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**RECONSTRUCTION OF THE RULE OF LAW IN DISRUPTED OR
COLLAPSED STATES**

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“We are free because we live under civil laws.” --- Charles de Secondat Montesquieu

Introduction

My appointment as the Judge Advocate General ("JAG") of the Australian Defence Force ("ADF") is made pursuant to the *Defence Force Discipline Act 1982* (Cth) and the functions, powers and duties of my appointment are prescribed in that Act. The Act contemplates that the appointment as Judge Advocate General be held concurrently with appointment as a Justice or Judge of a federal court or of a Supreme Court of a State or Territory. My judicial office as a Justice of the Supreme Court of Western Australia is important because of the responsibility the JAG has for general oversight of the functioning of the *Defence Force Discipline Act*. Judicial office is also important because the JAG is required by the Act to provide a final internal legal review on petitions against convictions and sentence by ADF members convicted of offences under the Act. Judicial office ensures that the Judge Advocate General has the appropriate degree of independence, status and credibility to properly perform these functions.

The *Defence Force Discipline Act* is a criminal and disciplinary code which provides the processes and procedures for the enforcement of the ADF's military justice system. The Act is applicable to all ADF members subject to certain jurisdictional limitations that apply within Australia where an ADF member commits an offence with an equivalent under the civilian criminal law. When deployed overseas, jurisdiction under the Act is much wider although there is still a requirement to show that proceedings under the Act are necessary for the maintenance of discipline within the ADF. Consequently, when ADF members are deployed on operations, in circumstances where there is no working legal system, such as when Australian forces were deployed to East Timor, the *Defence Force Discipline Act* will usually apply to ADF members as a complete criminal code.

I am speaking today on the reconstruction of justice systems in collapsed states based on my perspective as a judicial officer but with the benefit of my unique position as the Judge Advocate General of the ADF. I am not speaking as a military commander nor as a spokesperson for the ADF. I will not be addressing the ADF's current involvement in the 'War on Terror' nor the current commitment in Iraq. Accordingly, my comments are

limited to my own theoretical observations of the issues in this area, although I will draw upon the recent examples of the ADF's involvement in Somalia and East Timor in order to provide practical illustrations of these observations.

In his analysis of the reconstruction of the legal system in East Timor, Hansjoerg Strohmeier described the environment faced by the multinational force, INTERFET, and the United Nations transitional administration, UNTAET, in East Timor in the aftermath of events of August to September 1999. He observed that:

“...administering justice is no easy task when there is no system left to be administered, when the personnel needed to carry out judicial tasks have left or are tainted due to the perception of affiliation with the previous regime, when the court houses and related facilities had been looted and destroyed, and when laws to be applied are politically charged and no longer acceptable to the population and its new political leadership.”²

Peace operations, such as that which occurred in East Timor, create a vast array of complex and unique operational challenges for a military force. These challenges compound when the military commander has to contemplate the creation of a self-sustaining legal framework in an environment such as the one described by Hansjoerg Strohmeier. A military commander might understandably be inclined to defer consideration of rule of law issues to the post-conflict phase. The military commander is concerned with the short-term crisis (peace and security) as opposed to the long-term problem of ‘nation-building’, which may appear to be well beyond the scope of the mission or what the military commander believes the mission to be. The reality is that legal considerations are ever present. First, international law imposes immediate obligations on any occupying force. The nature and extent of those obligations will depend upon many factors, including the circumstances and purpose of the occupation. Secondly, the success of the military operation itself will often, if not invariably, depend upon recognition of the need to establish, operate within and maintain, a basic legal framework. Once his force has taken control of the territory and its population, the military commander is required to focus on establishing respect for the rule of law and observance of human rights whilst simultaneously contending with threats to peace and security. Immediate progress in re-establishing the rule of law is vital for the operation to maintain focus, credibility and public confidence. Many of the tasks inherent in the re-establishment of the rule of law are in fact preconditions for the accomplishment of the mission. Recent history has shown that there are grave consequences where progress in these areas has stalled and led to the loss of credibility for the operation, and the cultivation of an environment of lawlessness in the host or occupied State.

