 and 421.

<sup>105</sup> See Cpt. 5 *supra.*, and R. Murphy, *op. cit.*, 41-73.

<sup>106</sup> See *Nissan v. Attorney General* [1968] 1 Queens Bench 286, and [1969] 1 All England Reports 629; and I. Brownlie, 'Decisions of British Courts during 1968 Involving Questions of International Law', 42 *British Yearbook of International Law* (1968-69), 217.

legal point of view, obligations arising under humanitarian law are binding on states. Article 103 of the UN Charter may also be relied upon to support the argument that the obligations arising under the UN Charter on member states (including those arising from Security Council resolutions), take precedence over other international treaties, including the Geneva Conventions and Additional Protocols.<sup>108</sup> The role of the UN is to carry out the will of the international community as expressed by the Security Council.<sup>109</sup> When states assign troops to peacekeeping duties, they are under the command or operational control of the Security Council. This may be the theory, but even a superficial knowledge of UN peacekeeping indicates that the reality is much more complex. Few states ever relinquish full operational control to the UN.<sup>110</sup> The 'Bihac incident' illustrates the UN's ambivalent attitude to humanitarian law. Not surprisingly, it has been a source of tension between the ICRC and the UN. The UN has declared its commitment to the application of humanitarian law to peacekeeping operations, but it has consistently taken the position that UN forces act on behalf of the international community, and therefore they cannot be considered a 'party' to the conflict, nor a 'Power' within the meaning of the Geneva Conventions. The mere presence of UN peacekeeping soldiers in an area of conflict or a theatre of war, while performing a humanitarian or diplomatic mission, does not necessarily mean that humanitarian law binds these troops.<sup>111</sup>

In addition, the UN is not in a position to become a party to the Conventions or Additional Protocols as this would entail binding the Organization to detailed provisions that are aimed at states, and do not fit the

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<sup>107</sup> R. Gutman, 'The UN and the Geneva Conventions' in Roy Gutman and David Reif (eds.), *Crimes of War*, New York: Norton and Co., (1999), 361-364.

<sup>108</sup> See Simma, *op. cit.*, 1116-1125; and Goodrich, Hambro and Simons, *op. cit.*, 614-617. See also B. Tittmore, *op. cit.*, esp. 101-108.

<sup>109</sup> *Ibid.*, statement to this effect attributed to S. Katz, OLA official, in R. Gutman, 'UN and the Geneva Conventions', *op. cit.*, 361-364 at 361.

<sup>110</sup> See chapter 5 and R. Murphy, *op. cit.*, 41-73.

<sup>111</sup> This position has not altered with the Secretary-General's Bulletin on Observance by UN forces of international humanitarian law, ST/SGB/1993/3 of 6

role and function of an international organization.<sup>112</sup> Notwithstanding its international legal personality, the UN is not itself a state and thus, it does not possess the juridical or administrative powers to discharge many of the obligations laid down in the Conventions.<sup>113</sup> However, this does not mean that the conduct of hostilities by UN forces will be free from humanitarian constraint or that humanitarian law considerations do not apply.<sup>114</sup> While a relevant factor in determining how UN forces will implement humanitarian law, it is not a reason for concluding that it cannot be applicable to them.<sup>115</sup>

The ICRC has been instrumental in obtaining agreement from the UN that international forces acting under UN authority would do so in accordance with the 'principles and spirit' of relevant law.<sup>116</sup> But once a provision to this effect was incorporated in the Regulations of the Force and in the agreements with troop contributing states, it did not entail the direct responsibility of the UN to ensure respect for humanitarian law by members of its forces. In this regard the relatively recent UN Model Agreement with troop contributing states and the Model Status of Force Agreements between the UN and host states now include an express provision to this effect.<sup>117</sup> Under that provision, the UN

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August 1999. See Section 1(1) discussed *infra*..

<sup>112</sup> On the question of treaty making powers, see Amerasinghe, *op. cit.*, 102-103.

<sup>113</sup> *Reparations Case* [1949] ICJ Rep., 174, and *Symposium*, 43

<sup>114</sup> Roberts and Guelff, (eds), *op. cit.*, 721.

<sup>115</sup> C. Greenwood, 'International Humanitarian Law and United Nations Military Operations', *op. cit.*, 15.

<sup>116</sup> U. Palwankar, 'Applicability of International Humanitarian Law to UN Peacekeeping Forces', 80 *International Review of the Red Cross*, (1993), 227-240 at 229-33. A provision to this effect was incorporated into the UNEF, ONUC and UNFICYP Force Regulations. As no Regulations were adopted in respect of UNIFIL, no such provision exists for that force.

<sup>117</sup> Shagra and Zacklin, *Symposium*, 44. The Model Agreement with troop contributors contains the following provision: '[The UN peacekeeping operation] shall observe and respect the principles and spirit of the general international conventions applicable to the conduct of military personnel. The international conventions referred to above include the four Geneva Conventions of 12 August 1949 and their Additional Protocols of 8 June 1977 and the UNESCO Convention of 14 May 1954 on the Protection of Cultural Property in the

undertakes that the operations of the force in question will be conducted with full respect for the principles and spirit of the general international conventions applicable to the conduct of military personnel.

While these developments are welcome, they fail to address the fundamental questions, and more importantly, it seems to suggest that the UN does not have a duty to monitor the behaviour of third parties. The 'Bihac incident' already referred to confirms this policy.<sup>118</sup> This is crucial, as the military culture requires that such duties be spelt out in clear terms. There is, however, a lack of consistency in this regard, as UNIFIL did monitor the behaviour of Israeli forces in Lebanon after the 1982 invasion.<sup>119</sup>

The recent Secretary-General's Bulletin on the observance by UN forces of humanitarian law does go some way towards addressing these problems.<sup>120</sup> It adds significant weight to the ICRC position and it is important in terms of legal certainty by giving obligations substance. Bulletins of this nature are intended to be legally binding on UN personnel, in this case UN forces, but the issue is not straightforward.<sup>121</sup> Section 1 of the Bulletin states that:

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event of armed conflict. [The Participating State] shall therefore ensure that the members of its national contingent serving...be fully acquainted with the principles and spirit of the conventions'

<sup>118</sup> R. Gutman, 'The UN and the Geneva Conventions' in R. Gutman and D. Reif (eds.), *op. cit.*, 361-364. There were also claims that UN forces in Bosnia-Herzegovina ignored evidence of human rights abuses elsewhere.

<sup>119</sup> Interview, T. Goksel, UNIFIL spokesman, Naqoura, Lebanon, 1998 and personal experience of writer.

<sup>120</sup> Secretary-General's Bulletin on Observance by UN forces of international humanitarian law, ST/SGB/1993/3 of 6 August 1999. See P. Rowe, 'Maintaining Discipline in UN Peace Support Operations: The Legal Quagmire for Military Contingents', *op. cit.*, 52; and M. Zwanenburg, 'The Secretary-General's Bulletin on Observance by United Nations Forces of International Humanitarian Law: Some Preliminary Observations', 5 (4-5) *International Peacekeeping* (Kluwer), (1999), 133-139.

<sup>121</sup> Personal interview, Official, UN Legal Division, New York, December 2000. Bulletins were described as part of the UN 'internal law, binding within the Organization's own legal system'. Rowe has argued that in those countries where international law has to be incorporated directly into national law, the Bulletin will create no binding obligation, by itself, upon the soldier, see P. Rowe, 'Maintaining Discipline in UN Peace Support Operations: The Legal Quagmire for Military

The fundamental principles and rules of international humanitarian law set out in the present Bulletin are applicable to UN forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement. They are accordingly applicable in enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defence.

The categorisation of UN troops as combatants in certain instances may seem unusual, especially to troop contributing states. However, this Bulletin must be judged in the context of the 1994 Convention on the Safety of UN and Associated Personnel, and there is a problematic overlap in the respective regimes covered.<sup>122</sup> Both are incompatible because they are based on fundamentally different principles. The objective of the Convention being to protect UN personnel and ensure immunity from attack for other than those engaged in enforcement operations under Chapter VII involving combat against organized armed forces, while the remit of humanitarian law is much broader and respects the combatants privilege to attack enemy forces once the general rules of international law are followed, and is based on the cardinal principle that combat forces are treated equally.<sup>123</sup>

The Bulletin appears to say that when UN forces, for whatever reason, are required to resort to the use of force in armed conflict situations, and then humanitarian law will apply. What degree, intensity and duration of force are required is unclear, but some threshold must exist and be crossed before triggering the application of humanitarian law. Commanders and soldiers will still find themselves in a kind of legal no mans land trying to determine in the first instance if the situation can be classified as one of armed conflict, and then whether or not the use of force was sufficient to change their status from that of peacekeeper or peace enforcer, to that of combatant. No pocket book of humanitarian law of the kind usually supplied to military personnel will supply

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Contingents', *op. cit.*, 53.

<sup>122</sup> *Ibid.*, at 136 and 138, and *infra*.

<sup>123</sup> See Roberts and Guelff, (eds), *op. cit.*, 623-626. On combatants generally,

easy answers to these questions. At least paragraph 9 (4) should provide an answer to those that would see UN stand by in situations that arose in Bihac. Under these provisions, the UN shall in all circumstances respect and protect medical personnel and wounded.<sup>124</sup> This places a clear onus on peacekeepers to intervene and actively accept responsibility for the protection of these categories of persons.

The Bulletin also commits the UN to ensuring that members of military personnel are fully acquainted with the rules of humanitarian law. It accepts co-responsibility with the contributing states for this whether or not there is a Status of Force Agreement. What liability the UN may be subject to for breach of this duty is unclear. Most important, however, is Section 4 to the effect that it is the responsibility of the national courts to prosecute military personnel for violations of humanitarian law. This means that the UN will not be required to establish a special tribunal to consider violations of humanitarian law by UN troops, and the *status quo ante* remains.<sup>125</sup>

What practical effect this Bulletin will have with the UN forces on the ground, and the policy of contributing states, remains to be seen. Does it impose a wider duty on UN forces to intervene to prevent violations of humanitarian law by third parties in the absence of a specific provision to this effect in the mandate? Common Article 1 of the Conventions provides that 'the High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances'.<sup>126</sup> It can be argued that this, and a

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see K. Ipsen, 'Combatants and Non-Combatants', in D. Fleck (ed.), *op. cit.*, 65-104.

<sup>124</sup> Paragraph 9.4 states: The UN shall in all circumstances respect and protect medical personnel exclusively engaged in the search for, transport or treatment of the wounded or sick, as well as religious personnel.

Paragraph 9.5 states: The UN shall respect and protect transports of wounded and sick or medical equipment in the same way mobile medical units.

<sup>125</sup> It has been proposed by the Security Council (22 December 2000) that the Special Court for Sierra Leone have jurisdiction over crimes committed by peacekeepers or related personnel, where the state that had sent the relevant personnel was unwilling or genuinely unable to carry out an investigation or prosecution, see *Amnesty International, Sierra Leone – Renewed commitment needed to end impunity*, 24 September 2001, para. 3.6.

<sup>126</sup> See Pictet, *Commentary – Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War*, Geneva: ICRC, (1958), 16.

similar provision in Protocol 1, places a duty on UN forces to take action to prevent such violations.<sup>127</sup> Although this may not have been the original intention of the negotiators of the Conventions<sup>128</sup> and Protocol, is such an interpretation supported by the agreement to respect and observe the 'spirit and principles' of humanitarian law and the recent Secretary-General's Bulletin? It would seem that the UN remains reluctant to acknowledge a duty to intervene in such circumstances<sup>129</sup>, and that the Bulletin acknowledges such a duty in very limited circumstances. In this way, as the law currently stands, a UN force is not under a general legal duty to intervene on behalf of victims of violations of applicable law in its area of operations, unless the mandate of the force provides otherwise.

The real problem for the UN is that acknowledging a duty to intervene then creates an onus to give the force(s) the means and capacity to do so without exposure to unnecessary risk.<sup>130</sup> If a force cannot intervene directly without exposing troops to significant danger, then the duty of a commander must first be to the safety of his/her personnel. Most lightly armed peacekeepers will not be in a position to prevent large-scale abuses by a party to the conflict, and this was the predicament of the Dutchbat at Srebrenica.<sup>131</sup> But peacekeepers should not be placed in such a position in the first instance<sup>132</sup>,

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<sup>127</sup> See Greenwood, 'International Humanitarian Law and United Nations Operations', *op. cit.*, 9, 32-33.

<sup>128</sup> A. Roberts, 'The Laws of War: Problems of Implementation' in *Law in Humanitarian Crises*, European Commission, *op. cit.*, 13 at 31-32.

<sup>129</sup> For a discussion of this issue, see R. Weiner and F. Ní Aoláin, 'Beyond the Laws of War: Peacekeeping in Search of a Legal Framework', 27 *Columbia Human Rights Law Review*, (1996), 293 at 312-320.

<sup>130</sup> The recently published *Report of the Panel on UN Peacekeeping Operations*, UN, 23 August 2000 (*Brahimi Report*, available from <<http://www.un.org>>), recommended that UN peacekeepers –troops or police – be authorized to stop violence against civilians, within their means, in support of basic UN principles. At present this has no legal status, but it is a significant acknowledgement of the duty to intervene. See generally R. Marx, 'A Non-Governmental Human Rights Strategy for Peacekeeping', 14 *Netherlands Quarterly of Human Rights*, 2,( June 1996), 126-145.

<sup>131</sup> See R. Siekmann, 'The Legal Position of Dutchbat vis-a-vis Srebrenica', 1 *Yearbook of International Humanitarian Law 1998*, *op. cit.*, 301-312.

and in any event this will not relieve them of responsibility to take some action, as protests and assertiveness on the ground at an early stage<sup>133</sup>, and later through higher channels can have effect. This is the kernel of the dilemma, and will commanders hide behind the cloak of preserving force security to excuse a failure to protect. It can also be argued that intervention in such circumstances will compromise the impartiality of the force, but if the policy adopted by the UN is applied in a consistent and impartial manner, this argument may be rebutted. Acknowledging that such a duty exists by expressly providing so in the mandate of the force may make the mission more difficult, but it cannot be right to allow a UN force stand idly by in circumstances where breaches of humanitarian law are taking place in their area of operations.<sup>134</sup>

### **The ICRC position**

Having rendered the concept of the classical 'war' redundant, the UN considered that it could not now set about regulating its conduct, and the responsibility to codify and improve the principles of humanitarian law fell upon the ICRC.<sup>135</sup> The question of the applicability of humanitarian law to UN forces was raised for the first time during the Korean conflict. This highlighted a fundamental problem for the UN in regard to ensuring compliance with the principles involved. Having been requested to apply *de facto* the humanitarian law principles protecting war victims and especially common Article 3 of the Geneva Conventions, the UN commander replied that his instructions were to abide by the humanitarian principles of the 1949 Geneva Conventions, particularly Common Article 3, and by the detailed provisions of the Prisoners of War Convention.<sup>136</sup> The importance of the latter convention may have arisen from the need to ensure that all prisoners were treated equally, whereas

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<sup>132</sup> See 'Lessons for the future', in *Report of the Secretary-General pursuant to General Assembly resolution 53/35 – The fall of Srebrenica*, General Assembly A/54/49, 15 November 1999, para. 498.

<sup>133</sup> *Ibid.* para. 264. This concluded that the Serb advance continued beyond that originally planned when they met with no resistance.

<sup>134</sup> See generally O. Ulich, 'Peacekeeping and Human Rights: Is there a Duty to Protect', *International Human Rights Advocacy*, (Spring, 1996).

<sup>135</sup> *Supra.*

in the case of common Article 3, the principles concerned represent a compulsory minimum to be applied irrespective of the nature of the conflict or the issue of reciprocity.<sup>137</sup> However, as the UN Commander, he claimed that he did not have the authority to accept, or the means to ensure the accomplishment of responsibilities incumbent upon sovereign nations under the detailed provisions of the other Geneva Conventions. Since then the ICRC has drawn the attention of the Secretary-General to the application of humanitarian law to the forces at his disposal, and to the desirability that these forces be provided by their contributing governments with adequate instruction in this area.<sup>138</sup>

The essence of the ICRC position is that humanitarian law principles, recognised as part of customary international law, are binding upon all states and upon all armed forces present in situations of conflict.<sup>139</sup> If these rules are binding on all states, then they must be binding on an international organization that resorts to the use of force on their behalf. This is especially so when this Organization is an independent subject of international law and it was established by those states bound by the principles in the first place. In this context, the status of the parties or the legality of the use of force is not an issue that will determine the applicability of humanitarian law. Recognising that the UN is not a party to the Conventions, and given the nature of the Organization, it is accepted that the applicability of humanitarian law principles to the Organization would have to be *mutatis-mutandis*.<sup>140</sup>

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<sup>136</sup> Shagra and Zacklin, *Symposium, op. cit.* 39-48 at 39.

<sup>137</sup> Common Article 3, referred to as the mini convention, is contained in all four Geneva Conventions. It applies to armed conflict 'not of an international character'. See Pictet, *op. cit.*, 25-44. The ICJ has deemed that 'certain general and well recognised principles', including those contained in common article 3, reflect the 'elementary considerations of humanity', the *Corfu Channel Case*, 1949 I.C.J. 4 at 22.

<sup>138</sup> Both the ICRC and the International Conference of the Red Cross and Red Crescent on many occasions expressed their opinion on the applicability of international humanitarian law to peacekeeping forces, see U. Palwankar, *op. cit.*, 230-31

<sup>139</sup> Shagra and Zacklin, *Symposium, op. cit.*, 43

<sup>140</sup> Thus rules pertaining to prisoners of war of penal sanctions could not apply, whereas rules pertaining to methods and means of combat, categories of protected

When member states are authorised by the Security Council to intervene in an internal conflict such as Somalia, the basic character of the conflict remains internal.<sup>141</sup> However, the forces of the participating member states are carrying out an international mission on the basis of the UN resolution. In the relations between the 'UN forces' and the parties to the conflict, the rules applicable to international armed conflict must be applied. It is acknowledged that the application of the rules of humanitarian law in their entirety is problematic as this was intended for conflict between states.<sup>142</sup> Nevertheless, it would be denial of the clear international dimension of such missions if humanitarian law were to be restricted to common Article 3 or Protocol II to the Geneva Conventions.

It is apparent that the adoption of military measures under Chapter VI or VII of the Charter is likely to call for the application of humanitarian law under various profiles. Action against the illegal use of force in the past has involved the use of force by the UN or states acting on its behalf. Action of this nature *contra bellum* operates in situations where humanitarian law calls for the application of its *ius in bello* rules.<sup>143</sup> In regard to peacekeeping operations, it is commonly accepted that deployment in situations endangering peace or constituting a threat to international peace and security may also call for preventive measures involving the use of force. If and when conflict does break out and humanitarian law is applicable, it makes little sense to argue that UN forces on the ground in such a situation are not bound by these same principles.<sup>144</sup> Adherence to these principles will also assist in facilitating a restoration of the peace, a matter that is ultimately the goal of all UN forces.

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persons and respect for recognised signs, would be fully applicable. Statement by the ICRC at the 47<sup>th</sup> Session of the General Assembly on 13 November 1992.

<sup>141</sup> Pfanner, *op. cit.*, *Symposium*, 49-59 at 55.

<sup>142</sup> *Ibid.*

<sup>143</sup> Benvenuti, *op. cit.*, p. 85.

<sup>144</sup> Both the ICRC and the International Conference of the Red Cross and Red Crescent on many occasions expressed their opinion on the applicability of international humanitarian law to peacekeeping forces, see U. Palwankar, *op. cit.*, 230-31

## The 1994 Convention on the Safety of UN and Associated Personnel

In an effort to address some of the issues surrounding the protection of, and regulations governing UN forces, the 1994 Convention on the Safety of UN and Associated Personnel (the Convention) was adopted. The new Convention clarifies the protective duties of the receiving or host state, and this is a welcome initiative, but in the context of UN enforcement measures and humanitarian law, the Convention raises some interesting issues. The outcome, in terms of what has been achieved may in some ways be described as the proverbial camel created by a committee established to design a horse.<sup>145</sup>

Taking into account the Preamble, it is evident that the Convention was drafted owing to the concerns of contracting states and contributors to UN peacekeeping operations over the scale and frequency of attacks on peacekeeping forces. It acknowledges the contribution of UN personnel in the fields of preventive diplomacy, peace-making, peacekeeping, peace building and humanitarian and other operations. It is noteworthy that there is no specific mention of 'peace enforcement' operations. The importance of the fundamental features and traditional characteristics of peacekeeping operations is also emphasised. Also of importance in this context are the non-use of force except in self-defence and the policy of impartiality.<sup>146</sup> It is significant that the Convention contains a number of 'savings clauses' to the effect, *inter alia*, that nothing shall affect the applicability of humanitarian law and universally recognised standards of human rights to UN operations and personnel, or their responsibility to respect humanitarian law and standards.<sup>147</sup> One of the interesting features of this provision is that it merely states that the law is

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<sup>145</sup> See W. G. Sharp, 'Protecting the Avatars of International Peace and Security', 7 *Duke Journal of Comparative and International Law*, (1996), 93-183. Sharp is very critical of the Convention, and he suggest the adoption of a Geneva Protocol III instead. C. Greenwood replied to Sharp's article in 'Protection of Peacekeepers: The Legal Regime', 7 *Duke Journal of Comparative and International Law*, (1996), 185-207.

<sup>146</sup> Article 6 of the Convention calls on UN personnel to respect the laws of the host state and to refrain from any action or activity incompatible with the impartial and international nature of its duties. Article 20 and the Preamble emphasise the issue of consent, while Article 21 refers to the right to use force in self-defence.

<sup>147</sup> Article 20 (a) of the Convention.

applicable, but fails to outline the circumstances when and where this is so. Given the complexity of the issue, and the haste with which the Convention was drafted, this is not surprising.<sup>148</sup> It is unfortunate that an opportunity to clarify and even expand on this area was not availed of.

The Convention provides that UN personnel, including those involved in maintaining peace and security, or providing emergency humanitarian assistance, are protected from attack.<sup>149</sup> The negotiators realised that it was necessary to have a clear separation between the situation where the Convention would apply and that where humanitarian law is applicable, so that UN and associated personnel and those who attack them would be covered by one regime or the other, but not both.<sup>150</sup> An important reason for this was not to undermine the Geneva Conventions, which rely in part for their effectiveness on all forces being treated equally. If it became a crime to engage in combat with UN forces acting as combatants, this could have a dramatic impact on other parties willingness to adhere to accepted principles of humanitarian law.

Article 1 of the Convention is central to its applicability and scope. The text provides for a two-fold definition. The operation must be established by the competent organ of the UN in accordance with the Charter and under

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<sup>148</sup> It would seem that the Convention was adopted with undue haste. The Sixth Committee adopted draft resolution A/C.6/49/L.9 by consensus on 16 November 1994. Resolution 49/59 adopting the Convention and declaring it open for signature and ratification was adopted by the General Assembly by consensus on 9 December 1994. See generally P. Kirsch, 'The Convention on the Safety of UN and Associated Personnel', 2 (5) *International Peacekeeping* (Kluwer), (1995), 102-106.

<sup>149</sup> E. Bloom, 'Protecting Peacekeepers: The Convention on the Safety of UN and Associated Personnel', 89 *American Journal of International Law*, (1995), 621-631 at 623-624. In essence, it covers two types of personnel who carry out activities in support of the fulfilment of the mandate of a UN operation. In the first category are those directly engaged as part of a UN mandated operation whether in a military, police or civilian capacity. The second category covers 'associated personnel' i.e. persons assigned by the Secretary-General or an intergovernmental organization with the agreement of a competent organ of the UN. For example, NATO forces asked to assist UNPROFOR in Bosnia-Herzegovina, and US assistance under UNITAF in Somalia would fall within this element of the definition.

<sup>150</sup> *Ibid.* 625. However, Article 20(a) of the Convention, a 'savings clause', indicates that the special protective status given to non-combatant UN forces neither derogates from those provisions of humanitarian law that would protect such forces, nor removes the responsibility of non-combatant UN forces to respect the law.

UN authority and control. In addition, one of two further conditions must be met i.e.

(i) The operations must be for the purpose of maintaining or restoring international peace and security; or

(i) Where the Security Council or General Assembly has decided for the purposes of the Convention, that there exists an exceptional risk to the safety of the personnel participating in the operation.

This means that operations authorised, as opposed to mandated by the Security Council, but carried out under the command and control of one or more states are outside the scope of the Convention. The Convention also provides further evidence to substantiate the view already advanced that enforcement measures by the UN are subject to humanitarian law. In particular, Article 2, paragraph 2 of this Convention is entirely consistent with the aforementioned view and in defining the scope and application, establishes that it:

shall not apply to a UN operation *authorised by the Security Council as an enforcement action under Chapter VII* of the Charter of the UN in which any of the personnel are *engaged as combatants against organised armed forces* and to which the law of international armed conflict applies.<sup>151</sup> [italics added]

Having reached agreement on the principles involved, states with the advice of the ICRC, had to adopt criteria to determine which operations would be covered by the Conventions, and those that would not. Chapter VII operations are thus excluded from the scope of the Convention upon the fulfilment of this cumulative list of conditions.<sup>152</sup> Even if only part of the operation fulfils these conditions, then all of the UN elements participating in that operation will be excluded from its protection.

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<sup>151</sup> This should be read in conjunction with Article 1 (definitions) of the Convention.

<sup>152</sup> M. Christiane Bourloyannis-Vrailas, 'The Convention on the Safety of UN and Associated Personnel', 44 *International and Comparative Law Quarterly*, (July 1995), 560-590 at 567.