Whilst there is a general consensus that reconstruction of the legal system is an issue that needs to be tackled early on in an operation, there has been significantly less consideration of what the rule of law actually requires during the reconstruction process. I will begin with an examination of the legal framework that is likely to apply to the

mission and the military force carrying out the mission during a peace operation. I will focus on the fundamental characteristics of the rule of law, including which law will apply and the particular legal rules that I consider must be embedded into the reconstruction of policing, the judiciary and the penal system in both the short and longer term. Finally, I will consider how the establishment of the rule of law and the administration of justice should be balanced against the overall operational challenges of restoring security and stability.

Legal Framework Applicable to the Military Force

The circumstances that lead to a collapsed state scenario are infinitely variable. In the East Timor example, after the East Timorese exercised their right to self-determination, militia forces initiated a campaign of orchestrated violence. This led to Security Council Resolutions deeming the situation in East Timor to be a threat to international peace and security and authorising the creation of INTERFET and subsequently UNTAET. The legal framework applicable to INTERFET and UNTAET was based on these Security Council Resolutions.

Before considering the obligations the rule of law imposes on a military commander, I will discuss the legal framework applicable to the military force undertaking the peace operation. This framework will establish the legal parameters for the operation so that the military commander will have an appreciation of the permissible actions that can be taken to discharge the mandate. Self-evidently, there is little prospect of an independent, legitimate and effective justice system emerging from an environment where the military force or the transitional administration itself lacks legal legitimacy.

The legal framework will usually be based on a Security Council mandate that has been authorised pursuant to the United Nations Charter. The scope of the mandate will determine the extent of the military force's powers to use force, conduct security operations, and detain persons. A mandate authorised pursuant to Chapter VII of the United Nations Charter gives a military force much more coercive powers and will be given in situations requiring the use of force to counter threats and breaches of international peace and security, as well as acts of aggression. On the other hand, a Chapter VI mandate is primarily concerned with the use of measures such as negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement and resort to regional agencies to resolve the dispute.¹³ There are a number of examples in the last decade which demonstrate the increased willingness of the Security Council to act on the basis of Chapter VII as opposed to Chapter VI because of an increasingly "...robust and realistic appreciation of what might constitute a threat to the peace".⁴ Prior to this change in attitude, the Security Council tended to grant limited mandates under Chapter VI and constrain the powers of the military force engaged in such operations accordingly,

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sometimes to an extent which rendered them militarily ineffective, with tragic consequences to those they were intended to protect.⁵

Security Council Resolution 1264 of 15 September 1999 was a Chapter VII mandate authorising INTERFET 'to restore peace and security in East Timor, to protect and support UNAMET in carrying out its tasks and, within force capabilities, to facilitate humanitarian assistance operations.'⁶ The mandate was tested very early in the deployment when INTERFET soldiers sought to detain persons who were suspected of committing serious offences. Initially the laws of Indonesia were considered to apply in East Timor so that the government of Indonesia continued to have responsibility for law and order in East Timor until the transfer of authority to the United Nations. However, operational reality saw persons detained by INTERFET being handed over to the civilian authorities, who then promptly released them. Based on the powers conferred under Security Council Resolution 1264, INTERFET implemented an interim procedure of preventative detention to overcome this situation. This subsequently evolved into the Detainee Management Unit, which was established by INTERFET on 21 October 1999 as part of an interim legal system.⁷

UNTAET was established under Security Council Resolution 1272 of 25 October 1999, pursuant to Chapter VII of the United Nations Charter, and given responsibility for overseeing East Timor's transition to independence. The scope of UNTAET's mandate was extremely broad. It authorised the United Nations to assume a governance function (complete executive and legislative power) in East Timor, which included judicial reconstruction to prepare the country for independence. Article 41 of the United Nations Charter gives the Security Council wide discretion to determine the appropriate measures to give effect to its decision under Chapter VII and this is now accepted as including governance functions.⁸

A United Nations mandate provides the legal authority for the military force. There are instances where additional or alternative sources of authority will also apply. For example, in East Timor, in addition to the United Nations mandate, Australia negotiated a 'Status of Forces Agreement' with Indonesia because of the unique circumstances of the intervention.⁹ Australian practice is to negotiate such agreements for all overseas deployments, and in the case where a peace operation is conducted without United Nations sanction, these agreements often form the basis of the legal authority for the operation by specifying the privileges, obligations and responsibilities that apply to the Australian force. The recent deployment of Australian forces to the Solomon Islands is an example where Australian forces have deployed at the request of the Solomon Islands. When the United Nations accepted responsibility for governance of East Timor (UNTAET) Australia's Status of Forces Agreement with Indonesia lapsed and status of forces arrangements for the Australian forces were negotiated with the United Nations.

The Status of Forces Agreement between Australia and Indonesia granted Australian forces deployed to East Timor immunity from the criminal law of East Timor (recalling that when INTERFET initially deployed Indonesia retained responsibility for maintaining law and order). This immunity was granted on the basis that ADF personnel were to be

subject to the jurisdiction of the military justice system embodied in the *Defence Force Discipline Act*. Whilst the mandate governs the permissible range of actions the military commander can take with respect to the operation, the *Defence Force Discipline Act* regulates the force in carrying out those actions. As I mentioned previously, when the ADF deploys into an operational environment, the *Defence Force Discipline Act* operates as a complete ‘portable’ criminal code. It includes offence provisions, provisions for the investigation of offences including the circumstances in which an ADF member can be arrested and held in pre-conviction custody, and the procedures applicable to the questioning of persons suspected of having committed offences under the Act, provisions for a scheme of tribunals with differing powers of punishment depending on the seriousness of the matter, provisions for the execution and enforcement of punishments, and a process for the mandatory legal review of all punishments and convictions including provision for a convicted ADF member to petition or appeal to an appellate tribunal. The Status of Forces Agreement gives the military force a blanket immunity from local law, but only on the basis that the force is subject to its own disciplinary system. In practice, such immunity would be granted only on this basis, which is a further illustration of why the *Defence Force Discipline Act* is an exercise of the defence power under s 51(vi) of the *Commonwealth Constitution*.

The legal framework applicable to the operation will also be supplemented by the rules of customary international law, particularly the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (‘GC IV’). Whilst there is some debate about whether GC IV applies on a *de jure* basis in particular instances, it is often applied on a *de facto* or policy basis within the parameters of the applicable legal framework. This is because it is seen as the most appropriate outline of the rights and duties of the respective parties to use where a military force is occupying a territory.¹⁰ For example, Security Council Resolution 1264 (INTERFET’s mandate) lacked detail as to the guidelines INTERFET should use in the course of carrying out arrests and subsequently detaining people. Consequently, GC IV was used to develop the framework for the Detainee Management Unit. Similarly, the principles in GC IV were applied by Australian forces in Somalia during Operation Solace with respect to their operations in and around Baidoa. GC IV provided a framework for dealing with the local law, parameters for departing from this law when necessary, and guidance on the temporary administration of justice where there is no local capability.¹¹

Under GC IV principles, the law which should be applied by the peace operation is the pre-existing law of the collapsed state, unless that law (or part thereof) constitutes a threat to the security of the occupying force or an obstacle to the application of GC IV. GC IV provides that the tribunals of the State should continue to function for all offences covered by this law (Article 64). This implies that in the case of a collapsed State where there is no functioning legal system, the system that existed prior to the collapse should be used. This is consistent with the approach adopted by INTERFET, and subsequently UNTAET, in choosing to apply the law of Indonesia, which had applied in East Timor for the previous 25 years. Portuguese law would have been the alternative choice particularly given that parts of the East Timorese community objected to the idea of continuing the application of Indonesian law because of the circumstances of Indonesia’s

occupation of East Timor.¹² In response to this, the United Nations adopted Indonesian law but suspended all provisions that conflicted with internationally recognised human rights standards and Security Council Resolution 1264 (for example, the death penalty was abolished).¹³