Initially the ICRC and some states had concerns regarding the reference to international armed conflict, but the wording of Article 2 (2) proved acceptable in the end because it was generally agreed that it was impossible for the UN to be involved in internal armed conflict. Once UN or associated personnel intervened or became engaged in a conflict with a local force (as opposed to acting merely in self-defence), the conflict became by definition 'international' in character.<sup>153</sup> Identifying if any of the personnel are engaged as combatants against organised armed forces and whether the operation is one to which humanitarian law applies is problematic. The formulation was designed to be consistent with Common Article 2 of the Geneva Conventions, and thus the point of analysis is whether the operation involves combat during an international armed conflict, which would trigger the application of Article 2 while excluding the application of the UN Convention.<sup>154</sup> This provision will prove difficult to interpret in practice, and the fact that there is no agreement on which provisions of humanitarian law apply to UN personnel and in what circumstances, will only add to the confusion. It can also be predicted that the UN and troop contributing states will be reluctant to recognise that the Convention has ceased to apply, and this may inflate the level of conflict required before acknowledging 'armed conflict' is taking place.<sup>155</sup>

Another interpretation is that humanitarian law would continue to apply to UN personnel when, in the conduct of a Chapter VII mandated operation, they are actively engaged in a combat mission, regardless of whether the armed conflict is international or internal in character. Humanitarian law would also be applicable in peace keeping operations, which however peaceful and consensual they may be in theory, can in practice give rise to situations where UN personnel can resort to the use of force in self-defence or to resist attempts to prevent them carrying out their mandate.<sup>156</sup> However, in most traditional

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<sup>153</sup> Kirsch, *op. cit.*, 105.

<sup>154</sup> Evan Bloom, *op. cit.*, 625.

<sup>155</sup> See C. Greenwood, 'Protection of Peacekeepers: The Legal Regime', *op. cit.*, at 200-202.

peacekeeping operations, situations where force is used in self-defence are short and could not be described as involving sustained periods of fighting. Incidents of this nature do not by themselves remove the protection offered by the Convention because the UN troops involved are not necessarily engaged as combatants.<sup>157</sup>

Under the Convention traditional peacekeeping forces enjoy a protected status similar to that of non-combatants. However, it does not purport to protect armed forces acting as combatants on behalf of the UN. Article 2, paragraph 2 applies to troops acting under Chapter VII, in particular Article 43 of the Charter, in furtherance of UN collective security provisions. It is submitted that what is also being referred to in this provision is enforcement operations conducted by third states as occurred in the Gulf conflict. These operations are authorised by the Security Council under the umbrella of Chapter VII, and they arise as a direct result of the failure of member states to conclude the necessary agreements for military forces under Article 43 of the Charter. The element of consent, which has hitherto been an important factor in distinguishing peacekeeping from enforcement operations, is absent. But the criterion of consent should be applied with some caution. Even in the case of UNIFIL, when deployed in 1978 with the consent of the Lebanese government, the authority of the government barely extended beyond west Beirut. Likewise, in the more recent case of Albania, the government there consented to the deployment of a 'coalition of the willing' under a Chapter VII enforcement mandate.<sup>158</sup> However, peace support operations, whether of the traditional peacekeeping or peace enforcement kind, can be distinguished from enforcement action as envisaged under collective security provisions of the UN Charter. When a situation is deemed to pose a threat to the peace, breach of the peace, or act of aggression, the legal groundwork is then laid for military and other action to compel a recalcitrant state to succumb to the will of the

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<sup>156</sup> Shagra and Zacklin, *Symposium*, 46-47. See R. Murphy 'UN Peacekeeping in Lebanon and the Use of Force', 6 (2) *International Peacekeeping* (F. Cass), (1999), 38-63.

<sup>157</sup> Bloom, *op. cit.*, 625.

<sup>158</sup> See D. Kritsiotis, *op. cit.*, 511-547.

international community. This may ultimately lead to combat by UN authorised forces against the armed forces of a non-complying party or parties. In this way, Article 1, paragraph 2 of the Convention provides additional evidence of the applicability of humanitarian law to UN enforcement operations of this nature.

The Convention effectively repeals the combatant's privilege: soldiers in the field who attack UN military personnel pursuant to the orders of their commanders are deemed to be committing a crime for which individual criminal responsibility is established.<sup>159</sup> It has been argued that in effect the Convention purports to change humanitarian law by criminalizing attacks on UN forces and modifying the combatant's privilege as it applies to such attacks, without a concomitant recognition that the UN is governed in such situations by specific norms of the same body of law.<sup>160</sup> This conclusion is flawed. Under humanitarian law, where only non-combatants are protected from attack, UN personnel acting as combatants, are both bound to apply these rules and to invoke their protection when appropriate. In this way the Convention and humanitarian law are mutually exclusive, the former regime applying to non-conflict situations, and the latter applying to any situation of sufficient degree of conflict.<sup>161</sup>

The exact scope and nature of UN operations covered by the Convention is a matter on which there is a divergence of opinion. Originally the Convention was to be limited to operations 'established pursuant to a mandate approved by a resolution of the Security Council'.<sup>162</sup> A broader material scope of application of the Convention was eventually agreed.<sup>163</sup> The

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<sup>159</sup> Article 9 of the Convention.

<sup>160</sup> R. D. Glick, 'Lip Service to the Laws of War: Humanitarian Law and UN Armed Forces', *17 Michigan Journal of International Law* 53, (1995), 53-107 at 81-96.

<sup>161</sup> Shagra and Zacklin, *Symposium, op. cit.*, 46

<sup>162</sup> Document A/AC.242/L.2, proposal by New Zealand and Ukraine, Article 1, paragraph 2. Civilian UN personnel were also unhappy with the original proposals, interview, Ambassador P. Kirsch, former chairman of the negotiations on the Convention, Galway, August 2000..

view that the Convention applies to most kinds of UN operations falling short of enforcement action itself is the dominant opinion, although the protection provided for there under might not extend to all stages and components of the military operation.<sup>164</sup> The confusion arises primarily from the different perspectives among countries as to the purpose of the Convention in the first place. Many were critical of the scope and expansion of the Security Council's activities in recent years, but were powerless to prevent it. They saw the approval of a Convention covering traditional peacekeepers as a means to curtail these activities. But arguing that it should apply to traditional peacekeeping operations only missed the point somewhat. It was precisely because of the Somalia type operations that pressure was brought to bear to deal with the legal deficiencies that existed in the international regime.<sup>165</sup>

The end result is still unsatisfactory in that the difficulty of distinguishing between peacekeeping and enforcement operations, while making provision for hybrid operations involving both, has not been properly taken into account. This crucial issue, like the question relating to the applicability of humanitarian law to UN operations, has been left unresolved by the Convention. It now seems generally accepted that the Convention applies to peace enforcement operations such as that established in Somalia. The problem is when and who determines that a confrontation between UN troops and others reaches the threshold that the participants may be regarded as combatants under Article 2 (2) of the Convention. Did Aided's forces in Somalia constitute 'organised forces' for the purposes of the Convention? These are not straightforward questions. Why is the Convention so replete with references to the characteristics of traditional peacekeeping duties, i.e.

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<sup>163</sup> For background see A. Bouvier, 'Convention on the Safety of UN and Associated Personnel', 309 *International Review of the Red Cross*, (1995), 638-666 (available at [www.icrc.org](http://www.icrc.org)).

<sup>164</sup> Shagra and Zacklin, *op. cit.*, *Symposium*, 46. Stephen Lepper, 'War Crimes and the Protection of Peacekeeping Forces', 28 *Akron Law Review*, (Spring, 1995), 411-415 at 415.

<sup>165</sup> Interview, Kirsch, *supra*. There was also concern among some states to avoid condoning the possible future presence of NGO's on their territory, and the issue of consent to the presence of UN forces in the first instance.

impartiality, host state consent, and non-use of force except in self-defence?<sup>166</sup> The answer can only be that the Convention is a poorly drafted and ill thought out document that was heavily influenced by political factors. As a compromise document, governments like that of Canada and Ireland may take some solace from the fact the troops serving with missions in Kosovo and Bosnia-Herzegovina are protected by the terms of the Convention. But how this will work in practice is anyone's guess, and it presents a potential nightmare for a prosecutor seeking to invoke the terms of the Convention.

There is also the issue of European and Western neo colonialism under the cloak of UN activity.<sup>167</sup> How will the Convention operate in a situation like Somalia when a major contributor to the UN force decides to target a clan or militia leader, and sometimes operates outside the UN command structure? The problem with accepting that peace enforcement operations come within its remit is that is it seeks to criminalize action by military forces against UN mandated or authorised peace enforcement operations. What happens when these operations are outside the formal framework of the organization, and come under the umbrella of traditional and reciprocal inter power relations to which humanitarian law of armed conflict naturally applies? During wartime combat operations, or hostile acts engaged in during an armed conflict, combatants do not commit crimes by killing or wounding the 'enemy' if this is carried out in a manner that does not conflict with the rules of humanitarian law.<sup>168</sup> It cannot be correct that military action at the behest of political or others leaders, which is otherwise in accordance with humanitarian law, could render the combatants concerned liable to prosecution

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<sup>166</sup> Benvenuti, *op. cit.*, 92

<sup>167</sup> Some states have reviewed their positions and expressed reservations about the Security Council's use of Chapter VII, see J. Ciecchanski, 'Enforcement Measures under Chapter VII of the UN Charter: UN Practice after the Cold War', and D. Daniel and B. Hayes, 'Securing Observance of UN Mandates Through the Employment of Military Force', in M. Pugh (ed.), *The UN, Peace and Force*, *op. cit.*, 82-104 at 97 and 105-125 at 106 respectively.

<sup>168</sup> Under the Geneva Conventions Relative to the Treatment of Prisoners of War of August 12, 1949, 75 U.N.T.S. 135 (Third Convention) prisoners of war, that is, captured enemy combatants cannot be prosecuted or punished for having fought in accordance the humanitarian law.

under the Convention. Such a scenario would place these forces in an invidious position, which it is submitted, is neither the intention nor the effect of the Convention.

Doubts have been expressed about the Convention's usefulness and the question was raised whether it did not rather belong to *ius ad bellum* - as it contains the prohibition to wage war at the UN - than to *ius in bello*.<sup>169</sup> The Convention does address what was a significant gap in international law. While humanitarian law governs the conduct of combatants, no international instrument prohibited or provided legal remedies for attacks upon traditional peacekeeping forces acting in that role.<sup>170</sup> This is no longer the case, and the new regime is welcome. However, the Convention does not have a significant impact on the humanitarian law implications of UN operations and its adoption marked a lost opportunity to clarify rather than obfuscate the question further. Nor is it clear from the Convention whether humanitarian law may be applicable when the Convention itself applies. It also avoids the thorny issue of the consequences if the procedure and/or the adoption of UN resolutions authorising or mandating certain kinds of peace enforcement operations are themselves in accordance the UN Charter and international law. It bears all the scars of the behind the scenes battles regarding the separate, but linked issue of the expanded powers of the Security Council.

### **Humanitarian Law and UN Forces in Lebanon and Somalia**

#### ***The predicament of UNIFIL***

UNIFIL in Lebanon is a traditional peacekeeping force based on consent of the parties and the non-use of force except in self-defence. Though part of the conflict in Lebanon may be classified as internal, the presence of, *inter alia*, Israeli and Syrian forces meant it could also be classified as international in character. The most obvious characteristic of peacekeeping forces that directly raises the question of applicability of humanitarian law is that the members are

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<sup>169</sup> See comments to this effect in the Notes on the Conference on 'The UN and International Humanitarian Law', Geneva, 119-20 October 1995, in Martin Meijer, 2 (6) *International Peacekeeping*, (Kluwer), (1995), 136-138 at 137; and C. Greenwood, 'The Relationship of *Ius ad Bellum* and *Ius in Bello*', *op. cit.*

<sup>170</sup> For the limited protection available under the Geneva Conventions and Additional Protocols, see fn. 137.

armed and permitted to use force, albeit in self-defence or to resist attempts to prevent the implementation of the mandate.<sup>171</sup>

At the time UNIFIL was being established, the President of the ICRC wrote to the Secretary-General and drew attention to the necessity of compliance with the Geneva Conventions by forces placed at the disposal of the UN.<sup>172</sup> Later, the Secretary-General wrote to the permanent representatives of troop contributing states. This letter pointed out that in situations where members of UNIFIL have to use weapons in self-defence, the principles and spirit of humanitarian law 'as contained, *inter alia*, in the Geneva Conventions ...[and] the Protocols of 8 June 1977...shall apply.' Troop contributing states were obliged to ensure that their troops fully understand the principles of humanitarian law. For its part, the UN undertook, 'through the chain of command, the task of supervising the effective compliance with the principles of humanitarian law by the contingents of its peacekeeping forces.'<sup>173</sup> But no system for monitoring humanitarian law training and ensuring compliance with relevant principles was ever put in place. Similarly, such training seemed to be conducted on an *ad hoc* basis, and did not always achieve the desired level of knowledge.<sup>174</sup>

The Israeli invasion and subsequent occupation of most of south Lebanon presented UNIFIL with a number of serious difficulties. It was never envisaged that the peacekeeping Force would find itself alongside non-Lebanese forces that were occupying the area UNIFIL was responsible for and supposed to control. In the circumstances, UNIFIL was unable to enforce its standing operating procedures or make any serious attempt to carry out its

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<sup>171</sup> Document S/12611, 19 March 1978 provides, *inter alia*,

'd. The Force will be provided with weapons of a self-defensive character. It shall not use force except in self-defence. Self-defence would include resistance to attempts by forceful means to prevent it from discharging its duties under the mandate....'

<sup>172</sup> U. Palwankar, *op. cit.*, 227-240 at 230.

<sup>173</sup> *Ibid.*, 232-233

<sup>174</sup> This conclusion was arrived at from a visit to UNIFIL in 1998, and discussions with a number of contingent commanders. See also the result of the survey of Irish forces at Appendix C, and *infra.*, 318-319.

mandate. Not surprisingly, UN officials used every means at their disposal to justify the continued presence of UNIFIL in such an adverse situation.

The legality of Israeli actions and policy in Lebanon under international law received little public attention up until the *Report of the International Commission* to enquire into reported violations of international law by Israel during its invasion of Lebanon.<sup>175</sup> The 1982 invasion and the subsequent policy pursued led to many complaints of grave and fundamental breaches of the international legal order. In the absence of an official UN investigating authority, it was considered essential to establish an independent international tribunal or commission to investigate these complaints and related issues.<sup>176</sup> The Commission dealt comprehensively with a wide range of matters arising from Israeli policy throughout Lebanon, and concluded that Israel had violated a number of international legal principles and conventions governing the laws of war.<sup>177</sup>

The question of the Israeli treatment of Lebanese civilians in the aftermath of their invasion and occupation in 1982 was first brought before the Security Council in 1984.<sup>178</sup> After the Lebanese Government introduced two draft resolutions to the Security Council calling on Israel to comply with the provisions of the Fourth Geneva Convention and the regulations annexed to the Hague Convention of 1907, UNIFIL was inadvertently presented with an opportunity to play a role in ensuring Israeli observance of these Conventions.<sup>179</sup> While the Security Council prevaricated over what to do about

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<sup>175</sup> *Israel in Lebanon*, Report of the International commission to enquire into reported violations of International Law by Israel during its invasion of the Lebanon, London: Ithaca Press, (1983). See also *Civilian Pawns – Laws of War Violations and the Use of Weapons on the Israeli-Lebanon Border*, New York: Human Rights Watch, (1996).

<sup>176</sup> *Ibid.*, preface xi – x. The Commission was comprised of Mr. Sean MacBride (Chairman), Prof. Richard Falk, Kadar Asmal, Dr. Brian Bercusson, Prof. G. de la Pradelle and Prof. Stefan Wild.

<sup>177</sup> *Ibid.* at 38, 65, 99, 103, 108, 121, 159-160, 187-197 and *passim*.

<sup>178</sup> Document S/16713, 24 August 1984, letter from representative of Lebanon to Council President. The Four Geneva Conventions of 1949 were ratified by Lebanon and Israel in 1951. Neither were party to the Additional 1977 Protocols.

the peacekeeping Force, the role of safeguarding the rights of a civilian population under occupation provided a reasonable solution to the problem in the short term. This policy was a reaction to events rather than a carefully planned response.

Since the invasion had undermined the whole *raison d'être* of the Force, adopting such a role provided UNIFIL with an interim solution to the total disregard of its authority by Israel. However, UNIFIL could do little to influence the major events taking place elsewhere in the country and unless it was prepared to intervene within its own area it risked being held responsible for Israeli actions there.<sup>180</sup> Faced with an impossible situation, UNIFIL did perform a worthwhile function in highlighting breaches of humanitarian law. More importantly, it ensured compliance with fundamental principles when it appeared that they would be disregarded. This aspect of UNIFIL's presence at the time should not be underestimated. Even those Lebanese who were often critical of its failure to carry out the mandate agreed that the Force played an important role during the period, but this presented particular difficulties for UNIFIL that deserve closer analysis.<sup>181</sup>

When Israeli forces adopted what became known as an 'iron fist' policy in and close to the UNIFIL area during 1984 to deter further attacks, this put UNIFIL in an impossible position.<sup>182</sup> In the changed situation, there was an

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<sup>179</sup> The Lebanese draft resolution called upon Israel as the Occupying Power, to respect strictly the rights of the civilian population in the area under its occupation and to comply strictly with the provisions of the Fourth Geneva Convention. The vote on the text (S/16732) was fourteen in favour, to one against (the USA), there were no abstentions. The draft resolution was not adopted due to the negative vote of the United States. See also S.C.O.R. 2552 Mtg., 29 August 1984 to 2556 Mtg., 4 September 1984.

<sup>180</sup> There were also grave risks for UNIFIL of being caught in crossfire or being deliberately targeted by parties to the conflict, see D. Turns, 'Some Reflections on the Conflict in Southern Lebanon: The "Qana Incident" and International Humanitarian Law', 5 *Journal of Conflict and Security Law*, (2000), 177-209.

<sup>181</sup> Personal experience of writer from discussions with Lebanese during 1989. This was particularly true when the Israeli forces came under intense pressure after their decision to re-deploy in 1985.

<sup>182</sup> It began in February 1984, and involved, *inter alia*, the deportation of Lebanese from their home villages, expulsions of local inhabitants, curfews, mass arrests, internment, transfer of suspects and the increased destruction of homes belonging to suspected resistance fighters. The policy was reportedly sanctioned by the

urgent need to define the policy UNIFIL should adopt and in response the Secretary-General issued the following statement,

. . . . a new situation has developed in southern Lebanon . . . UNIFIL is now stationed in an area where active resistance against IDF is in progress, and in which the latter is engaged in active countermeasures. UNIFIL, for obvious reason, has no right to impede Lebanese acts of resistance against the Occupying force, nor does it have the mandate or the means to prevent counter measures . . . It seems to me that the only course for UNIFIL is to maintain its presence and to continue within its limited means to carry out its existing functions in the area . . . <sup>183</sup>

This highlighted the dilemma facing UNIFIL as it had neither the means nor the authority to prevent resistance attacks against Israeli Forces and the subsequent counter measures by Israel. Questions such as how UNIFIL was to distinguish between Palestinian guerrillas and local resistance groups attempting to infiltrate by night through UNIFIL lines, were not clarified. UNIFIL was told to carry out its existing functions. Unfortunately, the Secretary-General did not elaborate upon this. In attempting to monitor the Israeli raids on villages, UNIFIL sometimes appeared to be in collusion with them. The sight of UNIFIL soldiers standing by Israeli soldiers led some to complain that UNIFIL was helping to carry out the raid.<sup>184</sup> The policy also meant UNIFIL avoided the potentially difficult issue of which, if any, resistance groups were entitled to recognition.

Notwithstanding the policy adopted, a number of confrontations did occur when UNIFIL denied passage through its checkpoints to unauthorised armed personnel. An incident in the Irish area in November 1985 demonstrated the anomalous and dangerous predicament in which UNIFIL found itself.<sup>185</sup> It

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Israeli Defence Minister and was likened to that used in the Gaza Strip in the early 1970's to curtail Palestinian unrest, see R. Fisk, *The Times*, 15 February and 21 February 1985. For a more extensive account by the same author in *Pity the Nation*, London: Andre Deutsch, (1990), 243 to 281 and *passim*.

<sup>183</sup> UN Document S/17093, 11 April 1985, para. 24.

<sup>184</sup> The leader of Amal, Mr. Nabbi Berri, accused UNIFIL of helping the Israelis on occasions, *The Irish Times*, 23 January 1985. Other groups made similar accusations, *The Times*, 22 February 1985.

<sup>185</sup> *Document S/17684*, 16 December 1985, Para 7. A confrontation developed when Irish personnel apprehended four armed personnel. A UNIFIL patrol dispatched to the scene was intercepted and detained by armed elements. Other Irish positions

showed how easily armed elements could mobilise and deploy, and the vulnerability of UNIFIL personnel when attempting to carry out the mandate. It could be argued that the armed elements should have been allowed total freedom of movement. This was consistent with the Secretary-General's policy statement, but UNIFIL did have to draw the line somewhere. If it allowed unauthorised Lebanese armed elements complete freedom of movement, it would have relinquished the last vestiges of authority and control that it possessed in the area. As it was, the policy of co-operating with Amal allowed its members considerable scope in the area.

The situation deteriorated as the Israeli Defence Forces redeployed and in certain instances clashes did occur between the Israeli forces and UNIFIL troops. The French battalion in particular adopted a more forceful stance than many of the other UNIFIL contingents.<sup>186</sup> Irish UNIFIL troops also clashed with the Israelis, especially during raids on the Shiite village of Yatar.<sup>187</sup> For the most part there was not much that UNIFIL could do. Its policy of monitoring and reporting did little to instil confidence in UNIFIL among the population, who accused it of being 'both the observer and protector of the [Israeli] invasion army'.<sup>188</sup> UNIFIL policy appeared to to be accomplishing

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were quickly surrounded by armed elements and UNIFIL reinforcements fired on. Fire was returned and the situation was later resolved by negotiations with senior AMAL personnel.

<sup>186</sup> In one incident they became involved in a fist fight with the Israelis when trying to prevent the latter blowing up houses. They were also reported to have laid the French Tricolour at the entrance to another village and threatened to shoot the first Israeli to drive over it. The Israelis are reported to have retreated. R. Fisk, *The Times*, 28 February 1985.

<sup>187</sup> In the first joint Israeli/'South Lebanon Army' operation, during which the latter forces played the leading role, an attempt to forcefully evict the Irish troops from their post there was successfully resisted. See R. Fisk, *The Irish Times*, 8 March 1985. The report was confirmed by Comdt. B. McKevitt who was serving with 56 Inf Bn at the time. The Israelis used the South Lebanese Army to extend the 'Security zone' and push the Irish back from certain posts in their way. The Irish refused to move from posts, such as 'Charlies Mountain'(Al Yatun) despite Israeli demands that they do so, *The Irish Times* 21, 22 March 1985 and 1 April 1985 and *The Guardian*, 21 March 1985.

<sup>188</sup> Personal interview, senior Irish officer who served with UNIFIL at the time, Dublin, June 1998.

little and it led to allegations of collusion with the Israelis.<sup>189</sup> This was despite the fact that many UNIFIL personnel sent to monitor Israeli operations often placed themselves in personal danger in attempting to mitigate the excessive behaviour of the Israelis and their allies. UNIFIL was being placed in a 'no-win' situation. It was not surprising that soon after the 'iron fist' policy began, a serious threat was made against UNIFIL by one of the resistance groups.<sup>190</sup> In such circumstances, it was difficult to determine whether UNIFIL was accomplishing sufficient to justify remaining in south Lebanon. Its role and function was very unclear, while its overall predicament was unsatisfactory. In fact, during 1985 and 1986 the reports to the Security Council were very pessimistic and there seemed little hope of improving the situation. Despite this, the Secretary-General continued to recommend extensions of the mandate.

The anomalous position of UNIFIL was evident during a serious incident in February 1986 when Israeli and 'South Lebanon Army' personnel were ambushed near the village of Kunin in the 'security zone'.<sup>191</sup> Two Israeli soldiers were abducted and this led to a large Israeli force carrying out a series of cordon and search operation during which UNIFIL monitored the situation as closely as possible and tried to prevent acts of violence against the local population.<sup>192</sup> In so doing they put themselves at risk, especially in dealing with the 'South Lebanon Army'. The Secretary-General's report of the incident states that UNIFIL personnel observed some cases of what appeared to be unacceptable treatment of prisoners by IDF/SLA personnel. The UNIFIL reports of the incidents were transmitted immediately to the Israeli authorities and their comments invited.<sup>193</sup>

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<sup>189</sup> R. Fisk, *The Times*, 22 February 1985.

<sup>190</sup> *Ibid.*, the threat was made by the Shia Muslim Organization Hizbollah.

<sup>191</sup> Document S/17965, 9 April 1986, para 21.

<sup>192</sup> UNIFIL reported that six persons, including one Israeli soldier, were killed in the operation, ten more wounded and about one hundred and fifty others were taken prisoner by the Israeli 'South Lebanon Army' forces. Eighty of the detained were released soon afterwards, however, the other sixty were held indefinitely.