GC IV provides that courts shall only apply those provisions of law which were applicable prior to the offence, and which accord with general principles of law, in particular, the principle that the penalty shall be proportionate to the offence (Article 67). Further, under GC IV judicial procedure must include a number of guarantees. Firstly, that the accused has to be informed without delay of the particulars of the offence he or she is alleged to have committed which must have constituted to the offence at the particular time, and must be brought to trial as promptly as possible (Article 71). Second, the accused has the right to legal representation, the right to present evidence in their defence and the right to call witnesses to present that evidence (Article 72). Third, a convicted person has the right to be informed of their right to appeal or petition, and the time limits within which they may do so (Article 73). The Australian initiatives in Somalia to re-establish the judiciary and conduct prosecutions in the Baidoa area were modelled on these Articles.

I have considered the legal framework applicable to a military force undertaking a peace operation in some detail. The scope of the mandate or agreement under which the operation is authorised lays the legal ground rules for the conduct of the operation. It defines the ambit within which the military force can permissibly operate. The legal framework derived from the mandate is supplemented by the rules of customary international law. Customary international law provides the military force with guiding principles to use in developing operating practices and procedures ensuring mission accomplishment in a lawful and credible manner. Having outlined the legal framework applicable to the military force conducting a peace operation, I now turn to the fundamental characteristics of the rule of law and what they imply for the military force faced with having to reconstruct the legal system in the collapsed State.

The Fundamental Characteristics of the Rule of Law

Practice in the reconstruction of justice in a collapsed state has had a tendency to be improvisational rather than principled.¹⁴ In the last few years a number of initiatives have been pursued to introduce uniformity in approach including a **project to develop a generic penal code and code of criminal procedure**¹⁵ and another examining the viability of rapid-reaction judicial units able to deploy at short notice.¹⁶ Both projects were intended to enable an interim judicial system to be promptly established but on a more standardised basis than has been seen in past operations. The implications of these projects is that a 'one size fits all' solution is both possible and desirable despite that differences in the contextual settings in which peace operations occur suggest otherwise.

Irrespective of which legal system is ultimately applied, there are certain fundamental characteristics of the rule of law, independent even of ethnic and cultural contexts, that should underpin any approach to this complex task. The noted English jurist, A. V.

Dicey, considered that the rule of law had three essential characteristics: regularity as opposed to arbitrariness, equality before the law, and due process or procedural fairness.¹⁷ Using the rule of law as a foundation, it is possible to identify particular legal rules that should be incorporated into the reconstruction process in order to ensure the integrity and durability of the justice system in both the short and longer term. These legal rules are consistent with the guiding principles contained in GC IV described earlier.

It was necessary for INTERFET to devise a pre-trial detention regime very early in the mission. The legal rules that I regard as critical to a pre-trial detention regime were present in the framework developed to implement that regime. The most significant of these rules is the presumption in favour of personal liberty and the recognition that deprivation of liberty must be justified (not arbitrary) and should only be for as long as necessary. In order to detain there must be a reasonable suspicion of an offence having been committed, or the presence of other grounds such as risk of fleeing, interfering with investigation, committing further offences or disturbing public order, in order to warrant detention. There must also be provision for independent judicial supervision of detention and provision for a detained person to challenge the lawfulness of the detention.

The procedures implemented by INTERFET via the Detainee Management Unit incorporated these principles. Only persons suspected of committing serious criminal offences or who obstructed or interfered with INTERFET in carrying out its mandate were detained. Review of detention by an independent reviewing authority occurred after the expiry of 96 hours from the time the person was taken into custody. The reviewing authority was required to consider a prosecution brief as well as written submissions from the defending officer (a lawyer) on behalf of the detained person. The reviewing authority was required to assess whether there was a reliable body of evidence to show that the person might have committed a serious offence, and whether there was a need to continue detention in order to prevent escape, intimidation of witnesses, or the destruction of evidence. The reviewing authority would exercise powers to either release the detainee conditionally or continue detention pending trial by a competent court.