<sup>193</sup> *Ibid.* Israel claimed that its forces had received clear instructions on how to behave towards the local civilian population before and during the operation, and that follow up investigations of all Israeli army units involved had found no deviation from these instructions

The operation led to a number of complaints being made by local civilians regarding the treatment they received.<sup>194</sup> The most serious of these was that the Israeli forces attempted to expel all the locals from the village of Kunin in retaliation,<sup>195</sup> and that Israeli actions violated a number of provisions of the Fourth Geneva Convention.<sup>196</sup>

While Israeli anger at what took place is understandable, it did not justify the response.<sup>197</sup> The attempt to expel all the Shiite residents of Kunin could not be justified on military or security grounds.<sup>198</sup> The large numbers of civilians detained indicated the follow up operation was a retaliation that was intended to coerce information from those detained.<sup>199</sup> The ambush afforded

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<sup>194</sup> Personal interview with senior Lebanese Red Cross official, 19 September 1989 and local civilians from villages affected September/October 1989. The Secretary-General's report states that following the incident an Israeli force of about three mechanized battalions accompanied by members of SLA and supported by tanks and helicopter troop carriers and gun ships carried out a series of cordon and search operations in the UNFIIIL area from 17 to 22 February. S/17965, *op. cit.*, para 21.

<sup>195</sup> *Ibid* and personal interview Mr. T. Goksel, *op. cit.*

<sup>196</sup> Article 33 provides that no protected person may be punished for an offence he or she has not personally committed. See Pictet, *op. cit.*, 224-229, Roberts and Guelff, *op. cit.*, 312-313 and G. Schwarzenberger, *International Law, Vol. II, The Law of Armed Conflict*, London: Stevens, (1968), 223-224. Collective penalties, and likewise all measures of intimidation or of terrorism, are prohibited, including reprisals against such persons or their property. Article 31 forbids any physical or morale coercion against protected persons to obtain information, see Pictet, *op. cit.*, 219-220.

<sup>197</sup> Those detained were blindfolded and had their hands tied behind their backs. Many of the suspects were beaten. Personal interviews with UNIFIL officers who witnessed such events at the time. For an account of Israeli Defence Forces actions in Lebanon see D. Yermiya, *My War Diary – Israel in Lebanon*, London: Pluto Press, (1983). The pamphlet, *Operation Iron Fist-Israeli Policy in Lebanon*, published by the League of Arab States, London: (May 1985), gives a somewhat bias chronology of events.

<sup>198</sup> Article 49 of the Geneva Convention IV states in para 2 that '...the Occupying Power may undertake total or partial evacuation if the security of the population or imperative military reasons so demand...' Neither justification was applicable in this instance, see Oppenheim, *op. cit.*, 452, J. Stone, *Legal Controls of International Conflict*, Sydney: Maitland Publications (1958), 704-705 and Pictet, *op. cit.*, 277-283.

<sup>199</sup> At the time of the ambush the Israeli forces and the 'South Lebanon Army' were considering establishing a 'sanitised zone' in the area immediately behind the so-called security zone. Personal interviews, senior Irish officer with UNIFIL at the time, Dublin 1986, and T. Goksel, *op. cit.*

the opportunity to implement the proposed 'sanitised zone' policy in Kunin. There was a similar threat to other villages in the UN area but UNIFIL's interventions prevented this going ahead. For this reason, the peacekeeping Force can take at least some credit for protecting the civilian population in the area.<sup>200</sup>

The Israelis faced a dilemma in south Lebanon. Their tactics alienated the population and meant international condemnation. However, they were still apparently unable to defeat the resistance groups and Israelis themselves began to question whether the tactics adopted were compatible with the so-called 'purity of arms' doctrine.<sup>201</sup> In fact, the policy was so evidently self-defeating that it was difficult to discern any coherent long-term goal. Many of the Shiite villages that suffered most during this period were strongly opposed to the Palestinian presence prior to the invasion. Now their hatred switched to the Israelis. Attempts to have the 'South Lebanon Army' adopt a more prominent role only made matters worse. Figures compiled by the UN in 1985 indicated that the 'iron fist' policy failed.<sup>202</sup> The daily attacks on Israeli soldiers increased considerably. In one well-publicised suicide attack by a Shiite resistance fighter in March, twelve Israeli soldiers were killed.<sup>203</sup> It was the eighth attack of its kind. The Israeli response was predictable. A major operation was launched against a number of villages that left at least thirty-two dead.<sup>204</sup> Throughout 1985, numerous cordon and search operations were

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<sup>200</sup> Israeli tactics led to widespread and unnecessary damage being caused to the property and personal belongings of villagers, contrary to Article 53 of the Fourth Geneva Convention, *S/17965, op. cit.* paras. 13-15 and interviews with local inhabitants living in the areas searched at the time, July to October 1989. When the Israeli troops were assisted or followed by the *de facto forces* the damage caused to property was much worse and the operation frequently turned into one of terrorising and ill treating villagers. The 'South Lebanon Army' also engaged in looting and harassment of UNIFIL troops. The Israeli troops made no attempt to restrain them from the excesses despite their responsibility under Article 29 and Section III of the Geneva Convention IV respectively.

<sup>201</sup> The doctrine is known as Tohar Haneshek and penetrates all aspects of Israeli Defence Forces life, see K.A. Gabriel, *Operation Peace for Galilee*. The Israeli PLO war in Lebanon, Toronto: Collins, (1985), paras. 171-176.

<sup>202</sup> *The Times*, 21 March 1985.

<sup>203</sup> *The Irish Times*, 11 March 1985.

<sup>204</sup> *The Irish Times*, 12 March 1985.

carried out. The *de facto* forces also frequently shelled villages, particularly in the Irish area.<sup>205</sup> During this period, the Israelis continued their efforts to impose the 'South Lebanon Army' on the people of the south while dangerous confrontations ensued when UNIFIL tried to curtail the activities of this militia.<sup>206</sup>

The maintenance of the security zone effectively precluded UNIFIL from carrying out patrols in the battalion sectors for fear of being mistaken for resistance fighters by the 'South Lebanon Army'.<sup>207</sup> Many vulnerable checkpoints and observation posts were closed, and consequently the effectiveness of the Force was diminished considerably. There was criticism of the manner in which Irish soldiers fulfilled their peacekeeping role and there was a number of controversial incidents in the Irish sector.<sup>208</sup> The abduction of local resistance leaders from the Irish area of operations in December 1988 was particularly serious. It seemed to some that the Irish had colluded in the affair, and the next day a checkpoint was overrun and three Irish soldiers kidnapped by armed elements. With the help of Amal, the soldiers were found alive and well.<sup>209</sup> The whole affair highlighted a number of weaknesses in the UNIFIL and Irish performance in Lebanon.<sup>210</sup> Why were the Israelis able to enter the area in daylight and abduct civilians? What was UNIFIL's function if it could not or would not prevent such abductions? In March 1989, the resistance

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<sup>205</sup> Personal interview, Capt. G. Humphreys, *op. cit.*

<sup>206</sup> Document S/17684, 16 December 1985, paras. 2-7. The Norwegian battalion had particular difficulty with these groups when restrictions were imposed on the movement of UNIFIL personnel.

<sup>207</sup> *Ibid.*

<sup>208</sup> See for example the comments in the *International Defence Review*, 11/1988, 1434.

<sup>209</sup> See Secretary-General's report S/20416, 24 January 1989. An extremist group intended to take the soldiers to Beirut.

<sup>210</sup> It was even said that 'Irish soldiers now see their prime task as staying alive until the end of their period of duty'. This is hardly surprising given the relatively high number of Irish casualties in Lebanon to date and the lack of co-operation from the parties to the conflict.

movement exacted its revenge for the perceived collusion when three Irish soldiers were targeted and killed by a land mine.<sup>211</sup>

The most serious aspect for UNIFIL as a whole was its reliance upon the Amal movement to resolve the affair.<sup>212</sup> While there were some serious confrontations with Amal since the Israeli redeployment, in general, UNIFIL's relations with the Movement improved gradually and in due course the level of co-operation amounted to an unofficial alliance.<sup>213</sup> There was no effective Government authority in the south and Amal was the closest thing to some form of authority. In any event, there were rival Governments in Beirut for a prolonged period and Amal's leader had been Minister for the south.<sup>214</sup> The Movement also had considerable influence and support in the area and was pro-UNIFIL.<sup>215</sup> The alternative was Hizbollah, which did not support the Force's presence in Lebanon. Nonetheless, the level of co-operation between UNIFIL and Amal risked comprising the Force's impartiality. This was one of the most serious threats to UNIFIL's delicately balanced impartiality and general acceptability in the area.

### Summary

The consequences for UNIFIL of Israeli policy were very grave. The UN response was a reaction to events rather than a carefully planned policy. The focus of attention on Israeli violations of the Fourth Geneva Convention marked a change in emphasis, up until then little attention was paid to Israeli violations of international law in Lebanon. The degree of control exercised by Israel before and after the 1985 redeployment was sufficient to justify the UN decision to treat the Israeli forces as an Occupying Power under international law and this in turn determined the nature of UNIFIL's response. But there is

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<sup>211</sup> This conclusion is based on conversations with local resistance fighters during 1989, see also H. McDonald, *IRISHBATT –The Story of Ireland's Blue Berets in the Lebanon*, Dublin: Gill and Macmillan, (1993), 116-117.

<sup>212</sup> This was just one of many occasions UNIFIL had turned to Amal for assistance. Personal interview, senior UNIFIL officer, *op. cit.*.

<sup>213</sup> *Ibid.*

<sup>214</sup> *Ibid.*

<sup>215</sup> Personal interviews, Comdt. M. Hanrahan and Capt. J. Walsh, Military Information Officers with UNIFIL, Lebanon, August 1989.

no escaping the fact that UNIFIL policy regarding the Occupying Power and the indigenous resistance movements was inconsistent with its original mandate and terms of reference.<sup>216</sup> In granting the Israelis the rights and privileges of an Occupying Power, while at the same time deliberately avoiding impeding acts of resistance, the peacekeeping Force made no progress whatsoever in confirming the Israeli withdrawal or bringing about a cessation of hostilities. Nonetheless, the performance of humanitarian tasks as an interim measure was a worthwhile attempt to ease the plight of the local population and maintain goodwill towards UNIFIL. It also undermined those within Lebanon that sought to discredit the Force as a 'tool of American imperialism'.<sup>217</sup> However, it did not justify a six thousand strong peacekeeping Force remaining in what was effectively occupied territory, when it was unable to perform any of its original tasks laid down by the Security Council. Whether UNIFIL would have achieved as much or even more by withdrawing at the time will never be known.<sup>218</sup> In the long term, another peacekeeping force could have been deployed under a more realistic mandate in circumstances more conducive to the conduct of peacekeeping.

The presence of UNIFIL rendered the Israeli occupation of south Lebanon unique and less harsh than otherwise would have been the case.<sup>219</sup> UNIFIL gave the local population support and protection by intervening to prevent, by non-violent means, the demolition of public and private property and the ill treatment of civilians.<sup>220</sup> A major achievement during the period was the ability to hinder the Israeli consolidation of its occupation of Lebanon.

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<sup>216</sup> According to Resolution 425 (1978), UNIFIL was supposed to confirm the Israeli withdrawal, bring about a cessation of hostilities, and restore international peace and security. See UN Document S/12611, *op cit*.

<sup>217</sup> The accusation was made by Hizbollah leaders.

<sup>218</sup> The Government of the Netherlands obviously thought so when they unilaterally withdrew their contingent, *The Irish Times*, 9 October 1985.

<sup>219</sup> M. Heiberg, 'Observations on UN Peacekeeping in Lebanon', *Norwegian Institute of International Affairs*, NUPI NOTAT No.305, (September 1984), 30.

<sup>220</sup> Personal interview, Capt. G. Humphreys (Ret'd), former UNIFIL HQ Information Officer at the time, Dublin, 1999.

Some commentators were critical of the policy of treating the Israeli forces as an Occupying Power, owing to the presence of UNIFIL as the legitimate military power in its area of operation.<sup>221</sup> However, UNIFIL was not an instrument of the Lebanese Government or a replacement for the Lebanese Army. It is true that there was a lack of consistency among the different UNIFIL battalions in their policy towards the Israeli forces and the 'South Lebanon Army'.<sup>222</sup> The peacekeeping Force had no option but to accept the reality of its predicament, 'without the mandate or firepower to do more, UNIFIL found itself in the unenviable position of watching the rockets and shells fire back and forth overhead, while on occasion falling victim to direct hits itself'.<sup>223</sup> The real shame is that the Security Council did nothing to change this, and that UN forces were sidelined to fulfil a role essentially as witnesses and protestors to violations of humanitarian law. The recent *Brahimi Report* stated that 'UN peacekeepers - troops or police - who witness violence against civilians should be presumed to be authorised to stop it, within their means'.<sup>224</sup> But this requires a mandate for civilian protection, and the resources to carry out this role. Experience to date, in Lebanon and elsewhere, does not augur well for such developments in the near future.

### ***Somalia***

The Somalia situation, on the other hand, shows the limitations and difficulties of attempts at too rigid an adherence to categories of UN military operations. In the first place the Security Council deployed a traditional peacekeeping force in an internal conflict situation, and then found that the situation was beyond

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<sup>221</sup> *Ibid.* 33 and M. Heiberg and J.J. Holst, 'Keeping the Peace in Lebanon: Assessing International and Multinational Peacekeeping', *Norwegian Institute of International Affairs*, NUPI NOTAT No.357, (June 1986), 13-14. See also M. Heiberg and J.J. Holst, 'Peacekeeping in Lebanon – Comparing UNIFIL and the MNF', *Norwegian Institute of International Affairs*, (1986), 406. It was submitted that since UNIFIL continued to operate as a legitimate military authority, inside the area of operation, the IDF did not exert exclusive control and therefore should not have been regarded as an Occupying Power. See also by the same authors 'Keeping the Peace in Lebanon: Assessing International and Multinational Peacekeeping'.

<sup>222</sup> *Ibid.* This led to claims that some UNIFIL battalions were passive and others more aggressive in their interpretation of UNIFIL Standing Operating Procedures.

<sup>223</sup> Human Rights Watch, *Civilian Pawns*, *op. cit.*, 35.

the traditional approaches. Later, the Security Council authorised member states, under the leadership of the United States, to intervene in the internal affairs of Somalia. But the forces of the participating member states were acting under the mandate of the Security Council and carrying out a mission on behalf of the international community.

In order to understand and apply the rules, the participant must first know what the rules are, but in the theatre of military operations, the rules depend on the level of conflict as this 'dictates the nature of the law applicable...either the internal law of the state or international humanitarian law'.<sup>225</sup> But the situation in Somalia was unclear in many ways, despite the level of hostilities, the reported body count, and the armed confrontations and shooting, it remained uncertain which if any of the laws of war applied.<sup>226</sup> This led at least one commentator to claim that applying the Geneva Conventions and Additional Protocols to the situation in Somalia merely demonstrates the inadequacies in the current international legal regime to meet the complexities presented by peacekeeping operations.<sup>227</sup>

In the complex humanitarian emergency that was Somalia, UN forces intervened with an ill-defined mission that contained conflicting and unrealistic objectives.<sup>228</sup> It is not surprising then that there is confusion regarding applicable legal norms, especially when those norms themselves may also be ill defined.<sup>229</sup> Somalia shifted from a traditional peacekeeping mission to one of the most robust peace enforcement missions of recent times. There seemed to be little attention paid to the political and legal consequences of this escalation, and it provided a stark example of UN military forces operating in the twilight zone between peace and armed conflict or war. In the intervening no mans

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<sup>224</sup> *Brahimi Report, op. cit.*, Executive Summary, page 3 of 6.

<sup>225</sup> R. Kiwanuka, 'Humanitarian Norms and Internal Strife: Problems and Prospects', in F. Karlhoven and Y. Sandoz (eds), *Implementation of International Humanitarian Law*, Dordrecht & London: Nijhoff, (1989), 229-234..

<sup>226</sup> Turley, *op. cit.*, 140.

<sup>227</sup> Turley, *op. cit.*, 156

<sup>228</sup> See Chapter 6.

<sup>229</sup> Turley, *op. cit.*, 153.

land, '[a] clear demarcation between a state of war and a state of peace no longer exists, if it ever did'.<sup>230</sup> Determining what, if any, international law applies in these circumstances is a difficult task. Nevertheless, in the relations between UNITAF forces and the parties to the conflict, it is submitted that the rules of humanitarian were applicable.<sup>231</sup> To accept anything less would be to adopt a minimalist view that denied the clear international character of the mission.

A military court in *R. v. Brocklebank* considered the matter of the applicability of humanitarian law to Canadian forces in Somalia.<sup>232</sup> This case arose from incidents that occurred in the course of the Canadian participation in the UNITAF mission during March 1993.<sup>233</sup> These events ultimately led to a military Board of Inquiry, several Courts Martial and appeals, and most importantly, to the establishment of a civilian *Commission of Enquiry into the Deployment of Canadian Forces to Somalia* ('the Commission'). Although the Commission discussed the issue and specifically the applicability of the Geneva Conventions and Protocols, it did not reach any firm conclusion in this regard. This is unfortunate, but it is also preferable to making decisions on matters that it may not have felt competent or able to decide in the circumstances.

The problem of determining the applicable international law to peace support operations was not unique to UNIFIL or UNOSOM II, and the issue also arose for consideration in the court martial of a United States army officer,

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<sup>230</sup> P. Zengel, 'Assassination and the Law of Armed Conflict', *43 Mercer Law Review*, 615, at 644, 1992.

<sup>231</sup> Pfanner, *op. cit.*, *Symposium*, 55.

<sup>232</sup> Court Martial Appeal Court of Canada, (1996) 134 DLR (4 th) 377. Pte. Brocklebank was arrested for aiding and abetting the torture of Shidane Arone, a Somali teenager who entered the Canadian Forces compound and was tortured and beaten to death while in custody. See K. Boustany, 'Brocklebank: A Questionable Decision of the Court Martial Appeal Court of Canada', *1 Yearbook of International Humanitarian Law*, *op. cit.*, 371-374 and J. Holland, 'Canadian Courts Martial resulting from participation in the UNITAF Mission in Somalia', *1(4)International Peacekeeping* (Kluwer), (1994), 131-132.

<sup>233</sup> For background on UNITAF and Somalia, see Chapter 8 and *Commission of Enquiry* (fn. 5), vol. 1, pp. 351-363. See also R.M.Young and M. Molina, 'IHL and Peace Operations: Sharing Canada's lessons learned from Somalia', *1Yearbook of International Humanitarian Law*, *op. cit.*, 362-370 at 370.

Captain Lawrence P. Rockwood, as a result of action taken while on duty with the United States led Multinational Force in Haiti.<sup>234</sup> Captain Rockwood was convicted of felony charges arising from his unauthorised human rights inspection of Haiti's National Penitentiary in September 1994.<sup>235</sup> In this case the military trial judge ultimately refused to instruct the court-martial of the applicability of international law, telling the members of the court that they should bear in mind that the expert witnesses could not agree on the parameters of international law applicable to the case.<sup>236</sup> The outcome of this case supports the notion that peacekeepers have a limited remit i.e. it emphasises the preservation of peace to the detriment of a potential role in the protection of the local population. However, peacekeeping also involves positive duties on behalf of the military personnel involved. This is where humanitarian law has a role to play. But in order to be useful in a military culture, the responsibilities of the military must be spelt out in clear and concise terms, preferably in the mandate. In this regard, the adoption of the role of Protecting Power by traditional peacekeepers is one option that could be examined.<sup>237</sup> However, it is not appropriate for peace enforcement operations, as the requisite neutrality would not exist in the case of peace enforcement forces.

The decision in *Brocklebank* concerned, *inter alia*, the applicability to the case of the Unit Guide to the Geneva Conventions, which imposed on members of Canadian forces *at all times* a duty to safeguard civilians in Canadian Forces custody, whether or not these civilians are in that member's custody.<sup>238</sup> The Court took the view that as there was no declared war or armed conflict in Somalia, and as the Canadian Forces deployed as part of the

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<sup>234</sup> *United States v Captain L. P. Rockwood II*, (1998) 48 MJ 501.

<sup>235</sup> The case is discussed in detail in Weiner and Ni Aolain, *op. cit.*, 293-354.

<sup>236</sup> *Ibid.* 305.

<sup>237</sup> *Ibid.* 331-333 and *passim*. A Protecting Power was anticipated in the Geneva Conventions as a state that is neutral party to a conflict, instructed by the belligerent parties to protect the interests of warring states' nationals, 'protected persons' and those detained in an armed conflict. See Article 8 common to Geneva Convention I, II and III.

<sup>238</sup> See fn. 232.

UNITAF mission were performing peacekeeping duties, they were not engaged in an armed conflict. In the circumstances, the Court held that Private Brocklebank had no legal obligation to ensure the safety of the prisoner because neither the Geneva Conventions nor Additional Protocol II applied to Canadian Forces in Somalia. Furthermore, neither the Conventions nor Protocols applied to a peacekeeping operation.

This analysis seems to have been flawed in a number of respects. In the first place the judgement mentioned in several places that the mission of the Canadian Forces at the time was a 'peacekeeping mission'. This was not the case, as the UNITAF mission had been authorised by the Security Council under Chapter VII in circumstances that indicated the peacekeeping mission of UNOSOM I was being replaced by a peace enforcement authorised operation comprising a coalition of nations.<sup>239</sup> It is also worth noting that Security Council Resolution 794 (1992) establishing UNITAF also condemned vigorously all violations of humanitarian law committed in Somalia.<sup>240</sup> This was a clear recognition by the Security Council that the conflict in Somalia was of sufficient degree and intensity to trigger the application of humanitarian law. Despite this, Decary J.A. for the majority found that there was no evidence there was an armed conflict. The Court does not appear to have heard any evidence of the level of killings among the armed factions, and the casualties among other contingents of UNITAF. Cognisance does not appear to have been taken of the reports of the Secretary-General to the Security Council on the situation in Somalia up to and during this period. The judgement also seems to have put too much emphasis on the need for a certificate from the Secretary of State for External Affairs stating that at a certain time a state of war or international or non-international armed conflict existed.<sup>241</sup> Not surprisingly, the *Brocklebank* decision has been questioned, most notably in the Simpson Study, which made a strong case that the decision of the Court

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<sup>239</sup> *Supra.* Cpt. 7.

<sup>240</sup> Adopted 3 December 1992.

<sup>241</sup> Pursuant to Section 9 of the *Geneva Conventions Act* of 1956. See Simpson Study, *op. cit.*, 26-28.

appears, a least partly, to have been based on the wrong provisions of the Fourth Geneva Convention and Protocols.<sup>242</sup>

The difficulty surrounding this issue was evident in the inconclusive findings of the Commission and the diverse views of other commentators.<sup>243</sup> It is worth noting that a Belgian Military Court, acting as the Court of Appeals also came to the view that the four Geneva Conventions of 1949 and two Additional Protocols of 1977 were not applicable to the armed conflict in Somalia.<sup>244</sup> In addition, members of UNOSOM II could not be considered 'combatants' since their primary task was not to fight any of the factions, nor could they be said to be an 'occupying force'. An Italian Commission of Inquiry into events in Somalia also had difficulty grappling with this issue, and it failed to make any legal evaluation of the facts, especially from the perspective of humanitarian law.<sup>245</sup>

Another view proffered is that the situation in Somalia was not an international or non-international armed conflict within the established treaties.<sup>246</sup> However, some of the relevant international instruments contained a

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<sup>242</sup> Simpson Study, *op. cit.*, 30-33. The CMAC may have failed to properly consider the relevance of Article 4 and 27 of the Fourth Geneva Convention. The Canadian Forces may arguably have been a party to the conflict or occupying part of Somalia within the meaning of the Fourth Convention. If so, this would create a group of 'protected persons' that the court failed to recognise. The decision was also questioned by K. Boustany, *op. cit.*, at 371 and R.M. Young and M. Molina, *op. cit.*, at 365-367.

<sup>243</sup> Although the Commission avoided reaching a firm conclusion a number of senior members of the Canadian Forces testified at the Commission's hearings that they thought the law of armed conflict applied in Somalia, *Simpson Study, op. cit.*, 27 and *Commission of Enquiry, op. cit.*

<sup>244</sup> Judgement of the Belgian Military Court regarding violations of IHL committed in Somalia and Rwanda, Nr. 54 A.R. 1997, 20 November 1997. Published in *Journal des tribunaux*, 24 April/Avril 1998, 286-289 (French language), and Comment by M. Cogen, 1 *Yearbook of International Humanitarian Law, op. cit.*, 415-416.

<sup>245</sup> See N. Lupi, 'Report by the Enquiry Commission on the Behaviour of Italian Peacekeeping Troops in Somalia', 1 *Yearbook of International Humanitarian Law, op. cit.*, 375-379.

<sup>246</sup> D. Hurley, 'An Application of the Laws of Armed Conflict', in Smith (ed) *The Force of Law: International Law and the Land Commander*, Canberra: Australian Defence Studies Centre/Australian Defence Forces Academy, (1994), 179-187 at 182. Col. Hurley commanded the 1 Royal Australian Regiment in Somalia.

substitute principle, the Martens Clause, which holds that in cases not explicitly covered by treaty law, civilian persons and combatants remain under the protection and authority of the principles of international law.<sup>247</sup> Arguments have also been put forward as to why the provisions of the Hague Rules, the Fourth Geneva Convention, and customary rules concerning an 'occupying power', could have applied in Somalia.<sup>248</sup> The policy of the United States is also illuminating, in that while applying the provisions of common Article 3, it made it clear that it did not consider the Fourth Geneva Convention applied during the UNITAF deployment.<sup>249</sup> Despite the outcome of the *Brocklebank* decision<sup>250</sup>, and whatever the category or qualification given to the situation in Somalia, it is difficult not to conclude that Private Brocklebank failed a duty incumbent upon any soldier in the circumstances. There can be no grey areas when confronted with such blatant human rights abuses. Cognisance should have been taken of the Martens Clause as it imposes at all times the minimal, but overriding obligation to act in accordance with the laws of humanity and the dictates of public conscience.<sup>251</sup> No relativity such as that suggested by the majority decision of the Court should be allowed in this regard.