In terms of criminal law procedure, the rule of law means that all persons must be afforded the right to a fair trial and presumed innocent until proven guilty. All persons have the right to prepare a defence and to have access to legal representation prior to trial for that purpose. All persons have the right to a trial within a reasonable time. The prosecutorial process must be independent and transparent and based on a criminal code that meets international standards and allows the judiciary to independently and effectively dispense criminal justice. The criminal code should make provision for traditional law and custom, in addition to incorporating mandatory human rights norms, in order for it to be eventually 'owned' by the local population.¹⁸ The criminal law should exhibit certainty so that uniformity of outcomes can be seen in situations where cases are not materially different.

The judiciary must be independent and impartial, and where necessary, vetting and selection processes should be used in order to ensure this independence. Judicial

decision-making must be conducted according to defined, comprehensible and publicly accessible legal standards and not by reference to subjective determinations or assessments of fairness. There must also be some capacity for review of decisions, whether by way of appellate courts or external legal review. It is also important in these circumstances that judicial rehabilitation is linked to an effective monitoring system for the work of all judges and prosecutors, in order to ensure the justice system functions fairly and effectively. The solution adopted by UNTAET was to create the Transitional Judicial Service Commission to oversee selection and appointment procedures.

Finally, consideration must be given to the legal rules for the operation of detention facilities. All detainees must be treated with humanity and respect for dignity. Their treatment and conditions must conform with legal prohibitions on torture, and other cruel, inhuman, or degrading treatment or punishment. Within the facility, detainees must be provided with suitable accommodation, bedding, food, medical treatment, opportunities for recreation and exercise, sanitation and protection from the elements. There must also be provision to allow meetings between detained persons and their legal representatives. The detention regime should be no more restrictive than necessary to allow for penal procedure and the security of detention facility. All detainees must have access to a complaint mechanism and an independent external body must conduct the investigation of any complaints.

The Force Detention Centre operated by INTERFET incorporated these principles in its operating procedures. The 'Orders for the Force Detention Centres' of 21 October 1999 set out standards for cleanliness, accommodation, meals, exercise, religious activities and medical treatment. The Orders provided for notification of the detainee's family of the detainee's whereabouts and visits by the International Committee of the Red Cross, medical officers, chaplains, legal practitioners and members of the detainee's family. The Orders also made provision for a 'Visiting Officer' who would conduct regular inspections, record any complaints received and furnish reports of these matters to the INTERFET Commander.¹⁹

Adherence to these legal rules will create a significant burden for the military force carrying out the peace operation, or later for a transitional administration governing a post-conflict territory. Because the practical implications are onerous, there may be a view that these issues should not be tackled until other primary mission objectives are achieved. Alternatively, there is a growing consensus of opinion that addressing the issue of the administration of justice goes to the heart of the conflict resolution objective of a peace operation and therefore must always be a goal of the operation.²⁰ In my introduction I suggested that even if justice reconstruction is not an explicit requirement of the mandate, it is a critical issue that must be addressed by the operation in order to reinforce legitimacy. The difficulty is that justice reconstruction is unlikely to be occurring in a benign environment, and it necessarily contemplates a longer-term undertaking that should ultimately involve the future national authority of the State. The issue for the military force engaged in a peace operation, or for a transitional administration, is the need to balance these competing considerations.

Practical Implications of the Rule of Law for Reconstruction of Policing, the Judiciary and the Penal System

The concept of rule of law assists in providing the foundational legal rules for a legal system. Context is important as the rule of law permits flexibility in the application of these rules in particular circumstances where there are overriding peace and security considerations. I will explore this issue in more detail later, but for the moment turn to consider the practical implications that flow from consideration of these foundational legal rules.