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<sup>247</sup> T. Meron, 'The Martens Clause, Principles of Humanity, and Dictates of Public Conscience', 94 *American Journal of International Law*, (2000), 78-89; A. Cassese, 'The Martens Clause: Half a Loaf or Simply Pie in the Sky?', 11(1) *European Journal of International Law*, (2000), 187-286 and R. Abi-Saab, 'Humanitarian Law and Internal Conflicts: The Evolution of Legal Concern', in A. Delissen and G. Tanja, (eds.), *Humanitarian Law of Armed Conflict*, Dordrecht: Martinus Nijhoff, (1991), 222.

<sup>248</sup> M. J. Kelly, *Restoring and Maintaining Order in Complex Peace Operations*, The Hague: Kluwer, (1999), esp. 111-182, and by the same author, 'Legal Regimes and Law Enforcement on Peace Operations', in Smith, *op. cit.*, 189-204 at 193. For reasons why the term 'belligerent' occupation was inappropriate for UNOSOM forces in Somalia, see P. Rowe, 'Maintaining Discipline in UN Peace Support Operations: The Legal Quagmire for Military Contingents', *op. cit.*, esp. 55-56. See also C. Greenwood, 'The Administration of Occupied Territories in International Law' in E. Playfair (ed.), *International Law and the Administration of Occupied Territories*, Oxford: Oxford University Press, (1992).

<sup>249</sup> *Ibid.* The US forces were ordered to apply the humanitarian provisions of common Article 3.

<sup>250</sup> See fn. 232.

<sup>251</sup> This clause had previously been recognised as proof that under international law war did not totally negate the protection accorded the civilian population-*Finta*

### Summary - Practical difficulties applying the Conventions in Somalia

In spite of the most significant codification of humanitarian law, i.e. the Geneva Conventions and Additional Protocol I and II, and there still remain significant practical difficulties when these are applied to a situation like Somalia.<sup>252</sup> In the circumstances it is difficult to make a definitive pronouncement on whether the situation in Somalia constituted an armed conflict. The most important determinant of the applicability of the humanitarian law is the level of hostilities, and Somalia was no exception to this general rule. Common Article 2 states that the Conventions '[s]hall apply to all cases of declared war or any other armed conflict, which may arise between two or more of the High Contracting Parties, even if a state of war is not recognised by one of them'. One of the major difficulties with this provision is the ill-defined nature of what constitutes *any other armed conflict* itself. It fails to address in clear legal terms at what stage the level of violence is sufficient to constitute armed conflict.<sup>253</sup> In this way it may be described as humanitarian, but hardly definitive.<sup>254</sup> Its deliberately expansive nature is to ensure that the humanitarian protections afforded by the Conventions are applicable in cases short of declared war. In one sense this may be described as strength, in that it may be invoked in circumstances that could not have been envisaged at the time of drafting. However, this lack of precision can also be a major weakness in that they may also abuse the discretion bestowed on states.<sup>255</sup> The need for recognition by one of the relevant states is also a

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case, Canada High Court of Justice, 10 July 1989, ILR 82, p.435. Furthermore, in *Nicaragua v. USA*, ICJ Rep. (1949), p.22, the ICJ referred to the terms of the Martens clause as corresponding to what it had earlier identified under 'elementary considerations of humanity, even more exacting in peace than in war'.

<sup>252</sup> See Rowe, *op. cit.*, where he lists a number of disadvantages to arguing that soldiers are not well served by political leaders who argue that the humanitarian law applies to peacekeeping forces.

<sup>253</sup> Although 'War Crimes' are defined in Article 8 of the Statute of the ICC, these too are linked to the existence of an armed conflict situation, see O. Triffterer, *op. cit.*, 173-288.

<sup>254</sup> R. Miller, *The Law of War*, Lexington Maass.: Lexington Books,(1975), at 275. This is also the position of the ICRC.

<sup>255</sup> C. Nier, Comment, 'The Yugoslavian Civil War, an Analysis of the Applicability of the Laws of War Governing Non-International Armed Conflicts in the

problem in that it does not envisage a situation where none of the parties acknowledge that a state of war exists.<sup>256</sup> Not surprisingly, there is considerably support for the view that 'armed conflict' should be given a broad interpretation and that the existence of international armed conflict should not be regarded as contingent upon hostilities reaching a particular level of intensity.<sup>257</sup>

The requirement of state recognition is especially problematical for UN military operations, as the UN is neither a party to the Conventions nor a state. It does not have the competence to recognise that an armed conflict invoking the application of the Geneva Conventions exists.<sup>258</sup> The UN also lacks the legal and other structures for dealing with violations of humanitarian law. The Additional Protocols of 1977 were intended to address some of the more apparent deficiencies in the current system, but these too did not take into account the deployment of UN forces and multinational forces authorised by the Security Council.<sup>259</sup> Protocol I would seem to have no application to Somalia as the clan fighting and conflict in general did not qualify as a struggle of self-determination, or a struggle against a racist regime.<sup>260</sup> An interesting aspect to the applicability of Protocol I, and some other relevant treaties, is that not all states have ratified it and this could give rise to the situation where different contingents in a unified force are governed by different principles of law.<sup>261</sup>

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Modern World,' 10 *Dickley Journal of International Law*, (1992), 303 at 317.

<sup>256</sup> The drafters of the Hague Convention on the Protection of Cultural Property amended the phrase to read '...even if a state of war is not recognised by one or more of them', Karlshoven, *op. cit.* 27.

<sup>257</sup> Greenwood, 'International Humanitarian Law and United Nations Military Operations', *op. cit.*, 23.

<sup>258</sup> Turley, *op. cit.* 158.

<sup>259</sup> Protocol I refers to struggles 'in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self determination', see *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1946*, Geneva: ICRC, (1987) at 33.

<sup>260</sup> See Chapter 6.

<sup>261</sup> This situation arose in respect of the NATO forces engaged in the Kosovo

Protocol II applies only when the conflict is between the armed forces of a High Contracting Party and dissident groups within the same territory, and the ICRC definition applies to struggles against a lawful government.<sup>262</sup> The problem here is that it is not possible to determine which if any faction in Somalia could be deemed the 'lawful government'. A strong case can be made that Aided fulfilled a number of important requirements to be regarded as a dissident organised force in control of a defined area, but the issue is so legitimately debatable that definitive conclusions are problematic. The level of fighting could also be regarded as having exceeded that regarded in other cases as sufficient to amount to armed conflict, and it meets the criteria suggested by Pictet and the Appeals Chamber in *Tadic*.<sup>263</sup> The experiences of Bosnia Herzegovina and Somalia indicate that NATO and the UN adopt a certain *à la carte* policy when it comes to determining the existence of 'armed conflict' and whether they are parties thereto. It would also seem that the threshold for triggering armed conflict is higher in the case of military operations authorised or mandated by the UN.<sup>264</sup>

The United States had the opportunity and authority to recognise that an armed conflict took place in Somalia, but it pointedly declined to do so. The Clinton Administration refused to declare it a war zone, arguing even after thirty United States soldiers had been killed and nearly two hundred wounded, and many hundreds more Somali casualties, that there had yet to be an event 'that makes it clear to everyone that this is combat, not peacekeeping'.<sup>265</sup> What difference does this make in practice if the United States agrees to act in a humane and civilised manner in any event? When cognisance is taken of one of the most recent accounts of American action against Aided, it is further confirmation of excessive use of force and violations of fundamental principles

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conflict during 1999.

<sup>262</sup> Turley, *op. cit.*, 160.

<sup>263</sup> See Fn. 59 and Pictet, *op. cit.*, 17-44.

<sup>264</sup> Greenwood, 'International Humanitarian Law and United Nations Military Operations', *op. cit.*, 24.

<sup>265</sup> Cited in Turley, *Texas Law Review, op. cit.*, 136.

of humanitarian law in what were admittedly extreme conditions.<sup>266</sup> This is where training and unequivocal rules apply. However, the lack of 'a method for authoritatively and effectively determining that a situation justifies the application of the laws of war is a major weakness of the contemporary laws'.

<sup>267</sup> Basing a finding of the existence of war or armed conflict in a material sense, *inter alia*, on the duration of the conflict merely serves to facilitate the exclusion of short-term hostilities such as occurred in Somalia and elsewhere. Surely it would be preferable if measures were taken to ensure that humanitarian law applied to conflict situations, especially those involving UN military forces, as a matter of law, rather than upon the finding of the existence of material war or armed conflict.

### **Lessons for Ireland from recent Canadian experience in humanitarian law training**

Finding ways to ensure compliance with the rules of humanitarian law has traditionally been a concern of the ICRC and other human rights organizations. The widespread breach of these rules by the parties to the conflict in the former Yugoslavia has highlighted the issue of non-compliance. In this regard certain factors have been identified as contributing to instances of failure to comply, in particular, ignorance of the law.<sup>268</sup> The establishment of war crimes tribunals and the accompanying publicity will go a long way towards eroding the cynical assumption that the laws of war are not enforceable. War crimes trials can take many forms, and at present the International Criminal Tribunal for the Former Yugoslavia (ICTY) is probably the best known. They are not a new phenomenon in that they have also been established under international agreements like that at Nuremberg, or under municipal law like the Leipzig

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<sup>266</sup> See <<http://www.nightstalkers.com/tfranger/blackhawkdown/Default.html>> and M. Bowden, *Black Hawk Down*, New York: Penguin, (1999/2000). This account of the US led attack and subsequent military action to extricate themselves is a realistic outline of the dilemmas facing soldiers in such circumstances.

<sup>267</sup> J. Peck, *op. cit.* , 306.

<sup>268</sup> G. Aldrich, 'The Laws of War on Land', *94 American Journal of International Law*, (2000), 42-59 at 54.

trials conducted by the German tribunals after 1919.<sup>269</sup> Military personnel accused can also be dealt with in certain circumstances by military courts martial, similar to those established by the United States military arising from incidents during the Vietnam and Korean conflicts, and by Canada for crimes committed while part of an international UN force in Somalia.

The establishment of the ICC is the most significant recent development in this regard. Once a state has ratified the Statute, then all nationals of that state will be subject to its provisions.<sup>270</sup> Concern about implementing humanitarian law was one of the driving forces behind proposals for its establishment.<sup>271</sup> The United States was most concerned about the impact this might have on participation in multinational and peacekeeping operations.<sup>272</sup> However, the Court to be established is not a serious alternative for the present system of criminal jurisdiction over peacekeepers.<sup>273</sup> The Preamble to the Statute states that the Court shall be complementary to national criminal jurisdictions.<sup>274</sup> In stark contrast to the Statutes for the ICTY and ICTR, this acknowledges the primacy of national authorities unless they are unable or unwilling to adequately investigate and prosecute alleged offences. Once a state has ratified the Statute, then all nationals of that state will be subject to its provisions. But fundamental problems

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<sup>269</sup> See generally C. Mullins, *The Leipzig Trials: An Account of the War Criminals Trials and a Study of the German Mentality*, London: H. F. & G. Witherby, (1921), and D. Schindler and J. Toman (eds.), *op. cit.*, 57.

<sup>270</sup> See generally Triffterer (ed.), *op. cit.*, 180-288; W. A. Schabas, *An Introduction to the International Court*, Cambridge: Cambridge University Press, 2001, esp. 1-20; M. C. Bassiouni, *The Statute of the International Criminal Court – A Documentary History*, New York: Transnational, (1998); R. Lee (ed), *The International Criminal Court - The Making of the Rome Statute*, Dordrecht: Kluwer, 1(999), 79-126; L. Caffisch, 'Toward the Establishment of a Permanent International Criminal Jurisdiction', 4 (5) *International Peacekeeping* (Kluwer), (1998) 110-115, and online at <<http://www.igc.org/icc/>>

<sup>271</sup> A. Roberts, *Humanitarian Action in War*, Adelphi Paper 305, Oxford, (1996), 50.

<sup>272</sup> M. Zwanenburg, 'The Statute for an International Criminal Court and the United States: Peacekeepers under Fire?' *10 European Journal of International Law*, (1999), 124-143 at 126.

<sup>273</sup> *Ibid.* at 125.

<sup>274</sup> ICC Statute, Preamble, para. 10 and Articles 1, 12-15, 17-19. Triffterer, *op.*

remain, as states that refuse to ratify will not be subject to the jurisdiction of the ICC unless an offence is committed by a national of that State on the territory of another state party to the Statute.<sup>275</sup> In addition, Article 8, which deals with war crimes, is also linked to the notion of armed conflict (international and internal), and is dependent on a minimum threshold of conflict being reached before the relevant provisions can apply.<sup>276</sup> The Statute emphasizes the prosecution of war crimes on a large scale, whereas the crimes committed by peacekeepers have been isolated and not part of a plan or policy sanctioned by higher authorities. Despite this, the possibility of a prosecution for a single act constituting a war crime still exists, and contrasts with the threshold level of gravity for a crime against humanity under the Statute.<sup>277</sup>

The war crimes trials to date indicate that one of the most serious problems likely to arise is that of the knowledge of the accused.<sup>278</sup> A fundamental premise of military life is the obligation to obey all lawful orders. This may seem like a simple statement of a self-evident rule, but it is not so straightforward as it first appears. Knowledge affects the validity of any attempt a soldier may make to rely on the defence of superior orders.<sup>279</sup> How is a soldier to judge the lawfulness or otherwise of a command? It would appear that insufficient attention is paid to this dilemma in military training. Most systems of municipal criminal law embody the principle *ignorantia juris*

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*cit.*, 15, 59-61 and *passim*.

<sup>275</sup> See ICC Statute, Article 12 (2) (a), see Triffterer, *op. cit.*, 329-342.

<sup>276</sup> Triffterer, *op. cit.*, 180-288 esp. 264-278; Schabas, *op. cit.*, 40-52, and Lee, *op. cit.*, 103-126. Lee notes that the Statute contains a substantially lower threshold for internal armed conflict than that laid down in Protocol II ( p.125).

<sup>277</sup> M. Arsanjani, 'The Rome Statute of an International Criminal Court', 93 *American Journal of International Law*, (1999) 33. Article 7(1) of the Statute provides that particular acts must have been committed as part of a 'widespread or systematic attack directed against any civilian population, Triffterer, *op. cit.*, 126-127.

<sup>278</sup> L. C. Green, 'Humanitarian Law and the Man in the Field', XIV *Canadian Yearbook of International Law*, (1976), 96-115 at 97.

<sup>279</sup> L.C. Green, 'Superior Orders and the Reasonable Man', 8 *Canadian Yearbook of International Law* (1970), 61-103, at 96 and *passim*. See also by the same author, 'Peacekeeping and War Crimes' , XXXIV *Military Law and Law of War Review*, 1995, 247-255.

*neminem excusat*.<sup>280</sup> This is a satisfactory principle when the rules are clearly defined and reasonably accessible to the ordinary citizen of a state, but this is by no means the situation with regard to international law where the rules are not always clear cut and accepted by all states. This lack of international consensus and certainty is all the more so in the case of humanitarian law and the laws of war. For this reason it is necessary to examine the extent to which states are obliged to inform all citizens and especially their military personnel, of these laws, and the steps and methods that ought to be taken to this end.<sup>281</sup>

There is also the additional factor that a law that is not known cannot be applied, and knowledge of humanitarian law should not be restricted to times or situations of conflict. It should be seen in the overall context of human rights education to promote 'understanding, tolerance and friendship among all nations' in accordance with the Universal Declaration of Human Rights.<sup>282</sup> In his authoritative commentary on the Geneva Conventions, Pictet, noted 'a knowledge of law is an essential condition for its effective application. One of the worst enemies of the Geneva Conventions is ignorance.'<sup>283</sup>

Some of the more important provisions concerning dissemination of information relating to humanitarian law are contained in Additional Protocol I and Protocol II to the Geneva Conventions.<sup>284</sup> These are especially relevant to Ireland after the coming into effect of the Geneva Conventions (Amendment)

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<sup>280</sup> 'Ignorance of the law does not excuse'. Every person is presumed to know the law. See *O' Loughlin v. O'Callaghan* (1874) IR 8 CL 116. However, Article 32 and 33 of the Statute of the ICC recognise that mistake of law may, in certain circumstances, be a ground for excluding criminal responsibility, see Triffterer (ed.), *op. cit.*, 555-588.

<sup>281</sup> The first recognition of the need to inform the armed forces of the rules of war is in the *Oxford Manual* prepared by the Institut de Droit International in 1880, see Schindler and Toman, *op. cit.*, at 35.

<sup>282</sup> Universal Declaration of Human Rights, Article 26, paragraph 2.

<sup>283</sup> Jean Pictet et al, *The Geneva Conventions of 12 August 1949 - Commentary: I Geneva Convention*, Geneva, Geneva: ICRC, (1952) at 348.

<sup>284</sup> Article 81 and Article 82 of Protocol I, and Article 19, Protocol II, see *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva: ICRC, (1987), 947-968 and 1487-1489.

Act, 1998, which enabled it to ratify the relevant Protocols after an inordinate delay.<sup>285</sup> Articles 82 and 83 place a significant legal obligation on all states parties thereto to disseminate information to military personnel and civilians.<sup>286</sup> The importance of the obligation to train military personnel was summed up by Kalshoven when he said that 'it would be a sheer miracle if all members of the armed forces were angels, or simply law abiding combatants – and if they remained so through every phase of the war. Factors such as insufficiently or wrongly oriented training programmes or a lack of discipline may play a role in this respect'.<sup>287</sup> At a minimum then, there should be a level of expertise among all Defence Force legal officers owing to the small number in existence. The syllabi and curricula of military training courses should also be revised to take account of the obligations, and even law schools in civilian educational institutions should be supported in placing emphasis on teaching humanitarian law. Although a similar obligation exists in respect of Protocol II, it creates a less onerous duty.<sup>288</sup>

While the principles and basic rules of humanitarian law may be considered to represent fundamental values that have received almost universal acceptance, peacetime efforts to implement them at the national level are nonetheless insufficient.<sup>289</sup> In fact, it is often a marginal item in military training programmes.<sup>290</sup> Consequently, these rules of law are not as well

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<sup>285</sup> See C. Campbell and R. Murphy, 'Geneva Conventions (Amendment) Act, 1998', *Irish Current Statutes Annotated 1998*, Dublin: Round Hall/Sweet and Maxwell, (1998), 35.01-35.58. For a discussion of the minimalist effect of the Geneva Conventions (Amendment) Act, 1995, in the United Kingdom, see P. Rowe & M. Meyer, 'The Geneva Conventions (Amendment) Act 1995 – A Genreally Minimalist Approach', *45 International and Comparative Law Quarterly*, (1996), 476-484.

<sup>286</sup> See *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, *op. cit.*, 947-968 and H. McCoubrey, *International Humanitarian Law*, Aldershot: Dartmouth, (1990), 205-210.

<sup>287</sup> F. Kalshoven, *Constraints on the Waging of War*, Geneva: ICRC, (1987), 61.

<sup>288</sup> Article 19 of Protocol I, see n. 226.

<sup>289</sup> L. Geiger, 'Armed forces and respect for international humanitarian law: Major issues', *Symposium*, 60-64 at 60.

known or understood as they should be by those who must apply them, especially members of the armed forces. Since the conflict in Korea, Canadian troops have had infrequent involvement in combat situations where they would have faced the ethical and legal challenges posed by the law of armed conflict. Such issues did not cause serious concerns on traditional peacekeeping missions. However, the conduct of Canadian and other contingents part of UNOSOM II highlighted the need for training in this area.<sup>291</sup>

The success or failure of peacekeeping operations rests to a great degree on the local population's perceptions of the peacekeepers, so the tactical and strategic consequences of violating the laws of war in peacekeeping missions could be greater than that during combat.<sup>292</sup> However, the advent of peace enforcement type operations has changed this. It was in this regard that the Canadian Department of National Defence was found wanting in its failure to take the necessary steps to ensure that their personnel were sufficiently educated in the law of armed conflict.<sup>293</sup> This had serious implications in the light of two related developments. The first was the evolution in the content, interpretation, and application of the law of armed conflict. The second more important change was in the nature and extent of peacekeeping operations themselves, and the emergence of a more complicated set of variables faced by peacekeepers in second-generation peacekeeping operations dealing with complex emergencies. As a result, widespread training in law of armed conflict

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<sup>290</sup> See generally D. Lloyd Roberts, 'Training the armed forces to respect international humanitarian law-The perspective of the ICRC Delegate to the Armed and Security Forces of South Asia', 319 *International Review of the Red Cross*, (1997), 433-446; F. de Mulinen, *The Law of War and the Armed Forces*, Series Ius in Bello, No. 1, Geneva: Henry Dunant Institute, (1992), and Y. Sandoz, 'Respect for the Law of Armed Conflict: the ICRC's observations and experiences', *International Seminar on International Humanitarian Law in a New Strategic Environment: Training of Armed Forces*, Stockholm, 17-18 June 1996.

<sup>291</sup> Though this need was recognised much earlier by some, see L. C. Green, 'Humanitarian Law and the Man in the Field', *XIV Military Law and Law of War Review*, (1976), 96-115.

<sup>292</sup> Blechman and Vaccaro, *Training for Peacekeeping, the UN Role*, Report No. 12, The Henry L. Stimson Centre, (July 1994), 4.

<sup>293</sup> P. LaRose-Edwards, J. Dangerfield and R. Weeks, *Non-Traditional Military Training for Canadian Peacekeepers* (hereafter 'Training study'), a study prepared for the *Report of the Somalia Commission of Enquiry*.

did not keep up with events. Substantive training was largely restricted to military lawyers, primarily short lectures for officers, and minimal operational training for rank and file.<sup>294</sup> The Report recommended that education in the law of armed conflict be available throughout the Canadian Forces.<sup>295</sup>

The situation pertaining in the Defence Forces today is very similar to what existed in Canada prior to the Commission of Enquiry into events in Somalia.<sup>296</sup> Like Ireland today, peacekeeping in Canada was largely concentrated in the ninety-day pre-deployment training period of a unit warned for a UN mission. Otherwise, there was little training time devoted by units to specific peacekeeping training. The situation in Canada was summarised as follows; there was no direct peacekeeping training at the basic level, very little at individual level, and almost none in the generic annual training cycles of units.<sup>297</sup> In the case of Ireland the situation is even more serious, as units are usually established specifically for such service. These are made up of men and women who may never have served together before. It was the Canadian study teams view that this situation was no longer appropriate for the new era and more complex peacekeeping environment. This is also the case in regard to the Irish Defence Forces. With members participating in Chapter VII operations in the former Yugoslavia, Kosovo and East Timor, and membership of the NATO sponsored Partnership for Peace likely to involve Irish troops in similar complex emergencies in the future, the need for ongoing training in peacekeeping operations at unit and sub unit level throughout the Defence Forces is recommended.

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<sup>294</sup> In addition, many of the operational level personnel interviewed for the report remarked that dry legal lectures by military lawyers were not particularly helpful. It was considered that training by their own warrant and other officers would have been preferable. *Training study*, 58.

<sup>295</sup> The recommendations of the Report were adopted by the *Report of the Somalia Commission of Enquiry*. See Recommendations, Chapter 21, paras 21.8 and Chapter 40, paras. 40.41 - 40.45. See also Lt. Col. Vogt, 'Experiences of a German Legal Adviser to the UNOSOM II Mission', *XXXV The Military Law and Law of War Review 1-4*, (1996), 219-300 at 226-227.

<sup>296</sup> See R. Murphy and C. Campbell, Correspondents Report-Ireland, *1 Yearbook of International Humanitarian Law*, *op. cit.*, 460-467, at 466.

<sup>297</sup> *Training study*, 43

One of the most telling conclusions of the Canadian study team was the dichotomy it found.<sup>298</sup> On the one hand, there were many separate and unconnected examples of Canadian Forces organizations and individuals that understood the changing peacekeeping environment and peacekeeping requirements, and were taking some initiatives to meet those needs. On the other hand, the study team could not ascertain a national, formalised, coherent, integrated peacekeeping policy and training programme that did likewise. It also concluded that the notion that a well trained combat capable soldier is all that is required for a good peacekeeper is changing or at least being modified. However, the bureaucracy had not caught up with the changing philosophy. This too is the situation in Ireland among the mandarins in the Department of Defence. The recently published White Paper on Defence does not address any of these issues.<sup>299</sup> There is also the matter of training first and second line reservists, especially as it seems that the policy regarding the participation of the second line reservists in UN military operations may change in the near future. For too long Ireland has relied on the peacekeepers capacity to use a bit of 'blarney' to avoid escalation and confrontation. This has been remarkably successful, but the downside is that it has encouraged an atmosphere of complacency and smugness with regard to Ireland's suitability as a contributor state to peacekeeping operations.

While it is acknowledged that there is a policy of support for the principles of humanitarian law within the Defence Forces, and this is particularly evident in its formal incorporation into military training and briefings; there is still much room for improvement. Although there is a genuine effort made to disseminate information regarding the humanitarian law principles, the general approach seems to be minimalist. There seems to be little or no recent material on humanitarian law published by the Defence Forces or the Department of Defence, which is accessible and useful to ordinary serving personnel, or the general public at large. A survey of Defence Forces personnel serving with UNIFIL in 1998 indicated that 86% wanted to know more about humanitarian law and some 71% considered that they did not

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<sup>298</sup>

Training Study, 83

receive adequate instruction in this area.<sup>300</sup> Not surprisingly, many considered their knowledge of humanitarian law to be poor. It is noteworthy that many also felt that humanitarian law was relevant on peacekeeping missions, and it was in the training for UNIFIL that most had come to learn about humanitarian law. Some 66% of those who completed the survey thought that humanitarian law was relevant to modern armies.

It is by no means certain that this is enough to satisfy Ireland's obligations under Protocol I. Despite efforts by individuals within the legal service, much more could be done by the Department of Defence and the military authorities to encourage interest and respect for the principles involved. The Canadian Report concluded that training in the law of armed conflict is of critical importance to effective peacekeeping: it cannot continue to be provided for in an *ad hoc* manner. In this regard the office of the Judge Advocate General of Canadian Forces was of critical importance, and the Report recommended that this office should be the focus for such training. The equivalent office in the Irish Defence Forces is that of the Deputy Judge Advocate General. It too must receive sufficient resource and the use of selected trained operators to conduct training at unit and sub unit level should be considered. It is neither practical nor desirable for legal officers to oversee or conduct all training in this field. The focus should be on integrating it into the operational context, and that operational military such as infantry officers and senior non commissioned officers are trained to deliver much of that training. If Ireland is serious about human rights law and its implementation, then real commitment of resources will have to be made.

## Conclusions

It is undisputed that the UN has international legal personality and that it is a subject of international law.<sup>301</sup> But it does not automatically follow that all the rules of international law, in particular those relating to humanitarian law, apply to

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<sup>299</sup> Dublin: Department of Defence, 2000.

<sup>300</sup> See Appendix C.

<sup>301</sup> *Reparations Case* [1949] ICJ Rep. 174. See also M. Bothe, 'Peacekeeping and international humanitarian law: friends or foes?', 3 *International Peacekeeping* (Kluwer), (1996), 91-95 at 94.

the UN. The arguments that the UN cannot be bound by such rules owing to their specific nature and structure, and that the Organization does not possess the necessary internal structure, are not compelling. In fact, the structures and resources of the UN are superior to many smaller states. When the UN was established, it became part of the existing international legal order. It was created by the common accord of states within the system. It is not within the powers of those states to create a functional international institution that is outside the framework of the pre existing international legal order. There are of course practical difficulties for the UN in ensuring troops under its command or operational control do not infringe any of the applicable rules of international law. Not least being the fact that no troops have ever served under the full command and control of the UN, and it is unlikely that they will do so in the foreseeable future.<sup>302</sup>

After the capture of a United States helicopter pilot shot down over Mogadishu, it was said that the United States recognised too late that there was no international law to protect him.<sup>303</sup> A gap was deemed to exist in international law as no international armed conflict was taking place and the Geneva Convention protecting prisoners did not apply. But to rely upon humanitarian principles in a conflict, both parties must be prepared to demonstrate willingness to respect those principles. Reciprocity, while not a legal requirement, is a practical necessity. A primary consideration in developing principles of humanitarian law was the self-interest of the most protected class of person under the original rules, the combatant. States, and in particular United States, sought to fill a perceived gap in international law by way of the Convention to Protect UN personnel. This Convention is far from perfect, and may not alter the risk to which UN personnel will be exposed. Categorising those who oppose or threaten

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<sup>302</sup> In the case of Ireland, Additional Protocol I and II became part of municipal law and binding on Irish soldiers with the passing of the Geneva Conventions (Amendment) Act 1998. Prior to that Irish troops part of IFOR and SFOR were not bound by Protocol I either.

<sup>302</sup> *Supra*. Cpt. 5 On command and control and R. Murphy, *op. cit.*, *Journal of Armed Conflict Law*, and H. McCoubrey, *International Relations, op. cit.*, 41-44..

<sup>303</sup> S .Lepper, 'War Crimes and the Protection of Peacekeeping Forces', 28 *Akron Law Review*, (1995), 411-415 at 415.

UN personnel as criminals or outlaws carries certain dangers, and if not implemented with caution and skill, it could be associated with a new kind of colonial mentality.<sup>304</sup>

With regard to the initial question posed as to the relevant applicable law to situations where UN forces are deployed, this will depend largely on the nature and extent of the conflict. Nevertheless, there appears to be little doubt but that the provisions of humanitarian law that have customary status do apply to UN forces. Such provisions bind all states, and may reasonably be suggested to apply to the UN itself.<sup>305</sup> The most difficult question arises in respect of those rules that have not yet attained customary status. There seems little sense in a system where combatants engaged in conflict are subject to humanitarian law when they are acting as members of national armed forces, whereas members of armed forces in the same armed conflict acting as peacekeepers are exempted from the obligations to respect the rights of protected persons. This is all the more absurd when these UN soldiers represent the Organization charged with upholding and promoting the fundamental human right that humanitarian law seeks to protect.<sup>306</sup> The application of humanitarian law to UN forces will not compromise the mission to promote peace. Moreover, as the declared aim of such operations is the restoration of international peace and security, it is surely not the case that it can be based on action in violation of existing principles of law. In addition, the legal obligations of peacekeeping and other UN military forces should reflect the notion that they will affirmatively seek to prevent abuses.

What can or should a UN force do when it becomes aware that parties in the country where it is deployed are violating applicable international law. Unless the mandate of a force states otherwise, as the law stands at present, there is no legal duty to protect victims of such violations. However, international military and civilian field personnel cannot be silent witnesses to gross violations of humanitarian law.<sup>307</sup> And nor do they wish to be. The legal

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<sup>304</sup> A. Roberts, *Humanitarian Action in War*, *op. cit.*, at 70.

<sup>305</sup> McCoubrey, *International Relations*, *op. cit.*, 46.

<sup>306</sup> See Article 1, UN Charter.

obligations of peacekeeping and other UN military forces should reflect the notion that they will affirmatively seek to prevent abuses. The *Brahimi Report* suggests a more assertive and interventionist approach in such cases. If a force cannot intervene directly without exposing troops to significant danger, then the duty of a commander must first be to the safety of his/her personnel. The post 1982 UNIFIL situation shows that most lightly armed peacekeepers will not be in a position to prevent large-scale abuses by a party to the conflict. The *Brahimi* recommendations are a welcome initiative, but it presupposes that UN personnel will be given the means and capacity to act in this way when appropriate, a presumption that past experience shows may not be taken for granted. This is the kernel of the dilemma, and some commanders may hide behind the cloak of preserving force security to excuse a failure to act.

Enforcement of humanitarian law is especially problematic in respect of UN forces. Relying on the contributing states to use their disciplinary regimes to enforce municipal law is one solution, but this requires the cooperation of those states concerned and the existence of an appropriate legal structure to deal with such offences. The *Brocklebank*, *Rockwood* and similar trials make it clear that there is significant confusion regarding the applicability of international law to the different kinds of UN military operations. The use of the courts martial or its equivalent within contributing states still remains the most likely system for dealing with disciplinary matters arising. While the independence of municipal legal regimes and disciplinary procedures must be respected, the current confusion is militating against a uniform and agreed formula for determining the applicability of international law to such operations.

In order to ensure humanitarian law is applied and enforced in the course of all relevant UN activities, it must first be clarified. This is not as simple a task as it may first appear. In the case of IFOR and SFOR, and the current KFOR, Protocol 1 Additional to the Geneva Conventions was applicable to the Canadian and German contingents, but not to the United States and France. This problem is

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<sup>307</sup> See comments to this effect in R. Siekmann, 'Notes on the Singapore Conference on Humanitarian Action and Peacekeeping Operations', 4 *International Peacekeeping* (Kluwer), (1997), 19-21 at 21. More recently, there were reports that UN troops deliberately avoided confronting militias in East Timor, and that French troops part of KFOR failed to protect ethnic Albanians in Kosovo, see *The Irish Times*,

mitigated somewhat by the fact that many of the relevant norms are part of customary international law which binds all states.<sup>308</sup> Making it mandatory for all UN personnel to be educated and trained in this area is essential. Such instruction is a legal obligation on states party to the Geneva Conventions and Additional Protocols.<sup>309</sup> In addition, the UN and the ICRC should agree on the rules applicable to military operations conducted on behalf of or by the UN. There is an urgent need for codification of the law as 'ambiguity is always a fault in legal norms and in international humanitarian law it is potentially a source of disaster'.<sup>310</sup> Several commentators have called for the formation of an independent body to police the application of humanitarian law and to recommend revisions where necessary.<sup>311</sup> One means of clarifying the issues raised would be for both organizations to identify precisely which rules have achieved the status of customary law. Despite the universality of the Geneva Conventions, not all the details of their provisions have simply become declaratory of customary law.<sup>312</sup> The situation is even more uncertain in regard to Protocol I; moreover, not all customary rules may be applicable to operations carried out by UN forces.

It is an unavoidable flaw that in relation to the purposes and functions of the UN, humanitarian law only plays a secondary role. Furthermore, states perceive criminal jurisdiction over their nationals as part of their jealously

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30 August 2000 at 1, and 10 February 2000, at 14.

<sup>308</sup> In the case of Ireland, Additional Protocol I and II became part of municipal law and binding on Irish soldiers with the passing of the Geneva Conventions (Amendment) Act 1998. Prior to that Irish troops part of IFOR and SFOR were not bound by Protocol I either.

<sup>309</sup> McCoubrey, *International Relations, op. cit.*, 43.

<sup>310</sup> McCoubrey, *International Humanitarian Law, op. cit.*, 17-18. Although McCoubrey was addressing the confusion surrounding internal and international armed conflicts, the basic logic applies to all issues concerning humanitarian law.

<sup>311</sup> H. S. Levie, *When Battle Rages: How Can Law Protect?*, Working Papers and Proceedings of the Fourteenth Hammarskjöld Forum 6 (John Carey, ed. 1971), and Miller, *The Law of War, op. cit.*, at 275. Tittmore recommended the adoption of a further Protocol to the Geneva Conventions permitting the UN to ratify the agreements, or the adoption of a report by the Security Council, Tittmore, *op. cit.*, 114.

<sup>312</sup> Pfanner, *op. cit., Symposium*, 49-59 at 49.

guarded sovereignty, and considerable national sensitivities are associated with participation in UN military operations.<sup>313</sup> The creation of a special tribunal or court to deal with such matters is one potential solution, but the fact that few if any countries actually place their forces under the full command of the UN could be problematic. It would also create constitutional difficulties for countries like Ireland. The matter would be complicated in respect of those countries with dualist legal regimes that do not automatically incorporate international law provisions into their domestic legal systems. Certainly the recent Secretary-General's Bulletin regarding the field of application of humanitarian to UN forces and the number of references to it in Security Council resolutions as a 'body of law' to be applied 'in all circumstances', it may be argued that humanitarian law is part of *ius cogens*.<sup>314</sup>

In most instances the task of applying theoretical principles of international law to specific cases becomes the responsibility of armed forces on the ground. There are a number of measures that contributing states could take to improve the current situation. Up until recently, United States policy was linked to the notion of armed conflict. In accordance with international law, United States military were obliged to comply with humanitarian law in conducting military operations in times of armed conflict.<sup>315</sup> However, military regulations are silent on when an engagement reaches the level of armed conflict, or what demarcates the point at which the laws of armed conflict apply. These distinctions are crucial to peacekeeping operations, and neither the recent Secretary-General's Bulletin nor the Convention on the Protection of UN Personnel shed much light on this area. In 1996 the United States Chairman of the Joint Chiefs of Staff issued an instruction that extended the application of 'the law of war principles during all operations that are

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<sup>313</sup> H. McCoubrey, 'International Humanitarian Law and United Nations Military Action in the "New World Order"', 1 *International Law and Armed Conflict: Commentary*, Nottingham: Nottingham University Press, (1994), 36 at 45.

<sup>314</sup> See comments to this effect in the Notes on the Conference on 'The UN and International Humanitarian Law', Geneva: 19-20 October 1995, in Martin Meijer, 2 (6) *International Peacekeeping*, (Kluwer), (1995), 136-138 at 137. The Secretary-General issued his Bulletin on 6 August 1999, ST/SGB/1999/3.

<sup>315</sup> Turley, *op. cit.*, 148.

characterized as Military Operations Other Than War'.<sup>316</sup> This effectively covers every conceivable military operation. Most significantly, there is no triggering event wedded to the notion of armed conflict, which is a prerequisite for the application of these principles under international law. This is a welcome initiative, but from a legal perspective, it too has deficiencies in that the instruction refers to principles of war, but gives no indication of what these might be.

Humanitarian law represents fundamental principles of humanity imposed on all of us, including the Security Council and agents of the UN. It must be respected in all circumstances, regardless of the existence or nature of the armed conflict. A solution would be for an acknowledgement and declaration that humanitarian law binds UN personnel, and that UN military and other personnel will be educated, trained and monitored in this regard. Ensuring the universality of the treaties on humanitarian law, including the Statute of the ICC, would serve as an additional guarantee of compliance. It is to be hoped that the lessons learned from Canada's deployment to Somalia will be studied and widely assimilated by armed forces around the world.<sup>317</sup> After one hundred years of law making, the primary objective must not be a new law, but ensuring compliance with and effective implementation of the laws already in existence.<sup>318</sup> It is the responsibility of the UN and all countries contributing troops to UN operations to ensure that all personnel undergo systematic training in humanitarian law, and that standing operating procedures be drawn up to deal with violations when they occur.

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<sup>316</sup> 'USA: International and Operational Law Note: When Does the Law of War Apply: Analysis of Department of Defence Policy on Application of the Laws of War', reprinted from *The Army Lawyer*, Department of the Army, June 1998 in *1 Yearbook of International Humanitarian Law*, *op. cit.*, 617-619.

<sup>317</sup> R.M.Young and M. Molina, *op. cit.*, at 370.

<sup>318</sup> C. Greenwood, *International Humanitarian Law and the Laws of War, Preliminary Report for the Centennial Commemoration of the First Hague Peace Conference 1899(May 1999)*, 3 (*para. 1.6*), quoting Sir Franklin Berman.

## Chapter 9

### CONCLUSION

‘The problem is a lack of vision, the opportunity is to provide that vision – the challenge is to promote the view that can see pragmatic idealism prevail over rather stale realism...[which] is often a euphemism for a short-sightedness and policies lacking in the necessary courage and vision’.<sup>1</sup>

The decision to allow Irish troops participate in the UN enforcement mission in Somalia was one of the most significant developments in Irish defence and foreign policy in recent years. The need to pass enabling legislation in Ireland arose from the dualist nature of Ireland’s legal system, rather than any new obligation undertaken by the State in relation to UN membership. Despite all the reports of recent years, defence policy in Ireland still lacks a coherent strategy. In addition, the current strength of the Defence Forces is inadequate for the tasks it is intended to fulfil. It will not be possible to meet the commitment to the UN Stand By force arrangement, and the European Rapid Reaction Force, at the same time. Successive governments have been neither honest nor realistic in their designation of the role of the Defence Forces, and what is being signalled now is a clear move away from traditional UN operations in favour of the post cold war model of ‘tendered out’ or delegated peace support operations. This may well be the way of the future, but what is missing is an honest and clear policy from the government on where Ireland stands on this and related issues.

Irish participation in recent peace support operations reflects a modification in the position outlined to the Special Committee on Peacekeeping Operations a decade ago.<sup>2</sup> The controversial decision to join the NATO sponsored Partnership for Peace programme, and the commitments under the European Common Foreign and Security Policy have important implications. The development of co-operative

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<sup>1</sup> B. Urquhart, ‘The United Nations in 1992, Problems and Opportunities’, 68 *International Affairs*, 2, (April 1992), at 311.

<sup>2</sup> See comments by Ireland to the Special Committee on Peacekeeping Operations, UN General Assembly, Document A/AC.121/37, 29 March 1990, 13-15 at 14.

military relations and compatibility with the Western European Union and NATO in particular, albeit for peacekeeping/humanitarian purposes, raises important issues for Ireland. Because of its association with NATO, membership of the Partnership for Peace may dilute Ireland's independent middle power identity even more than has already occurred. The change in policy regarding NATO's Kosovo campaign is just one manifestation of the consequences of seeking a joint European response.

The issues are complex, and the dilemmas confronting Ireland were evident in the debate about participation in the multinational force in the former Yugoslavia. Military neutrality, however, did not preclude Irish participation in this force, when it was deemed appropriate to do so. In reality, both SFOR and KFOR are NATO forces, albeit mandated by UN Chapter VII resolutions. In military terms, Ireland does not possess the capacity to make any significant contribution to such large-scale operations, but participation sets the scene for a longer-term re-orientation of Irish policy. If Ireland is to retain its skills and reputation in the field of peacekeeping, it is necessary to adapt and to participate in the organizations where best contemporary practice is developed. But in doing so, is Ireland contributing to the demise of the UN at the behest of the permanent members of the Security Council?

The UN currently faces a huge financial crisis that threatens its continued existence. But a far more serious threat is posed by the self-serving agenda pursued by the permanent members of the Council. It is they who are responsible for 85% of global arms exports, while at the same time they are charged with primary responsibility for the maintenance of international peace and security. The victors of World War II have arrogated to themselves crucial power within the Security Council. Its structure and procedures are inherently anti-democratic. This ruling oligarchy represents one of the major obstacles to the proper functioning of the UN and it is a major impediment to peace based on justice and universal suffrage. The legitimacy of the Security Council derives from the commitment of all member States to confer primary responsibility for international peace and security on a body of limited membership. There must be a balanced and fair representation, which reflects the global membership of the UN, and the realities of regional and global power. It must not be a tool for

enhancing pre-existing hegemonic power; if anything, it should curtail and control the potential abuse that the possession of such power often entails.

At the same time, there are issues that Ireland should not remain neutral in respect of - the genocide, ethnic cleansing, mass rapes, and other crimes against humanity perpetrated in the former Yugoslavia are but one example. The reality is that it has taken a NATO led force to impose some measure of peace, and prevent the seemingly endless slaughter of so many innocent civilians in the former Yugoslavia. But why have the same NATO powers left the UN strapped for cash and unable to act? The unilateral NATO response to the Kosovo crises may provide a more accurate insight into the true nature and purpose of these forces. NATO makes for an unpredictable bedfellow, once it gave the UN full co-operation as part of peacekeeping and enforcement missions in Bosnia-Herzegovina, now it seems to be competing with the UN and to have taken its place in the European area. This may suit the a financially embarrassed UN in the short term, but what of NATO's plans outside its own area of operations and without UN authorization? Where do Ireland's interests lie in such a scenario? The lessons of history are clear, Ireland's interests as a small state lie with the UN, collective security and international law.

The neutral states tradition of involvement in international peace support operations was confirmed again by the agreement of European neutrals to send soldiers to serve with the UN mandated but NATO commanded KFOR. This participation raises the issue of the compatibility of a policy of political and/or military neutrality with such operations.<sup>3</sup> Ireland is almost unique among the European neutrals in that the Defence (Amendment) Act, 1993, permits the participation of Defence Forces personnel in any kind of UN military operation. The Swiss experience shows that the general public there are wary of the extended parameters of recent UN military operations, and that the threat to neutrality is perceived as very real. The blurring of the distinction between peacekeeping, peace enforcement and enforcement action missions does not help this either.

In the current climate of rationalisation and 'downsizing' of armed forces throughout the developed world, it may be that the problem confronting Canadian and Irish participation in the more pro-active peace support operations

of today is capability and capacity to participate. This may be an even more important determiner of mission success than the nature of the conflict for which intervention is being considered. Canada, despite membership of NATO, does not appear to have compromised its status as a 'middle power.' As the European Union moves closer to some form of security and defence arrangements, and Ireland joins the NATO sponsored Partnership for Peace, Ireland must look to countries like Canada in assessing the political and legal implications of such changes. The risks of involvement for Ireland are not insignificant, as they were during the Congo crisis nearly forty years ago, but the duty to act as responsible member of the international community remains and is compelling, in particular, given the shameful record of Ireland and other European countries throughout the Yugoslav conflict.

Events in Somalia, Lebanon and elsewhere have highlighted deficiencies in international institutions and organizations. The UN, the European Union and the Organization for African Unity have all found that responding effectively to internal or intrastate conflicts is very difficult. Critics of the UN have pointed to its use of rhetoric when decisive action and leadership was required. Its bulging bureaucracy often seems to epitomise inefficiency and inertia.<sup>4</sup> In the former Yugoslavia the UN was exposed as the paper tiger so many believe it to be.<sup>5</sup> The peacekeeping operation was unsustainable as there was no peace to keep, while enforcement action was unsustainable due to a lack of political will among the permanent members of the Security Council. Many of the criticisms are true and justified. However, the failure is usually not that of the UN, but rather its

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<sup>3</sup> See S. Dragon, 'Permanent Neutrality and Peacekeeping', 5 (1-2), *International Peacekeeping* (Kluwer), (1999), 37-40.

<sup>4</sup> See comments by Boutros Boutros-Ghali, 'Empowering the United Nations', 71 *Foreign Affairs*, (1992/93), 100, to the effect that 'duplication is widespread; co-ordination is often minimal; bureaucratic battles aimed at monopolising a particular subject are rife, and organizational objectives are sometimes in conflict'.

<sup>5</sup> See generally R. Vayrynen, 'Preventive Action: Failure in Yugoslavia', in M. Pugh, (ed.), *The UN, Peace and Force*, 3 (4) *International Peacekeeping*, London: Frank Cass, (1996), 21-42; W. Biermann and M. Vadset, *UN Peacekeeping in Trouble: Lessons learned from the former Yugoslavia*, Aldershot: Ashgate, (1998) and L. MacKenzie, *Peacekeeper: the road to Sarajevo*, Toronto: Harper Collins, (1994).

membership as a whole. At the same time the successes of the UN are often neglected or ignored.

Former United States President, Bill Clinton, said that the UN could not engage in all the world's conflicts and that it must learn when to say no,<sup>6</sup> but who is to distinguish the worthy causes from those that should be ignored? Rwanda was a disaster waiting to happen, and even if the international community was willing to intervene, who would decide when, where and how. In the case of Rwanda, unlike Bosnia, there was no pretence. Although the French did respond, it was too late to prevent the genocide and was primarily motivated by French national interest. France, a permanent member of the Security Council, was one of the main suppliers of weapons to the perpetrators of the genocide and continued to lend support to those militias in exile.<sup>7</sup>

One of most serious deficiencies in the UN system is the inability to respond effectively to crisis involving violent intrastate or internal conflicts. Traditional interstate war of the kind that led to the Gulf war and Operation Desert Storm is quite rare. The reverse is true of conflicts within states. Africa and many parts of the world are comprised mostly of artificially drawn state boundaries that often divided traditional political, ethnic and national groups. Multi-nation states are far more common than homogenous states. Ethnic and religious differences are not the primary cause of conflict, no more than bad weather and crop failure are the sole cause of famine and starvation. In order to respond to the problem of intrastate conflict, there is need for reform of doctrinal foundations and structures in the UN system. Military intervention in any internal conflict is fraught with uncertainty and danger. The *Agenda for Peace* report, like most national governments, paid lip service to non-governmental actors. There are many lessons to be learned from Somalia, one of these is that non-governmental players, whether clan, community, tribal or nation based, and international NGO's can play a significant role in preventing a country or society imploding. But first this role must be recognised.

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<sup>6</sup> President Clinton, address to the UN General Assembly, New York, 27 September 1993, US Dept. of State 4 *Dispatch* 39 at 652. See generally M. Mackinnon, *US Peacekeeping Policy under Clinton*, London: F. Cass, (1999).

<sup>7</sup> Human Rights Watch Arms Project, Rwanda/Zaire, Vol.7. No.4, May 1995.

They are often the groups most aware of what is happening on the ground, and proposals for deploying early warning monitors in potential trouble spots makes no sense when those already working on the ground are not listened to. It is not just policies that must change, but the attitudes of those that frame them.

Countries of the developing South have legitimate fears that humanitarian intervention may be used as a pretext for destabilising selected Governments or regimes. This is one reason why reform of the Security Council and UN is so vital. A global society based on universal sovereignty and respect for fundamental human rights has the potential to provide all peoples with legitimate involvement in issues affecting the world as a whole. Who is to blame for the debacles in Rwanda, Somalia and the former Yugoslavia? To some extent the whole international community of states and peoples all share responsibility. However, the Security Council set up all three UN missions. They were ill conceived and short sighted, and placed the peacekeepers for the most part in an impossible situation. The Council hesitated and prevaricated when faced with starvation and genocide, and it refused to give UNPROFOR the resources and support required to protect itself, let alone the peoples whose very existence depended upon its protection. At the same time, the cosy consensus surrounding the UN response to Iraq's unlawful invasion of Kuwait was a sham. There was no mention of the economic intimidation that was imposed on the more vulnerable states of the South to secure their support or silence.<sup>8</sup>

There are many less aspirational matters concerning peace support operations that need attention. Revision of the legal framework of UN peacekeeping operations is long overdue. The *ad hoc* and improvised structures and procedures have long since been a source of concern and difficulty. Usually these forces have enough to contend with on the ground besides the ineptness of their own organization. The Somalia operation shows that it is essential to the success of a peace support operation that a valid and unified chain of command be authorized. There is an urgent need to clarify the relationship between the

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<sup>8</sup> See P. Bennis, 'Blue Helmets – For what? Under whom?' in E. Childers, *Challenges to the United Nations*, New York: St. Martins Press, (1995), 152-175 at 156; and personal interview, Mr. E. Childers, former UN civil servant and Senior Advisor to the UN Director-General for Development and International Economic Co-operation, Galway, 1995.