As previously indicated, justice reconstruction is a long-term undertaking but there is still a variety of short-term issues that must be addressed if the long-term goal is to be achieved.

A comprehensive appraisal of the practical implications that follow from the rule of law produces a large number of tasks that must be tackled by either the military force in the short term, or the transitional administration in the longer term. Using the tasks identified by Hansjoerg Strohmeyer in the context of East Timor as a basis²¹, likely issues are:

- Identification of the appropriate law on which the legal system is to be based. As I have noted, a pragmatic decision was made to apply Indonesian law in East Timor by both INTERFET and later UNTAET. The application of Indonesian law conformed with the rule of law. It had applied to the local population for the previous 25 years which meant that it was identifiable and accessible to the local population. It also incorporated elements of traditional or local law, which was appropriate, given that this had previously applied in the rural areas of East Timor. The decision was also consistent with the guidance in GC IV.
- Recruitment, selection and training of police officers to conduct investigations, traffic control and law enforcement (including training in interpersonal skills, the use of mediation and conflict resolution techniques as well as civil disorder management). The short-term solution is for public order and basic law enforcement functions to be performed by military police or CIVPOL. This can only be a partial solution as these personnel will always be a scarce commodity. The longer-term problem requires training resources and support from the military force or transitional administration. In Baidoa, Australian forces conducted joint operations with the newly appointed police officers to assist them in gaining confidence in the execution of their duties in the lawless environment. In East Timor, CIVPOL assisted in training the future local police force in procedures that were consistent with recognised international standards.
- Identification and selection of judges and prosecutors (including a vetting process to ensure that appointees are impartial and independent). Depending on local conditions, this can be one of the most difficult tasks encountered in the reconstruction process. In the East Timor example, initially there was no local capacity which meant that UNTAET was faced with having to recruit officers who

had no previous experience to fill these appointments. It is this scenario that has led to calls for international jurists to be used as an alternative to relying on unskilled local personnel. The ‘downside’ of this suggestion is that using international lawyers can actually create a greater array of resource problems than would otherwise be encountered.²² In East Timor these problems would have been the cost of importing jurists, the cost of support services such as interpreters and translation of documents, and the lack of familiarity with the civil law system of Indonesia. I have already mentioned that UNTAET created the Transitional Judicial Service Commission to oversee the judiciary.

- Development of legal training for judges, lawyers, and court staff (including a mechanism for monitoring and mentoring). This will inevitably require a medium to long-term commitment. An inadequate investment in training and skills development will ultimately undermine the integrity of the system. UNTAET adopted a three-tier training approach that included initial intensive, followed by mandatory ongoing training and the appointment of experienced international legal practitioners as part of a mentoring program.²³
- Identification of lawyers available to act as defence counsel and development of a legal aid scheme. Similar problems to those encountered in identifying appropriate personnel for appointment as judges and prosecutors may be encountered. Again, the solution is focus on training and professional education.
- Procurement of resources to enable the functioning of a court system (including library resources, translation services, support services). These are areas in which the military force will have difficulty in providing assistance and may be one of the last tasks the military commander would expect to be required to do. However, experience suggests it is something the military commander may have to contemplate.
- Identification of criminal law and trial practice and procedures. Practice and procedure differs greatly across jurisdictions, particularly between civil law and common law jurisdictions. Fledgling judges who are inexperienced in the interpretation and application of the criminal law of their jurisdiction will initially have considerable difficulty presiding over complex trials. One possibility that could be considered for implementation as part of criminal procedure is to specifically provide for a guilty plea and a considerable discount on sentence where a guilty plea is entered in order to help the judiciary ‘get off its feet’. This is a feature of Australian sentencing law²⁴ but was an unknown concept in the Indonesian legal system that applied in East Timor prior to September 1999. Introduction of the possibility of a plea may result in pleaded matters being dealt with leniently but still according to the principles of justice.
- Development of appropriate review or appellate mechanisms. Given the difficulties that are likely to be encountered in identifying a pool of appropriately qualified judicial officers, it is likely to be even more difficult to establish functioning appeal mechanisms early on in the reconstruction process. There may be a need to consider