Security Council and 'coalitions of the willing', especially the command and control mechanism adopted.<sup>9</sup> These issues were foremost in the minds of NATO political and military leaders. For this reason NATO is alert to the need to 'be careful not to subordinate NATO to any other international body or compromise the integrity of its command structure'.<sup>10</sup> The current force in Kosovo is UN mandated. If the NATO led operation is not subordinate to the UN, then what is its relationship with the Security Council? This depends on where the real concentration of power is based? It is not with the Secretary-General, and nor is it with the Security Council. This is a NATO led and *de facto* NATO commanded operation. There is no strategic direction from the Military Staff Committee, and the reality is that the Security Council is merely kept informed

Despite the complexities of providing a statutory basis in Irish law for distinguishing between the overall command referred to in the Defence Act and operational command and/or within the context of a UN force, there is an urgent need to amend the existing statutory framework to reflect the reality on the ground. The issue is even more complex in the context of the recent SFOR and KFOR missions. This may be unconstitutional, and /or contrary to Irish military law. In any event, this is an unsatisfactory situation. At the very least, Defence Force Regulations could be introduced by the Minister for Defence providing for different levels of command and control, and the Defence Acts amended to provide for elements to be placed under the operational command or the operational control of commanders of international forces organised and established under the authority of the UN. The situation prevailing for Canadian Forces has much merit and is a pragmatic attempt to balance the needs of the mission with that of the Canadian requirement to retain overall national command of the armed forces.

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<sup>9</sup> See D. Sarooshi, *The United Nations and the Development of Collective Security*, Oxford, Clarendon Press, (1999), esp., 247-285.

<sup>10</sup> See Deputy Secretary of State Strobe Talbott on NATO's future 'Strategic Concept', in B. Simma, 'NATO, the UN and the Use of Force: Legal Aspects', 10 *European Journal of International Law*, (1999) 1-22, at 15.

The litmus test for determining the nature of a UN operation i.e. peacekeeping or peace enforcement remains the ability and willingness to resort to the use of force. Despite this, the dividing line between the use of force in self-defence on traditional peacekeeping operations, and that on peace enforcement operations is not so clear cut in practice. Much will depend on subjective variables that are difficult to predict, and these may influence the way in which a mandate is interpreted and applied. Who, for example, has the authority to determine what defence of the mandate or mission means in practice? It is no coincidence that the commanders of traditional peacekeeping forces are more often than not selected from neutral or non-aligned nations, and that the first commander of UNOSOM II was a general from a NATO member country.

The resolutions in respect of UNITAF and UNOSOM II expressly referred to Chapter VII, and while the use of force was not mentioned specifically, the implication of 'all necessary means' to carry out the mandate was clear. It permitted the use of force without further authorisation and it was quasi-enforcement in nature. The significance of Resolution 837 (1993) cannot be overstated. Nevertheless, it is arguable whether it justified the nature and intensity of the military campaign pursued by UNOSOM II forces in its aftermath. The attack by US commanded forces culminated in an operation to capture Aided that led directly to the US decision to withdraw from Somalia. This was the turning point for US involvement, and it ultimately led to the break up of UNOSOM II as other countries followed suit.

While the Security Council had no hesitation in giving UNOSOM II a peace enforcement mandate and granting the Secretary-General overall control, in contrast, the Council and the Secretary-General were at all time clear that UNIFIL was a peacekeeping mission. And as such, it would not be permitted to adopt a peace enforcement role, incrementally or otherwise. The adoption of resolutions invoking Chapter VII and phrased in such overtly militaristic terms had the potential to escalate the level of violence unless strictly controlled. This is what happened in Somalia. In operating outside the formal UN chain of command, it could be said that the US 'hijacked' the mission, and pursued an agenda not always consistent with the UN objectives. The abandonment of

impartiality, and the consequent loss of credibility by both the US and the UN proved a recipe for disaster.

A clear lesson is that UN peacekeeping or peace enforcement operations alone cannot end a war, nor will the robust interpretation of a mandate provide the solution to intra state conflict. The use of force by the UN, whatever the circumstances, must be resorted to in the context of an overall political strategy with clearly defined political goals. While military force is the best way to achieve exclusively military objectives, using force to obtain a mix of military and political objectives is more problematic. It was not the use of force that brought the demise of the UN operation in Somalia, but a combination of factors, one of which was the selective and excessive use of force.

The Lebanon and Somalia operations show the need for support from the members of the Security Council, irrespective of the nature of the operation. Both operations also illustrate that problems arise when missions are ill defined, and this uncertainty was compounded in the case of Somalia by a dispute about the authority to use force. What was an acceptable level of force to remain within the parameters set by 'all necessary means'? UNOSOM II's experience provides a salutary lesson on the limits of the use of force, and a willingness to accept the responsibilities arising from such action. While some countries are not prepared to take part in enforcement operations, it is also evident that unless the vital interests of the US are at stake, there is little point in committing US forces to combat roles abroad. Most of all, UNOSOM II showed the need to set clear objectives when resorting to the use of force, and for the US and UN, there were lessons on what could or what would work in the future. In some ways the lessons to be had are contradictory. The use of force by the US was excessive for the nature of any UN peace support operation, but inadequate for the purposes of waging war, and although limited in nature, this ultimately is what the US embarked upon against Aided.

Much of the criticism of the Lebanon and Somalia operations has arisen from unrealistic expectations over what a UN military operation, whether traditional peacekeeping or peace enforcement, can achieve in the context of ongoing hostilities.

The *UN Commission of Inquiry* recommended that the UN refrain from taking peace enforcement actions within the internal conflicts of states.<sup>11</sup> But UN forces should never be deployed in a situation where they are forced to play a role as silent witnesses to gross violations of humanitarian law. This raises the question whether the UN should undertake peacekeeping and peace enforcement as part of the one mission. It caused doctrinal confusion and contributed to mission failure in Somalia. Nevertheless, UNIFIL shows that it is possible to use force in self-defence and retain impartiality. But enforcement action of any kind is inconsistent with the principles of peacekeeping, and Chapter VI operations should not have elements of enforcement in the mandate that could lead to the incremental adoption of a Chapter VII strategy. In this way, when not to use force is as crucial a question as when to use it.

The UNIFIL experience shows that the principle of non-use of force has been controversial and difficult to apply in practice. At an early stage in the operation, it was decided that operational effectiveness would be curtailed in order to adhere to the principle of non-use of force, and in this way the defence of At-Tiri in 1980 is best regarded as *sui generis*. The debacle of the Multi National Force's (MNF) involvement in Beirut during 1983, and the failure of the more recent robust peacekeeping in Somalia, has vindicated this policy.

The *Brahimi Report* called for more robust ROE in operations involving intra-state/transnational conflicts and bigger and better equipped forces.<sup>12</sup> It did not seem to take full cognisance of the fact that the use of force must be accompanied by political will, a clear mandate and strategy, a willingness to accept casualties, and a need for an effective command and control mechanism to ensure cohesion and uniform application. It also failed to address the issues raised by regional peacekeepers or coalitions of the willing acting under the authority of the UN. Somalia shows that robust ROE and increased size are not enough, and while it is imperative not to employ an emasculated UN force, it is important to have a clear military and political strategy agreed at the outset. Given the political difficulties that this may encounter, such a policy may

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<sup>11</sup> *UN Commission of Inquiry, op. cit.*, para. 270.

prove impossible to implement, even if the Report's recommended structural reforms are implemented. The recommendation of the Report make interesting reading, but UN controlled forces generally are not given adequate capabilities to intimidate or enforce. Another UN report is unlikely to change this historical fact.

Ensuring compliance with humanitarian law norms on peace support operations also remains problematic. There are of course practical difficulties for the UN in ensuring troops under its command or operational control do not infringe any of the applicable rules of international law. Not least being the fact that no troops have ever served under the full command and control of the UN, and it is unlikely that they will do so in the foreseeable future. Enforcement of humanitarian law is especially problematic in respect of UN forces, and the *Brocklebank*, *Rockwood* and similar trials make it clear that there is significant confusion regarding the applicability of humanitarian law to the different kinds of UN military operations. Relying on the contributing states to use their civil or military legal regimes to enforce municipal law is one solution, but this requires the co-operation of those states concerned and the existence of an appropriate legal structure to deal with such offences. While the independence of municipal legal regimes and disciplinary procedures must be respected, the current confusion is militating against a uniform and agreed formula for determining the applicability of international law to such operations.

There seems little sense in a system where combatants engaged in conflict are subject to humanitarian law when they are acting as members of national armed forces, whereas members of armed forces in the same armed conflict acting as peacekeepers are exempted. This is all the more absurd when these UN soldiers represent the Organization charged with upholding and promoting the fundamental human right that humanitarian law seeks to protect. The application of humanitarian law to UN forces will enhance rather than compromise the mission to promote peace. In addition, the legal obligations of peacekeeping and other UN military forces should reflect the notion that they will affirmatively seek to prevent abuses. This is best achieved by an express provision to this

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See Report of the Panel of Peacekeepers, UN, 23 August, 2000 (A/55/305-S/2000/809). Available from <<http://www.un.org>>

effect in the mandate. The *Brahimi Report* suggests a more assertive and interventionist approach be expressly provided for in the mandate of such forces. This presupposes that UN personnel will be given the means and capacity to act in this way, a presumption that past experience shows may not be taken for granted. Making it mandatory for all UN personnel to be educated and trained in this area is essential. In particular, contributors to peace support operations could follow the example of Canada, and learn to remedy deficiencies identified in this area.

The recent Convention on the Protection of UN Personnel has complicated the matter somewhat. The exact scope and nature of UN operations covered by the Convention is a matter on which there is a divergence of opinion. The view that the Convention applies to most kinds of UN operations falling short of enforcement action itself is the dominant opinion, although the protection provided for there under might not extend to all stages and components of the military operation. The confusion arises primarily from the different perspectives among countries as to the purpose of the Convention in the first place. Many were critical of the scope and expansion of the Security Council's activities in recent years, but were powerless to prevent it. They saw the approval of a Convention covering traditional peacekeepers as a means to curtail these activities. But it was precisely because of the Somalia type operations that pressure was brought to bear to deal with the legal deficiencies that existed in the international regime.

The end result is still unsatisfactory in that the difficulty of distinguishing between peacekeeping and enforcement operations, while making provision for hybrid operations involving both, has not been properly taken into account. This crucial issue, like the question relating to the applicability of humanitarian law to UN operations, has been left unresolved by the Convention. It now seems generally accepted that the Convention applies to peace enforcement operations like that of UNOSOM II. The problem is when and who determines that a confrontation between UN troops and others reaches the threshold that the participants may be regarded as combatants under Article 2 (2) of the Convention. As it stands, the Convention is a poorly drafted and ill thought out document that was heavily influenced by political factors. While is

does address what was a significant gap in international law, how it will work in practice is difficult to predict. Troop contributing states would be advised not to place too much store in its ability to protect UN persons, and prosecutors should be circumspect regarding efforts to invoke its terms.

Linked to this is the issue of European and Western neo colonialism under the cloak of UN activity. How will the Convention operate in a situation like Somalia when a major contributor to the UN force decides to target a clan or militia leader, and sometimes operates outside the UN command structure? The problem with accepting that peace enforcement operations come within its remit is that is it seeks to criminalize action by military forces against UN mandated or authorized peace enforcement operations.

It is an unavoidable flaw that in relation to the purposes and functions of the UN, humanitarian law only plays a secondary role. Furthermore, states perceive criminal jurisdiction over their nationals as part of their jealously guarded sovereignty, and considerable national sensitivities are associated with participation in UN military operations. The creation of a special tribunal or court to deal with such matters is one potential solution, but the fact that few if any countries actually place their forces under the full command of the UN could be problematic.

The UN has been criticised for its failure to fulfil the mandate in Lebanon, and for the failure of the operations in Somalia. An often overlooked factor is the fact that the Organization is resorted to by states most often when it suited their purposes and the problem otherwise seems insoluble. The situation created by the 1978 invasion of Lebanon was such an instance. Primarily sponsored by the United States to facilitate a speedy withdrawal of Israel from Lebanon, and to ensure that the so called Camp David Accords were not further jeopardised, co-operation from Israel was vital to the success of UNIFIL. When it became evident that this was not forthcoming, the United States failed to put sufficient pressure on Israel to co-operate. In the Security Council, the normal political divisions were temporarily put aside due to the urgency of the crises. Nonetheless, the mandate agreed upon was unrealistic and many elements of the overall plan for the deployment of UNIFIL had obvious deficiencies.

A number of recent multinational interventions, whether under the banner of the UN or an independent coalition, have often failed to make a long-term

improvement in the crisis situation.<sup>13</sup> There has been a tendency to rely on short-term political expediency to the detriment of long term strategic policies at the operational level. The Somalia experience indicates that military establishments need to re-examine their role in complex political and humanitarian emergencies, and address the mistrust between civil and military components of such missions. There is a need for the military to expand its concept of security to consider much more than 'keeping the lid' on things. The failure to disarm the clans was a serious flaw in the implementation phase of the UN operations, but even this would have been insufficient without the creation of a safe environment. If you want to create a secure environment, then peace must be made with, or imposed upon, all the parties. Where the peace is imposed, as in the case of the former Yugoslavia since the Dayton Agreement, then the price must be paid in terms of resources and long term commitment to political rehabilitation. The narrow focus on the humanitarian and military issues in Somalia meant the underlying political problems did not receive sufficient attention, and this can be traced back to, *inter alia*, an ambiguous mandate and objectives.

The long-term strategy in Somalia was unclear at the time of inception, but by the end of the operation it was non-existent. What efforts were made at rebuilding the war torn society were inept and imposed without sufficient attention to indigenous political, cultural and social traditions. Instead of seeking to marginalize all the major warlords, the UN targeted Aided. The unfolding events showed that the United States and the UN forces failed to appreciate the contradictions and inconsistencies in their confused roles of peacekeeping, peacemaking and peace enforcement. When this was combined with United States domination, and key positions held by difficult personalities, it was hardly surprising that UNOSOM II became a major protagonist in a conflict it was supposed to help resolve. Nor is it true to say that the UN broadened the mandate against the wishes of the United States.

These issues did not arise in the case of UNIFIL as this was an operation

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<sup>13</sup> J. MacKinlay & R. Kent, 'A New Approach to Complex Emergencies', 4 (4) *International Peacekeeping*, (Winter 1997), 31-49 at 36. For an analysis of the neglect of developmental components of peace operations, see J. David Whaley, 'Improving UN Developmental Co-ordination within Peace Missions', in J. Ginifer, *op. cit.* 107-122.

with an almost exclusive military focus. The political objectives were clear, but they were never intended to be the responsibility of UNIFIL, the Force would merely facilitate their achievement by international diplomacy. Nor was there a civil component to the mission. However, in the case of both missions, the Security Council acted as if the mandate would be self-executing once the troops were deployed.

There were similarities between the US/UN led mission in Somalia and the British army deployment in Northern Ireland.<sup>14</sup> At first both forces received a friendly reception from the local population, but relations soured when perceptions of their role changed as they failed to take account of its contradictions and inconsistencies. Likewise, in the 1980's Indian intervention in Sri Lanka and US intervention in Lebanon involved a similar confusion in roles and a practical incompatibility in their intervention.<sup>15</sup> Despite possessing the weaponry of a superpower, the US marines were reduced to that of a militia in Beirut. After the death of over one thousand Indian peacekeepers, the soldiers were withdrawn as their presence presented an obstacle to achieving a peaceful resolution of the conflict.

There were aspects to the UN operation that were especially reprehensible. The defence offered to claims of excessive zeal in the use of force had an all too familiar ring: provocateurs mingled in the crowds and fired first; collateral damage was minimal and civilian casualties exaggerated; the 'terrorists' used women and children as shields etc. Reputable organizations like the ICRC disputed the UN version of events. In addition, hundreds of Somalis were held in administrative detention. The scale intensity and frequency of the use of force converted UNOSOM II into a hostile army of occupations in the eyes of many Somalis, and endangered all those participating in the operation. What

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<sup>14</sup> See R. Murphy, *Ireland, Peacekeeping and Policing the 'New World Order'*, Belfast: Centre for Research and Documentation, (1997), esp. 25-44; and generally F. Ní Aolain, *The Politics of Force*, Belfast: Blackstaff, Belfast, (2000); R. Evelagh, *Peace Keeping in a Democratic Society – The Lessons of Northern Ireland*, London: Hurst and Co., (1978), and D. Hamill, *Pig in the Middle, the Army in Northern Ireland*, London: Mehthuen, (1985); E. McCann, *War and an Irish Town*, 3<sup>rd</sup>. edn., London: Pluto Press, (1993).

<sup>15</sup> See A. James, *Peacekeeping in International Politics*, London: Macmillan, (1990), 131-133.

made matters worse is that this was done on behalf of the international community by the very Organization committed to setting, promoting an enforcing human rights standards by state governments. Apart from the loss of life on all sides, the real tragedy of Somalia was its legacy and the failure to learn the right lessons from a situation where the UN was called upon to do a range of impossible and confused tasks

In deciding whether or not to initiate enforcement action or launch a peacekeeping operation, the criteria must be objective. Mandates and resources need to reflect the complexity of contemporary conflicts. The response must be graduated and proportionate, and retain the support of the international community as a whole. Bosnia and Somalia have shown that it is a mistake to assume that the square peg of UN humanitarian intervention will fit into the round hole of either peacekeeping or enforcement operations. UN peacekeeping is one of the more successful multilateral attempts to maintain peace and security. Despite recent setbacks, there is no reason why it cannot regain its lost credibility and adapt to the changed regional and global circumstances. It is too easy to be cynical and to view the UN as a vehicle for the exercise of self-interest and realpolitik. Its founders intended that it embody a higher morality than that which determined the responses of individual states. Like democracy itself, the UN is an imperfect system, but there are few visions of a more effective alternative.

**RESOLUTIONS OF THE SECURITY COUNCIL – UNIFIL****RESOLUTION 425 (1978) of 19 March 1978**

*The Security Council,*

*Taking note* of the letters from the Permanent Representative of Lebanon and from the Permanent Representative of Israel,

*Having heard* the statements of the Permanent Representatives of Lebanon and Israel,

*Gravely concerned* at the deterioration of the situation in the Middle East and its consequences to the maintenance of international peace,

*Convinced* that the present situation impedes the achievement of a just peace in the Middle East,

1. *Calls* for strict respect for the territorial integrity, sovereignty and political independence of Lebanon within its internationally recognised boundaries;
2. *Calls upon* Israel immediately to cease its military action against Lebanese territorial integrity and withdraw forthwith its forces from all Lebanese territory;
3. *Decides*, in the light of the request of the Government of Lebanon, to establish immediately under its authority a United Nations interim force for Southern Lebanon for the purpose of confirming the withdrawal of Israeli forces, restoring international peace and security and assisting the Government of Lebanon in ensuring the return of its effective authority in the area, the force to be composed of personnel drawn from Member States;
4. *Requests* the Secretary-General to report to the Council within twenty-four hours on the implementation of the present resolution.

*Adopted at the 2074<sup>th</sup> meeting by 12 votes to none, with 2 abstentions (Czechoslovakia, Union of Soviet Socialist Republics.)*

**RESOLUTION 467 (1980) of 24 April 1980**

*The Security Council,*

*Acting* in response to the request of the Government of Lebanon,

*Having studied* the special report of the Secretary General on the United Nations Interim Force in Lebanon of 11 April 1980 and the subsequent statements, reports and addenda,

*Having expressed* itself through the statement of the President of the Security Council of 18 April 1980,

*Recalling* its resolutions 425 (1978), 426 (1978), 427 (1978), 434 (1978), 444 (1979), 450 (1979) and 459 (1979),

*Recalling* the terms of reference and general guidelines of the Force, as stated in the report of the Secretary General of 19 March 1978 confirmed by resolution 426 (1978), and particularly:

- a. That the Force “must be able to function as an integrated and efficient military unit”,
  - b. That the Force “must enjoy the freedom of movement and communication and other facilities that are necessary for the performance of its tasks”,
  - c. That the Force “will not use force except in self defence”,
  - d. That “self defence would include resistance to attempts by forceful means to prevent it from discharging its duties under the mandate of the Security Council”,
1. *Reaffirms* its determination to implement the above-mentioned resolutions, particularly resolutions 425 (1978), 426 (1978) and 459 (1979), in the totality of the area of operation assigned to the United Nations Interim Force in Lebanon, up to the internationally recognised boundaries;
  2. *Condemns* all actions contrary to the provisions of the above-mentioned resolutions and, in particular, strongly deplores:
    - a. Any violation of Lebanese sovereignty and territorial integrity;
    - b. The military intervention of Israel in Lebanon;
    - c. All acts of violence in violation of the General Armistice Agreement between Israel and Lebanon;
    - d. Provision of military assistance to the so-called *de facto* forces;
    - e. All acts of interference with the United Nations Truce Supervision Organisation;
    - f. All acts of hostility against the Force and in or through its area of operation as inconsistent with Security Council resolutions;
    - g. All obstructions of the ability of the Force to confirm the complete withdrawal of Israeli forces from Lebanon, to supervise the cessation of hostilities, to ensure the peaceful character of the area of operation, to

control movement and to take measures deemed necessary to ensure the effective restoration of the sovereignty of Lebanon;

- h. Acts that have led to loss of life and physical injuries among the personnel of the Force and of the United Nations Truce Supervision Organisation, their harassment and abuse, the disruption of communication, as well as the destruction of property and material;
3. *Condemns* the deliberate shelling of the headquarters of the Force and more particularly the field hospital, which enjoys special protection under international law;
4. *Commends* the efforts undertaken by the Secretary General and by the interested Governments to bring about the cessation of hostilities and to enable the Force to carry out its mandate effectively without interference;
5. *Commends* the Force for its great restraint in carrying out its duties in very adverse circumstances;
6. *Calls attention* to the provisions in the mandate that would allow the Force to use its right to self-defence;
7. *Calls attention* to the terms of reference of the Force which provide that it will use its best efforts to prevent the recurrence of fighting and to ensure that its area of operation will not be utilized for hostile activities of any kind;
8. *Requests* the Secretary General to convene a meeting, at an appropriate level, of the Israel-Lebanon Mixed Armistice Commission to agree on precise recommendations and further to reactivate the General Armistice Agreement conducive to the restoration of the sovereignty of Lebanon over all its territory up to the internationally recognised boundaries;
9. *Calls upon* all parties concerned and all those capable of lending any assistance to co-operate with the Secretary General in enabling the Force to fulfil its mandate;
10. *Recognises* the urgent need to explore all ways and means of securing the full implementation of resolution 425 (1978), including enhancing the capacity of the Force to fulfil its mandate in all its parts;
11. Requests the Secretary General to report as soon as possible on the progress of these initiatives and the cessation of hostilities.

*Adopted at the 2218<sup>th</sup> meeting by 12 votes to none, with 3 abstentions (German Democratic Republic, Union of Soviet Socialist Republics, United States of America).*

## RESOLUTIONS OF THE SECURITY COUNCIL - SOMALIA

### A. UN Security Council Resolution 794

*December 3, 1992*

*The Security Council,*

*Reaffirming* its resolutions 733 (1992) of 23 January 1992, 746 (1992) of 17 March 1992, 751 (1992) of 24 April 1992, 767 (1992) of 27 July 1992 and 775 (1992) of 28 August 1992,

*Recognizing* the unique character of the present situation in Somalia and mindful of its deteriorating, complex and extraordinary nature, requiring an immediate and exceptional response,

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

*Gravely alarmed* by the deterioration of the humanitarian situation in Somalia and underlining the urgent need for the quick delivery of humanitarian assistance in the whole country,

*Noting* the efforts of the League of Arab States, the Organization of African Unity, and in particular the proposal made by its Chairman of the Assembly of Heads of State and Government of the Organisation of African Unity, at the forty-seventh regular session of the General Assembly for the organization of an international conference on Somalia, and the Organization of the Islamic Conference and other regional agencies and arrangements to promote reconciliation and political settlement in Somalia and to address the humanitarian needs of the people of that country,

*Commending* the ongoing efforts of the United Nations, its specialized agencies and humanitarian organizations and of non-governmental organizations and of States to ensure delivery of humanitarian assistance in Somalia,

*Responding* to the urgent calls from Somalia for the international community to take measures to ensure the delivery of humanitarian assistance in Somalia,

*Expressing grave alarm* at continuing reports of widespread violations of international humanitarian law occurring in Somalia, including reports of violence and threats of violence against personnel participating lawfully in impartial humanitarian relief activities; deliberate attacks on non-combatants, relief consignments and vehicles, and medical and relief facilities; and impeding the delivery of food and medical supplies essential for the survival of the civilian population,

*Dismayed* by the continuation of conditions that impede the delivery of humanitarian supplies to destinations within Somalia, and in particular reports of looting of relief supplies destined for starving people, attacks on aircraft and ships bringing in humanitarian relief supplies, and attacks on the Pakistani UNOSOM contingent in Mogadishu of the United Nations Operation in Somalia,

*Taking note* with appreciation of the letters of the Secretary-General of 21 November 1992 (5/24859) and of 29 November 1992 (5/24868),

*Sharing* the Secretary-General's assessment that the situation in Somalia is intolerable and that it has become necessary to review the basic premises and principles of the United Nations effort in Somalia and that UNOSOM's existing course would not in present circumstances be an adequate response to the tragedy in Somalia,

*Determined* to establish as soon as possible the necessary conditions for the delivery of humanitarian assistance wherever needed in Somalia, in conformity with resolutions 751 (1992) and 767 (1992),

*Noting* the offer by Member States aimed at establishing a secure environment for humanitarian relief operations in Somalia as soon as possible,

*Determined also* to restore peace, stability and law and order with a view to facilitating the process of a political settlement under the auspices of the United Nations, aimed at national reconciliation in Somalia, and encouraging the Secretary-General and his Special Representative to continue and intensify their work at the national and regional levels to promote these objectives,

*Recognizing* that the people of Somalia bear ultimate responsibility for national reconciliation and the reconstruction of their own country,

1. *Reaffirms* its demand that all parties, movements and factions in Somalia immediately cease hostilities, maintaining a cease-fire throughout the country, and cooperate with the Special Representative of the Secretary-General for Somalia as well as with the military forces to be established in pursuant to the authorization given in paragraph 10 below in order to promote the process of relief distribution, reconciliation and political settlement in Somalia;

2. *Demands* that all parties, movements and factions in Somalia take all measures necessary to facilitate the efforts of the United Nations, its specialized agencies and humanitarian organizations to provide urgent humanitarian assistance to the affected population in Somalia;

3 *Also demands* that all parties, movements and factions in Somalia take all measures necessary to ensure the safety of United Nations and all other personnel engaged in the delivery of humanitarian assistance, including the military forces to be established pursuant to the authorization given in paragraph 10 below;

4. *Further demands* that all parties, movements and factions in Somalia immediately cease and desist from all breaches of international humanitarian law including from actions such as those described above;

5 *Strongly condemns* all violations of international humanitarian law occurring in Somalia, including in particular the deliberate impeding of the delivery of food

and medical supplies essential for the survival of the civilian population, and affirms that those who commit or order the commission of such acts will be held individually responsible in respect of such acts;

6. *Decides* that the operations and the further deployment of the 3,500 personnel of the United Nations Operation in Somalia (UNOSOM) authorized by paragraph 3 of resolution 775 (1992) should proceed at the discretion of the Secretary-General in the light of his assessment of conditions on the ground; and requests him to keep the Council informed and to make such recommendations as may be appropriate for the fulfillment of its mandate where conditions permit;

7. *Endorses* the recommendation by the Secretary-General in his letter of 29 November 1992 (S/24868) that action under (Chapter VII) of the Charter of the United Nations should be taken in order to establish a secure environment for humanitarian relief operations in Somalia as soon as possible;

8. *Welcomes* the offer by a Member State described in the Secretary-General's letter to the Council of 29 November 1992 (S/24868) concerning the establishment of an operation to create such a secure environment;

9. *Welcomes also* offers by other Member States to participate in that operation;

10. *Acting* under Chapter VII of the Charter of the United Nations, *authorizes* the Secretary-General and Member States cooperating to implement the offer referred to in paragraph 8 above to use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia;

11. *Calls* on all Member States which are in a position to do so to provide military forces and to make additional contributions, in cash or in kind, in accordance with paragraph 10 above and requests the Secretary-General to establish a fund through which the contributions, where appropriate, could be channeled to the States or operations concerned;

12. *Also Authorizes* the Secretary-General and the Member States concerned to make the necessary arrangements for the unified command and control of the forces involved, which will reflect the offer referred to in paragraph 8 above;

13. *Requests* the Secretary-General and the Member States acting under paragraph 10 above to establish appropriate mechanisms for coordination between the United Nations and their military forces;

14. *Decides* to appoint an *ad hoc* commission composed of members of the Security Council to report to the Council on the implementation of this resolution;

15. *Invites* the Secretary-General to attach a small UNOSOM liaison staff to the field headquarters of the unified command;

16. *Acting* under Chapters VII and VIII of the Charter, *calls upon* States, nationally or through regional agencies or arrangements, to use such measures as may be necessary to ensure strict implementation of paragraph 5 of resolution 733 (1992);

17 *Requests* all States, in particular those in the region, to provide appropriate support for the actions undertaken by States, nationally or through regional agencies or arrangements, pursuant to this and other relevant resolutions;

18. *Requests* the Secretary-General and, as appropriate, the States concerned to report to the Council on a regular basis, the first such report to be made no later than fifteen days after the adoption of this resolution on the implementation of the present resolution and the attainment of the objective of establishing a secure environment so as to enable the Council to make the necessary decision for a prompt transition to continued peace-keeping operations;

19. *Also Requests* the Secretary-General to submit a plan to the Council initially within fifteen days after the adoption of the present resolution to ensure that UNOSOM will be able to fulfill its mandate upon the withdrawal of the unified command;

20. *Invites* the Secretary-General and his Special Representative to continue their efforts to achieve a political settlement in Somalia;

21. *Decides* to remain actively seized of the matter.

#### **E. UN Security Council Resolution 814**

*March 26, 1993*

*The Security Council,*

*Reaffirming* its resolutions 733 (1992) of 23 January 1992, 746 (1992) of 17 March 1992, 751 (1992) of 24 April 1992, 767 (1992) of 27 July 1992, 775 (1992) of 28 August 1992 and 794 (1992) of 3 December 1992,

*Bearing in mind* General Assembly resolution 47/167 of 18 December 1992,

*Commending* the efforts of Member States acting pursuant to resolution 794 (1992) to establish a secure environment for humanitarian relief operations in Somalia,

*Acknowledging* the need for a prompt, smooth and phased transition from the Unified Task Force (UNITAF) to the expanded United Nations Operation in Somalia (UNOSOM II),

*Regretting* the continuing incidents of violence in Somalia and the threat they pose to the reconciliation process,

*Deploring* the acts of violence against persons engaging in humanitarian efforts on behalf of the United Nations, States, and non-governmental organizations,

*Noting with deep regret and concern* the continuing reports of wide-spread violations of international humanitarian law and the general absence of the rule of law in Somalia,

*Recognizing* that the people of Somalia bear the ultimate responsibility for national reconciliation and reconstruction of their own country,

*Acknowledging* the fundamental importance of a comprehensive and effective programme for disarming Somali parties, including movements and factions,

*Noting* the need for continued humanitarian relief assistance and for the rehabilitation of Somalia's political institutions and economy,

*Concerned* that the crippling famine and drought in Somalia, compounded by the civil strife, have caused massive destruction to the means of production and the natural and human resources of that country,

*Expressing its appreciation* to the Organization of African Unity, the League of Arab States, the Organization of the Islamic Conference and the Non-Aligned Countries for their cooperation with, and support of, the efforts of the United Nations in Somalia,

*Also expressing its appreciation* to all Member States which have made contributions to the Fund established pursuant to paragraph 11 of resolution 794 (1992) and to all those who have provided humanitarian assistance to Somalia,

*Commending* the efforts, in difficult circumstances, of the initial United Nations Operation in Somalia (UNOSOM) established pursuant to resolution 751 (1992),

*Expressing* its appreciation for the invaluable assistance the neighboring countries have been providing to the international community in its efforts to restore peace and security in Somalia and to host large numbers of refugees displaced by the conflict and noting the difficulties caused to them due to the presence of refugees in their territories,

*Convinced* that the restoration of law and order throughout Somalia would contribute to humanitarian relief operations, reconciliation and political settlement, as well as to the rehabilitation of Somalia's political institutions and economy,

*Convinced also* of the need for broad-based consultations and deliberations to achieve reconciliation, agreement on the setting up of transitional government institutions and consensus on basic principles and steps leading to the establishment of representative democratic institutions,

*Recognizing* that the re-establishment of local and regional administrative institutions is essential to the restoration of domestic tranquility,

*Encouraging* the Secretary-General and his Special Representative to continue and intensify their work at the national, regional and local levels, including and encouraging broad participation by all sectors of Somali society, to promote the process of political settlement and national reconciliation and to assist the people of Somalia in rehabilitating their political institutions and economy,

*Expressing its readiness* to assist the people of Somalia, as appropriate, on a local, regional or national level, to participate in free and fair elections, with a view towards achieving and implementing a political settlement,

*Welcoming* the progress made at the United Nations-sponsored Informal Preparatory Meeting on Somali Political Reconciliation in Addis Ababa from 4 to 15 January 1993, in particular the conclusion at that meeting of, three agreements by the Somali parties, including movements and factions, and welcoming also any progress made at the Conference on National Reconciliation which began in Addis Ababa on 15 March 1993,

*Emphasizing* the need for the Somali people, including movements and factions, to show the political will to achieve security, reconciliation and peace,

*Taking note of* the reports of States concerned of 17-December 1992 (5/24976) and 19 January 1993 (5/25126) and, of the Secretary-General of 19 December 1992 (5/24992) and 26 January 1993 (5/25168) on the implementation of resolution 794 (1992),

*Having examined* the report of the Secretary-General of 3 March 1993 (5/25354 and Add.1 and 2),

*Welcoming* the intention of the Secretary-General to seek maximum economy and efficiency and to keep the size of the United Nations presence, both military and civilian, to the minimum necessary to fulfill its mandate,

*Determining* that the situation in Somalia continues to threaten peace and security in the region,

#### A

1. *Approves* the further reports of the Secretary-General of 3, 11 and 22 March 1993;
2. *Expresses* its appreciation to the Secretary-General for convening the Conference on National Reconciliation for Somalia in accordance with the agreements reached during the Informal Preparatory Meeting on Somali Political Reconciliation in Addis Ababa in January 1993 and for the progress achieved towards political reconciliation in Somalia, and also for his efforts to ensure that, as appropriate; all Somalis, including movements, factions, community leaders, women, professionals, intellectuals, elders and other representative groups are suitably represented at such conferences;
3. *Welcomes* the convening of the Third United Nations Coordination Meeting for Humanitarian Assistance for Somalia in Addis Ababa from 11 to 13 March 1993 and the willingness expressed by Governments through this process to contribute to relief and rehabilitation efforts in Somalia, where and when possible;
4. *Requests* the Secretary-General, through his Special Representative, and with assistance, as appropriate, from all relevant United Nations entities, offices and specialized agencies, to provide humanitarian and other assistance to the people of Somalia in rehabilitating their political institutions and economy and promoting political settlement and national reconciliation, in accordance with the recommendations contained in his report of 3 March 1993, including in particular:

- (a) Assistance in the provision of relief and in the economic rehabilitation of Somalia, based on an assessment of clear, prioritized needs, and taking into account, as appropriate, the 1993 Relief and Rehabilitation Programme for Somalia prepared by the United Nations Department of Humanitarian Affairs of the Secretariat;
- (b) Assistance in the repatriation of refugees and displaced persons within Somalia;
- (c) Assistance to help the people of Somalia to promote and advance political reconciliation, through broad participation by all sectors of Somali society, and the re-establishment of national and regional institutions and civil administration in the entire country;
- (d) Assistance in the re-establishment of Somali police, as appropriate at the local, regional or national level to assist in the restoration and maintenance of peace, stability and law and order, including in the investigation and facilitating the prosecution of serious violations of international humanitarian law;
- (e) Assistance to the people of Somalia in the development of a coherent and integrated programme for the removal of mines throughout Somalia;
- (f) Development of appropriate public information activities in support of the United Nations activities in Somalia;
- (g) Creation of conditions under which Somali civil society may have a role at every level in the process of political reconciliation and in the formulation and realization of rehabilitation and reconstruction programmes;

## B

Acting under Chapter VII of the Charter of the United Nations,

- 5 *Decides* to expand the size of the UNOSOM force, and its mandate in accordance with the recommendations contained in paragraphs 56-88, of the report of the Secretary-General of 3 March 1993, and the provisions of this resolution;
- 6. *Authorizes* the mandate for the expanded UNOSOM (UNOSOM II) for an initial period through 31 October 1993, unless previously renewed by the Security Council;
- 7 *Emphasizes* the crucial importance of disarmament and the urgent need to build on the efforts of UNITAF in accordance with paragraphs 59-69 of the report of the Secretary-General of 3 March 1993;
- 8. *Demands* that all Somali parties, including movements and factions, comply fully with the commitments they have undertaken in the agreements they concluded at the Informal Preparatory Meeting on Somali Political Reconciliation

at Addis Ababa, and in particular with their agreement on implementing the cease-fire and on Modalities of Disarmament (S/25168, annex. III);

9 *Also demands* that all Somali parties, including movements and factions, take all measures to ensure the safety of the personnel of the United Nations and its agencies as well as the staff of the International Committee of the Red Cross (ICRC), intergovernmental organizations and non-governmental organizations engaged in providing humanitarian and other assistance to the people of Somalia in rehabilitating their political institutions and economy and promoting political settlement and national reconciliation;

10. *Requests* the Secretary-General to support from within Somalia the implementation of the arms embargo established by resolution 733 (1992), utilizing as available and appropriate the UNOSOM II forces authorized by this resolution, and to report on this subject, with any recommendations regarding more effective measures if necessary, to the Security Council;

11. *Calls upon* all States, in particular neighboring States, to cooperate in the implementation of the arms embargo established by resolution 733 (1992);

12. *Also Requests* the Secretary-General to provide security, as appropriate, to assist in the repatriation of refugees and the assisted resettlement of displaced persons, utilizing UNOSOM II forces, paying particular attention to those areas where major instability continues to threaten peace and security in the region;

13 *Reiterates its demand* that all Somali parties, including movements and factions, immediately cease and desist from all breaches of international humanitarian law and reaffirms that those responsible for such acts be held individually accountable;

14 *Further Requests* the Secretary-General, through his Special Representative to direct the Force Commander of UNOSOM II to assume responsibility for the consolidation, expansion and maintenance of a secure environment throughout Somalia, taking account of the particular circumstances in each locality, on an expedited basis in accordance with the recommendations contained in his report of 3 March 1993, and in this regard to organize a prompt, smooth and phased transition from UNITAF to UNOSOM II;

## C

15. *Requests* the Secretary-General to maintain the fund established pursuant to resolution 794 (1992) for the additional purpose of receiving contributions for maintenance of UNOSOM II forces following the departure of UNITAF forces and for the establishment of Somali police, and calls on Member States to make contributions to this fund, in addition to their assessed contributions;

16. *Expresses appreciation* to the United Nations agencies, intergovernmental and non-governmental organizations and the ICRC for their contributions and assistance and requests the Secretary-General to ask them to continue to extend financial material and technical support to the Somali people in all regions of the country;

17 *Also Requests* the Secretary-General to seek as appropriate, pledges and contributions from States and others to assist in financing the rehabilitation, of the political institutions and economy of Somalia;

18. *Further Requests* the Secretary-General to keep the Security Council fully informed on action taken to implement the present resolution, in particular to submit as soon as possible a report to the Council containing recommendations for establishment of Somali police forces and thereafter to report no later than every ninety days on the progress achieved in accomplishing the objectives set out in the present resolution;

19. *Decides* to conduct a formal review of the progress towards accomplishing the purposes of the present resolution no later than 31 October 1993;

20. *Decides* to remain actively seized of the matter.

#### **F. UN Security Council Resolution 837 June 6, 1993**

*The Security Council,*

*Reaffirming* its resolutions 733 (1992) of 23 January 1992, 746 (1992) of 17 March 1992, 751 (1992) of 24 April 1992, 767 (1992) of 27 July 1992, 775 (1992) of 28 August 1992, 794 (1992) of 3 December 1992 and 814 (1993) of 26 March 1993,

*Bearing in mind* General Assembly resolution 47/167 of 18 December 1992,

*Gravely alarmed* at the premeditated armed attacks launched by forces apparently belonging to the United Somali Congress (USC/SNA) against the personnel of the United Nations Operation in Somalia (UNOSOM II) on 5 June 1993,

*Strongly condemning* such actions, which directly undermine international efforts aimed at the restoration of peace and normalcy in Somalia,

*Expressing outrage* at the loss of life as a result of these criminal attacks,

*Reaffirming its commitment* to assist the people of Somalia in reestablishing conditions of normal life,

*Stressing* that the international community is involved in Somalia in order to help the people of Somalia who have suffered untold miseries due to years of civil strife in that country,

*Acknowledging* the fundamental importance of completing the comprehensive and effective programme for disarming all Somali parties, including movements and factions,

*Convinced* that the restoration of law and order throughout Somali would contribute to humanitarian relief operations, reconciliation and political settlement, as well as to the rehabilitation of Somalia's political institutions and economy,

*Condemning strongly* the use of radio broadcasts, in particular by the USC/SNA, to incite attacks against United Nations personnel,

*Recalling* the statement made by its president on 31 March 1993 (5/25493) concerning the safety of United Nations forces and personnel deployed in conditions of strife and committed to consider promptly measures appropriate to the particular circumstances to ensure that persons responsible for attacks and other acts of violence against United Nations forces and personnel are held to account for their actions,

*Noting* of the information provided to the Council by the Secretary-General on 6 June 1993,

*Determining* that the situation in Somalia continues to threaten peace and security in the region,

*Acting* under Chapter VII of the Charter of the United Nations,

1. *Strongly condemns* the unprovoked armed, attacks against the personnel of UNOSOM II on 5 June 1993, which appear to have been part of a calculated and premeditated series of cease-fire violations to prevent by intimidation UNOSOM II from carrying out its mandate as provided for in resolution 814 (1993);
2. *Expresses its condolences* to the Government and people of Pakistan and the families of the UNOSOM II personnel who have lost their lives;
- 3 *Re-emphasizes* the crucial importance of the early implementation of the disarmament of all Somali parties, including movements and factions, in accordance with paragraphs 56-69 of the report of the Secretary-General of 3 March 1993 (S/25354), and of neutralizing radio, broadcasting systems that contribute to the violence and attacks directed against UNOSOM II;
4. *Demands once again* that all Somali parties, including movements and factions, comply fully with the commitments they have undertaken in the agreements they concluded at the informal Preparatory Meeting on Somali Political Reconciliation in Addis Ababa, and in particular with their Agreement on Implementing the Cease-fire and on Modalities of Disarmament (S/25168,annex III);
5. *Reaffirms* that the Secretary-General is authorized under resolution 814 (1993) to take all necessary measures against all those responsible for the armed attacks referred to in paragraph 1 above, including against those responsible for publicly inciting such attacks, to establish the effective authority of UNOSOM II throughout Somalia, including to secure the investigation of their actions and their arrest and detention for prosecution, trial and punishment;
6. *Requests* the Secretary-General urgently to inquire into the incident, with particular emphasis on the role of those factional leaders involved;
7. *Encourages* the rapid and accelerated deployment of all UNOSOM II contingents to meet the full requirements of 28,000 men, all ranks, as well as equipment, as indicated in the Secretary-General's report of 3 March 1993 (5/25354);

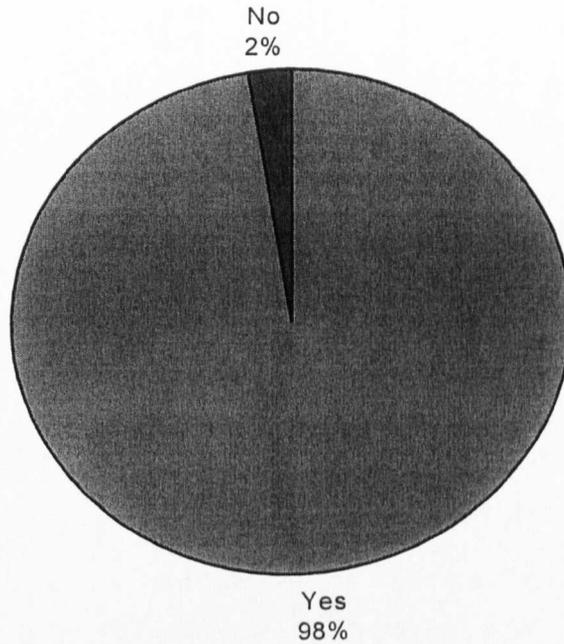
8. *Urges* Member States to contribute; on an emergency basis, military support and transportation, including armored personnel carriers, tanks and attack helicopters, in order to provide UNOSOM II the capability appropriately to confront and deter armed attacks directed against it in the accomplishment of its mandate;

9. *Also requests* the Secretary-General to submit a report to the Council on the implementation of the present resolution, if possible within seven days from the date of its adoption;

10. *Decides* to remain actively seized of the matter.