modified forms of review. Here I suggest it might be worthwhile to adapt a system such as that used in the *Defence Force Discipline Act* for the review of proceedings. A convicted person would retain the right to appeal to a higher level tribunal, but the legislation would also incorporate a system of automatic review by a 'reviewing authority' based on a legal assessment of the proceedings provided by senior counsel or judge (who could be located outside the jurisdiction). This same type of review process could be introduced as a short-term measure during the transitional administration thereby avoiding the need to introduce an appellate jurisdiction from the outset.

- The creation of a penitentiary system including the appointment of corrections officers. This will also be a resource-intensive task that will take some time to implement. Again, I refer to the *Defence Force Discipline Act* as a possible example of an approach that could be applied in the short-term. The Act contains a regime for the establishment and operation of detention facilities. This regime is designed to be used during peacetime or whilst the ADF is deployed on operations. The regime is pragmatic in terms of what is actually required to establish the facility but, importantly, it conforms with the rule of law in terms of the obligations it imposes to ensure the health, hygiene and dignity of detainees. The scheme set out in the Act is very similar to the regime used in the Force Detention Centre by INTERFET, particularly with respect to the use of a 'visiting officer' to inspect and report on the facility and receive complaints.
- Development of a mechanism to address crimes against humanity and other serious crimes. There may be a perception that this issue can be put to one side whilst more immediate problems are addressed, but the reality is that this is not the case. More than any other aspect of the judicial reconstruction process, action or inaction with respect to serious crimes will impact on the credibility of the operation or transitional administration. This is primarily because the international community's initial involvement will often have been influenced by international humanitarian law and human rights concerns and the local community will have high expectations that justice will be seen to be done with respect to serious crimes.²⁵ Efforts in this area might also be complemented by the use of truth and reconciliation processes. The UNTAET solution to this issue was to pass Regulation 2001/5 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences.²⁶ This regulation incorporated the substantive legal provisions in the proposed *Rome Statute of the International Criminal Court*.²⁷ There are two concerns with this approach. First, it potentially meant that UNTAET had 'bitten off more than it could chew' particularly regarding the legal and financial burden involved in investigating and prosecuting serious crimes.²⁸ Second, the decision to pass this regulation and adopt this approach to dealing with serious crimes had been made without consulting the local population, who were obviously the principal stakeholders in this matter. The suggested solution to these problems was to ensure increased consultation and genuine participation by the local population.²⁹

The practical implications of the rule of law in justice reconstruction are immense, particularly if the training and professional development needs of all persons involved in the system are to be properly catered for. An incremental approach can be used for many of these tasks to alleviate this burden, but these short-term measures must take into account the need to provide for a sustainable and durable legal system in the longer-term. Consultation and engagement with the local community as the principle stakeholders in the process will be vital. The task of justice reconstruction must also be balanced against the operational challenges of maintaining security and stability. I will now consider how the commander may balance the legal requirements against the military imperative.

The Balance between the Establishment of a Legal System and the Challenge of Maintaining Security and Stability

Reconstruction of a justice system implies a lengthy commitment on the part of the international force as well as a considerable burden in terms of cost and personnel. Literature in this area often refers to the reconstruction of the justice system in the ‘post-conflict environment’, which suggests there will effectively be a ‘neat break’ between the cessation of the conflict and the commencement of the reconstruction phase. The implication is that the military force can regroup and refocus after the security phase and then turn attention to the fresh operation of reconstructing the legal system. This seems overly optimistic as there may not always be this break, and as I have already pointed out, there are very strong reasons why a peace operation must confront rule of law issues very early on in the mission.