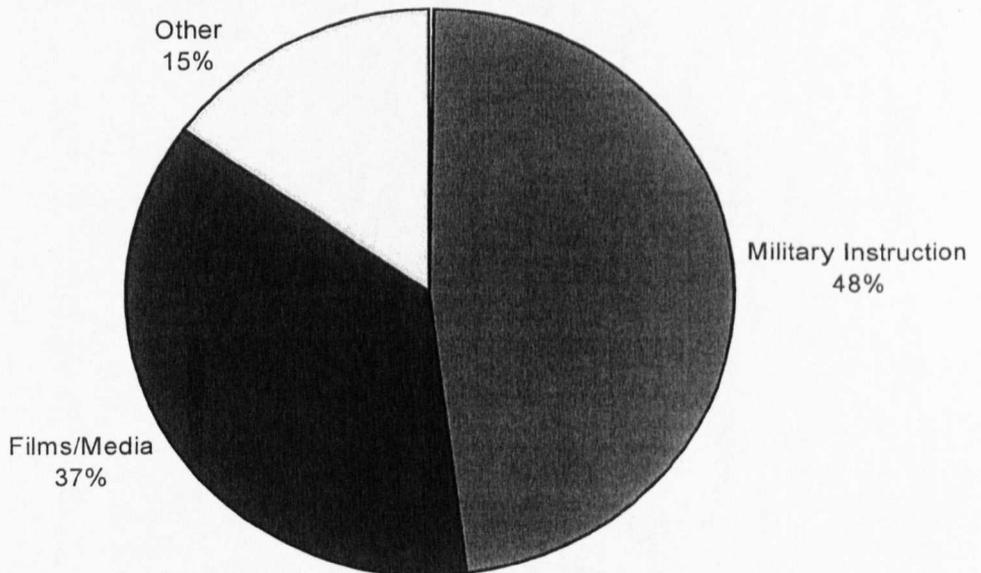
**Question 1:**

**Have you ever heard of the Geneva Conventions and/or the laws of war?**



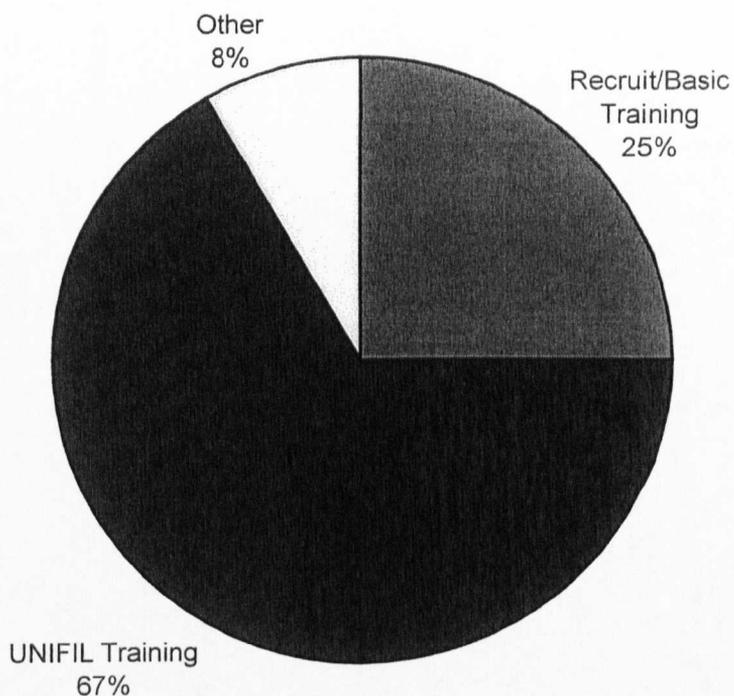
**Question 2:**

**Indicate how you came to know about the Geneva Conventions.**



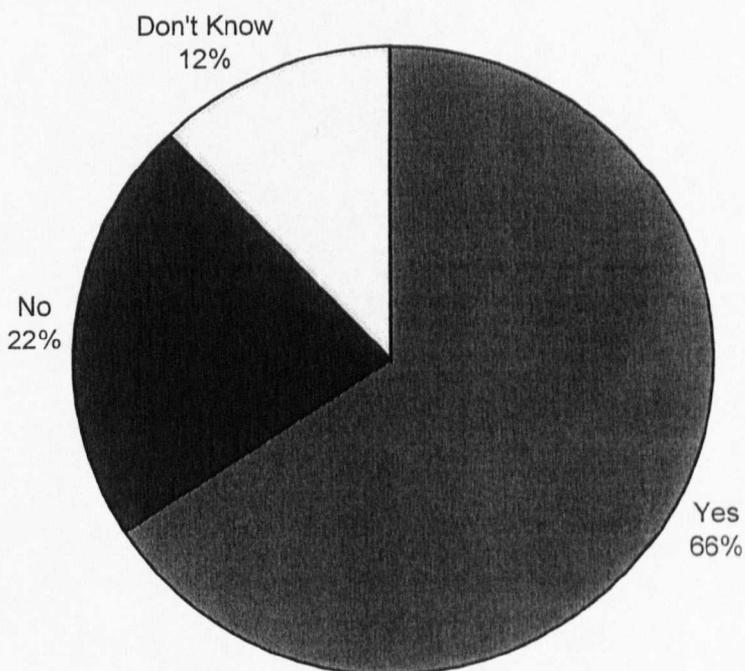
**Question 3:**

**When was the last time you received formal military instruction in relation to the Conventions?**



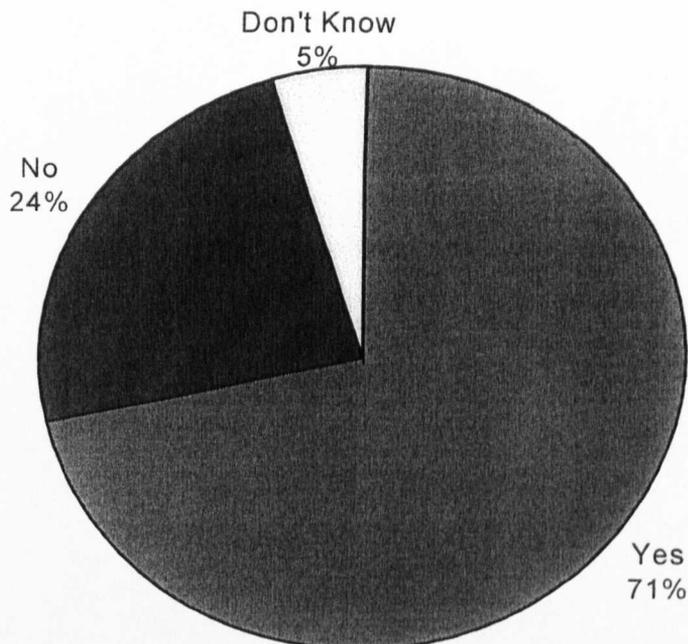
**Question 4:**

**Do you think the Conventions and laws of war have any practical relevance to modern armies?**



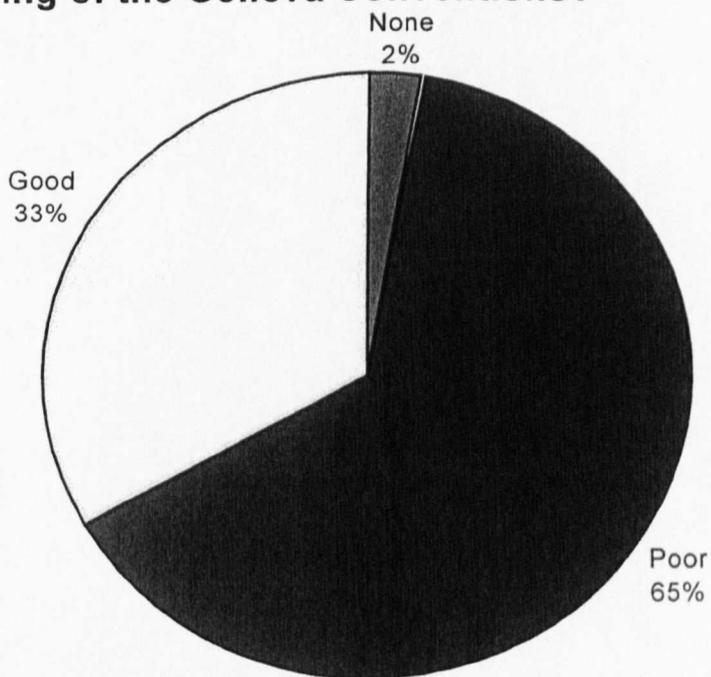
**Question 5:**

**Do you think the Geneva Conventions have any relevance on peacekeeping missions?**



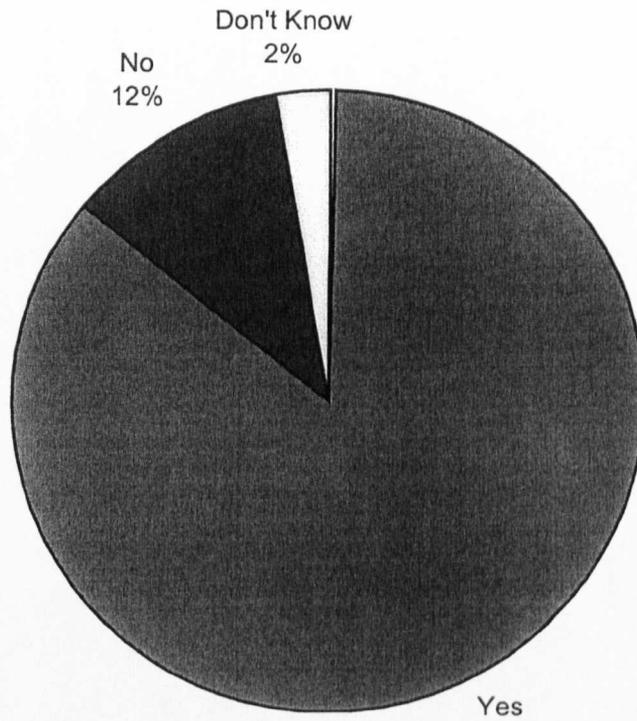
**Question 6:**

**How would you rate your personal knowledge and understanding of the Geneva Conventions?**



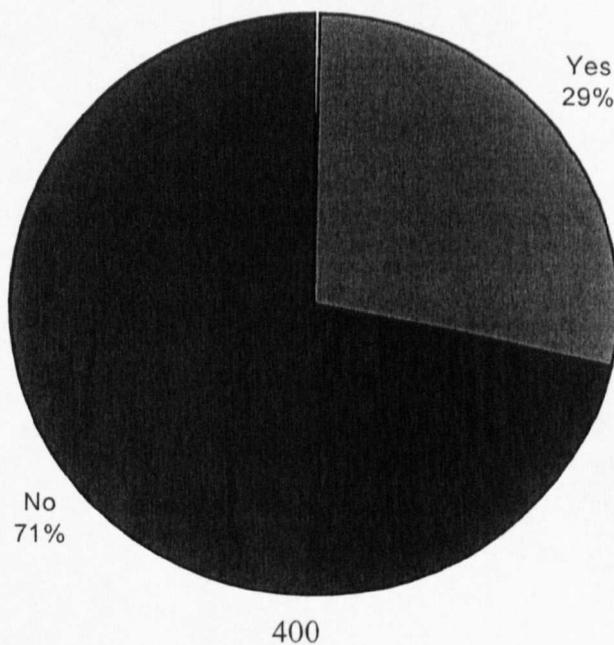
**Question 7:**

**Would you like to know more about the Geneva Conventions?**



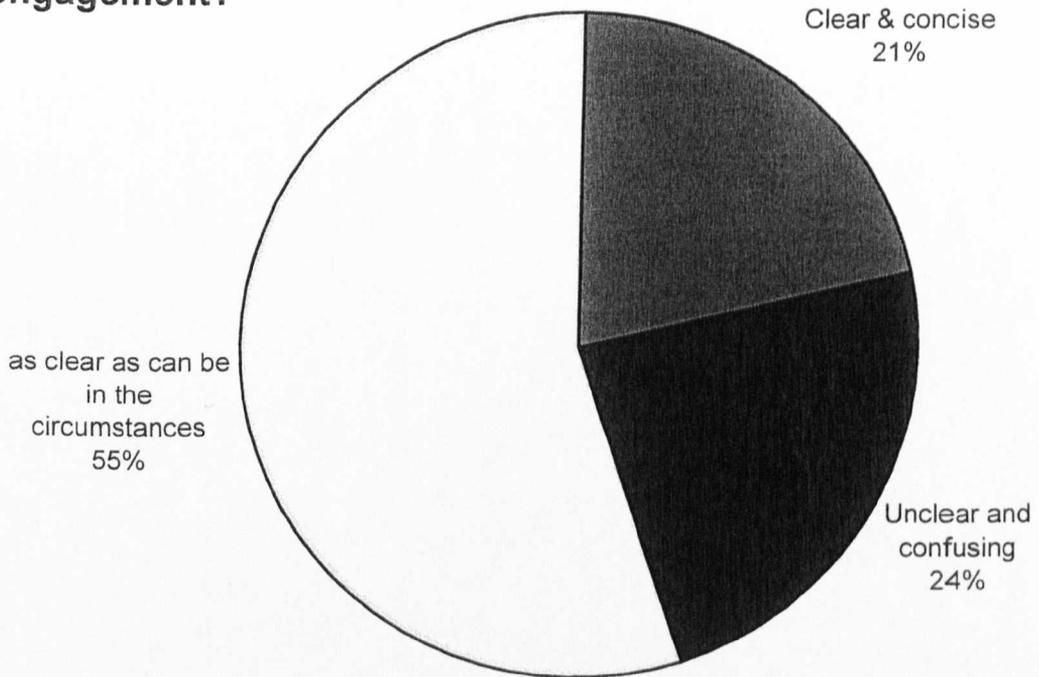
**Question 8:**

**Have you received adequate instruction in the Defence Forces on the meaning and relevance of Geneva Conventions?**



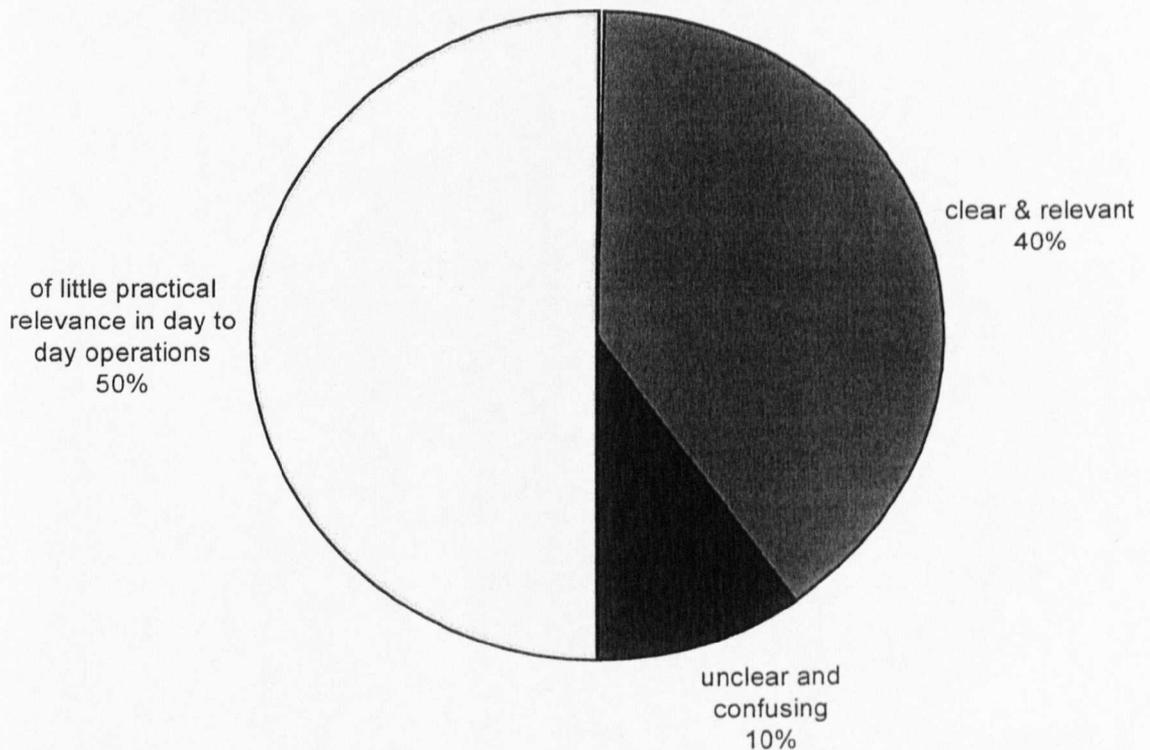
**Question 9:**

**How do you find the current UNIFIL rules of engagement?**



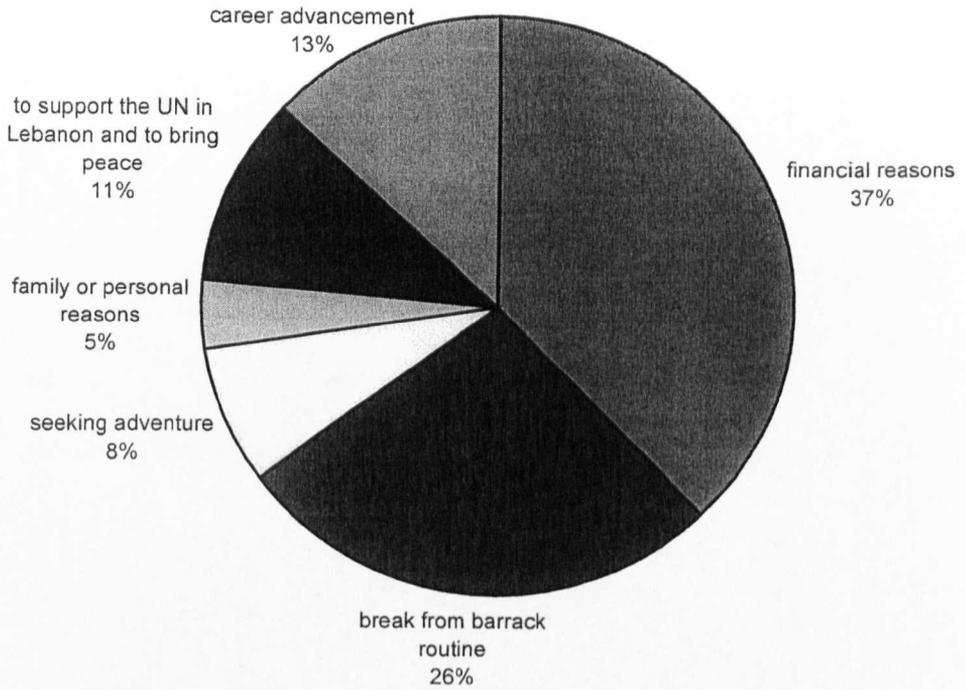
**Question 10:**

**How do you find the current UNIFIL mandate?**



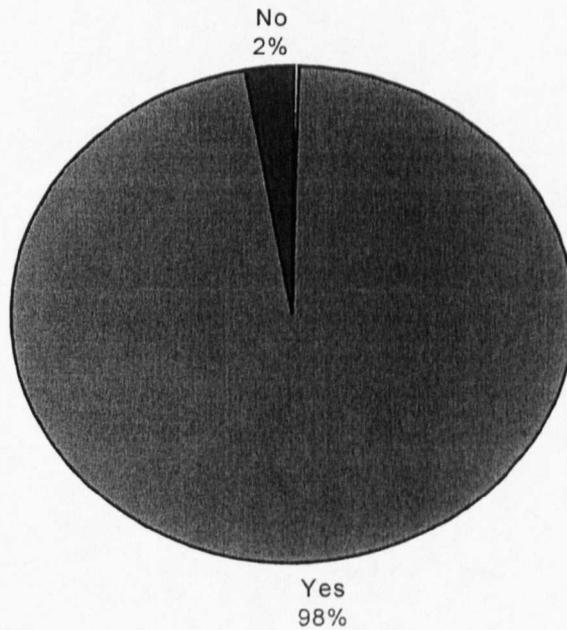
**Question 11:**

**Why did you volunteer for this mission?**



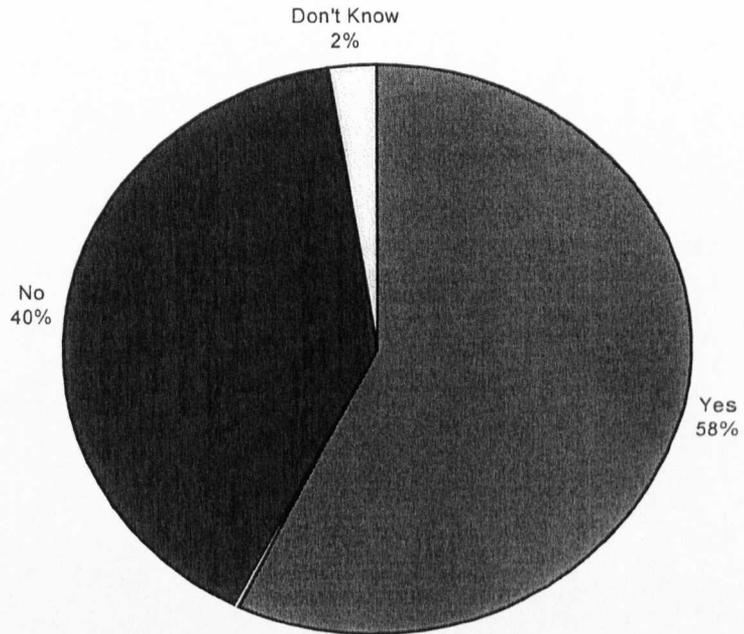
**Question 12:**

**Do you support the government policy of contributing troops to peacekeeping operations?**



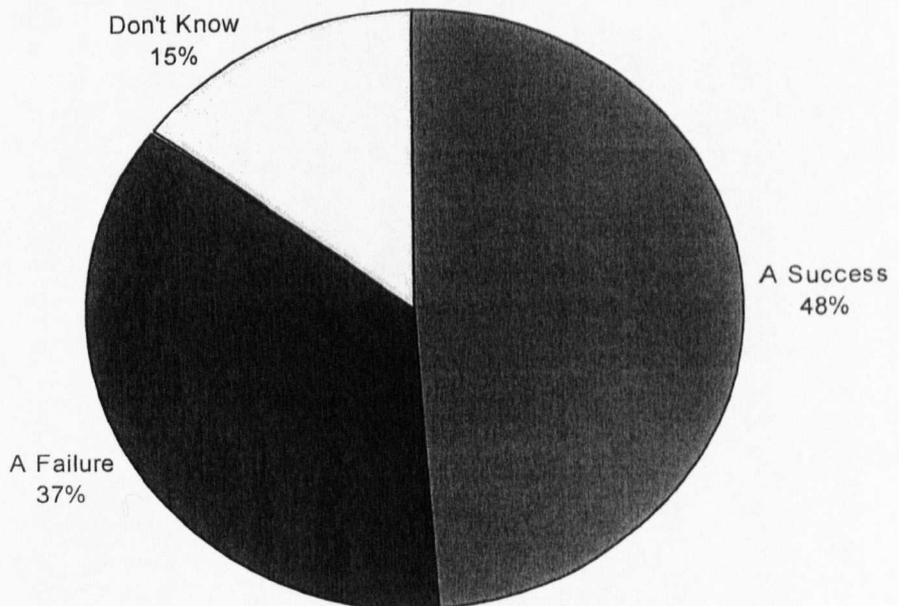
**Question 13:**

**Do you feel that the level of casualties among Irish soldiers in UNIFIL is acceptable for a peacekeeping operation?**



**Question 14:**

**How would you rate the UNIFIL mission to date?**







## LIST OF MISSIONS

Non-UN Missions / Non-Governmental Organisations.

## UNITED NATIONS MISSIONS

UN Observer Group in Lebanon (UNOGIL)	28 Jun 58 to 18 Dec 58	Irish commitment: 50
UN Truce Supervision Organisation (UNTSO) Location: Middle East	18 Dec 58 to date	Irish commitment: 392
UN Operation in Congo (ONUC) Location: Zaire	28 Jul 60 to 30 Jun 64	Irish commitment: 6191
UN Temporary Executive Authority (UNTEA) Location: West New Guinea (West Irian)	21 Aug 62 to 04 Oct 62	Irish commitment: 2
UN Peacekeeping Force in Cyprus (UNFICYP)	27 Mar 64 to date	Irish commitment: 9633
UN India-Pakistan Observation Mission (UNIPOM)	23 Sep 65 to 22 Mar 66	Irish commitment: 14
Second UN Emergency Force (UNEF II) Location: Sinai Desert	30 Oct 73 to 06 Sep 74	Irish commitment: 573
UN Disengagement Observer Force (UNDOF) Location: Golan Heights	3 Jun 74 to date	Irish commitment: From UNTSO
UN Interim Force in Lebanon (UNIFIL)	13 May 78 to date	Irish commitment: 30,327
UN Headquarters New York (UNNY)	27 Nov 78 to date	Irish commitment: 12
UN Inspection Teams (UNIT) Location: Baghdad and Teheran	24 Jun 84 to 31 Jul 88	Irish commitment: 9
UN Military Observer Group in India and Pakistan (UNMOGIP)	28 Sep 87 to 26 Jun 92	Irish commitment: 2
UN Relief and Works Agency (UNRWA) Location: Beirut	01 Feb 88 to 30 Jun 92	Irish commitment: 2
UN Good Offices Mission in Afghanistan & Pakistan (UNGOMAP)	25 Apr 88 to 15 Mar 90	Irish commitment: 8
Office of the Secretary-General Afghanistan, Pakistan (OSGAP)	16 Mar 90 to Jan 95	Irish commitment 5

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Office of the Secretary-General Afghanistan (OSGA)	Jan 95 to 30 Jun 96	Irish commitment 2
UN Special Mission Afghanistan (UNSMA)	01 Jul 96 to 26 Oct 99	Irish commitment: 3
UN Iran-Iraq Military Observer Group (UNIIMOG)	14 Aug 88 to 10 Mar 91	Irish commitment: 177
UN Transition Assistance Group in Namibia (UNTAG)	16 Mar 89 to 07 Apr 90	Irish commitment: 20
UN Observer Group in Central America (ONUCA)	03 Dec 89 to 27 Jan 92	Irish commitment: 57
UN Observer Mission in El Salvador (ONUSAL)	21 Jan 92 to 31 May 94	Irish commitment: 6
UN Iraq-Kuwait Observation Mission (UNIKOM)	18 Apr 91 to date	Irish commitment: 49
Second UN Angola Verification Mission (UNAVEM 11)	03 July 91 to 09 Sep 93	Irish commitment: 18
UN Mission for the Referendum in Western Sahara (MINURSO)	20 Sep 91 to date	Irish commitment: 106
UN Advance Mission in Cambodia (UNAMIC)	16 Nov 91 to 15 Mar 92.	Irish commitment: 2
UN Transitional Authority in Cambodia (UNTAC)	15 Mar 92 to 15 Nov 93	Irish commitment: 36
UN Military Liaison Office In Yugoslavia (UNMLO-Y)	12 Jan 92 to 05 Apr 92	Irish commitment: 7
UN Protection Force (R) Location: Yugoslavia	28 Mar 92 to Jan 96	Irish commitment: 29
UN High Commission for Refugees - Yugoslavia (UNHCR Y)	20 Dec 92 to 18 Mar 93	Irish commitment: 4
UN Operations in Somalia (UNOSOM 11)	08 Aug 93 to 15 Jan 95	Irish commitment: 177
UN Mission in Haiti (UNMIH)	21 Sep 93 to 31 Mar 96	Irish commitment: 6
UN Military Observer Mission Prevlaka (UNMOP)	01 Feb 96 to date	Irish commitment: 5
UN Preventive Deployment Force in Macedonia (UNPREDEP)	31 Mar 95 to 28 Feb 99	Irish commitment: 8
UN Transition Authority in Eastern Slavonia (UNTAES)	15 Jan 96 to Jan 1998	Irish commitment: 10

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UN Special Commission - Iraq (UNSCOM) HQ New York and Iraq	23 Sep 96 to date	Irish commitment: 5
UN Mission in East Timor (UNAMET)	28 June 99 to 24 Oct 99	Irish commitment: 3
UN Interim Administration Mission in Kosovo (UNMIK)	05 July 99 to date	Irish commitment: 5
UN Transitional Administration in East Timor (UNTAET)	25 Oct to date	Irish commitment 3

**NON-UN MISSIONS**

Organisation on Security and Co-Operation in Europe (OSCE) Location Vienna	16 Jan 84 to date.	Irish commitment 16
Organisation on Security and Co-Operation in Europe Georgia. OSCE Mission Georgia	13 Apr 94 to June 99	Irish commitment: 5
Organisation on Security and Co-Operation in Europe Bosnia Herzegovina, (OSCE B-HERZ)	Jan 96 to date	Irish commitment: 20
Organisation on Security and Co-Operation in Europe Croatia (OSCE - Croatia)	Jan 98 to date	Irish commitment: 13
Organisation on Security and Co-Operation in Europe Albania (OSCE - Albania)	Jan 97 to date	Irish commitment: 7
Organisation on Security and Co-Operation in Europe Kosovo Verification Mission (OSCE - KVM)	09 Dec 98 to 30 Jun 99	Irish commitment: 5
Organisation on Security and Co-Operation in Europe (OSCE - Kosovo)	01 Jul 99 to date	Irish commitment 4
EC Monitor Mission (ECMM) Location: former Yugoslavia	16 Jul 91 to date	Irish commitment: 168
EC Task Force in Russia (ECTF (R))	29 Jan 92 to 31 Dec 92	Irish commitment: 3
EC Task Force in Yugoslavia (ECTF (Y))	25 Feb 93 to 31 May 96	Irish commitment: 7
EU Mission South Africa (EUNELSA)	24 Jan 94 to 31 May 94	.Irish commitment: 2

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International Conference on the Former Yugoslavia (ICFY)	Sep 1994 to 19 March 1996	Irish commitment 6
WEU Brussels	09 July 96 to date	Irish commitment: 2
ICC Mons	12 June 1997 to date	Irish commitment: 2
Stabilisation Force (SFOR)	30 May 97 to date	Irish commitment: 248
Kosovo Force (KFOR)	29 August 1999 to date	Irish commitment 103
International Force East Timor (INTERFET)	12 Oct 99 to date	Irish commitment 40

**NON-GOVERNMENTAL ORGANISATIONS (NGOs)**

GOAL, CONCERN, RED CROSS, TRÓCAIRE.	14 Apr 93 to date	Somalia, Angola, Rwanda, Russia, Albania, Macedonia. Irish commitment 44
Irish Rwandan Support Group (IRSG)	Aug 94 to 05 Dec 94	Irish commitment: 39
Irish Honduran Support Group (IHSG)	Jan 99 to 12 May 99	Irish commitment: 27
Irish Refugee Agency, Macedonia	May to June 1999	Irish commitment: 2
2 Irish Honduran Support Group. (2 IHSG)	29 Jan to 13 Feb 2000	Irish commitment: 21

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