An insecure and unstable environment does not mean that the basic rule of law principles and rules referred to above will be suspended or ignored. International law permits the military force to carefully balance individual rights and the over-riding objective of the operation to restore peace and security. Derogation of particular human rights norms is justified provided there is some identifiable basis such as armed conflict, public emergency or security situation which threatens the life of the nation.³⁰ Arguably, there must also be some official recognition of this situation and there will obviously be limitations on the extent to which departures will be justified. A good example of how this principle applies in a practical sense is the manner in which INTERFET modelled the Detainee Management Unit so that it conformed with fundamental legal principles, but was specifically adapted to suit the operational context of the mission. It resulted in a mechanism that balanced the rights of the person detained in terms of due process and freedom from arbitrary deprivation of liberty against the military requirement to detain in the absence of a functioning legal system.

The situation is somewhat analogous to the position under the defence power in section 51(vi) of the Commonwealth Constitution. The scope of the defence power varies according to the circumstances, including the existence of ‘international tension’. A law which might be beyond the scope of the defence power in peace time because it is not seen as having a connection with defence, may fall into the defence power at other times when there is the existence of a threat or specific hostilities against Australia.³¹ The scope of the defence power effectively expands at these times and would legitimately

authorise the Commonwealth Parliament to enact legislation that encroaches into areas normally governed by the State and Territory law to disrupt the lives of ordinary Australians because of the emergency or wartime situation. The rationale is that these measures are necessary in order to enable the Commonwealth Parliament to effectively deal with the threat.

The same rationale applies to the application of international human rights norms in a conflict situation where the military force must contend with threats to security in order to discharge its mandate and protect the civilian population. This principle is embodied in GC IV. Article 64 provides that the laws of the territory shall remain in force with the exception that they may be repealed or suspended by the military force where they constitute a threat to security or an obstacle to the application of GC IV. This same idea is also present in the *Defence Force Discipline Act* which contains a number of provisions that specifically provide for flexibility with respect to particular time lines and reporting requirements because the 'Service exigencies' may necessitate departures from the normal standard required. That is not to say that an operational emergency permits a complete departure from the fundamental requirements of the rule of law. It merely permits necessary and proportionate departures from particular standards to enable the force to meet the particular threat or emergency.

A military force conducting a peace operation carries a heavy burden in terms of the commitment and resources required to address law and order issues. The commander must carry out the mission in a dynamic and changing environment whilst simultaneously adhering to what might seem rigid and inflexible legal principles that do not at all fit within the operational context. International law is able to afford a degree of flexibility in these circumstances. This is a clear theme that can be seen throughout the law and order regime in GC IV and is the same underlying theme present with respect to the defence power in the Australian Constitution.

Conclusion

The complexity of peace operations and nation-building is well documented. What is less clear is the legal basis on which such an operation proceeds and how this impacts on the process of re-establishing the rule of law in a collapsed state. In working towards the re-establishment of the legal system, the military force must act in accordance with its mandate and any amplifying rules of customary international law to carry out this task. The military force must also ensure that Dicey's three fundamental requirements for the rule of law, regularity, equality and fairness, become embedded in the reconstruction process. Their short and long-term implications are considerable. They will increase the complexity of operation and may even appear at times to obscure the main objective. They will also create the need to maintain a constant balance between the military imperative and the rights of the individual. But they are essential in order for the reconstruction of policing, the judiciary and the penal system to proceed on a solid foundation.

The Chief Justice of Australia, The Hon Chief Justice Murray Gleeson, AC, described the importance of the rule of law in the following terms:

“The importance of the rule of law lies partly in the power it denies to people and to governments, and in the discipline to which it subjects all authority. That denial, and that discipline, are conditions of the exercise of power, which in a democracy, comes from the community which all government serves. Judicial prestige and authority are at their greatest when the judiciary is seen by the community, and the other branches of government, to conform to the discipline of the law which it administers. The rule of law is not enforced by an army. It depends upon public confidence in lawfully constituted authority. The judiciary claims the ultimate capacity to decide what the law is. Public confidence demands that the rule of law be respected, above all, by the judiciary.”³²

Early action, by a military force conducting a peace operation, towards the re-establishment of the legal system of a State, is desirable because it assists in instilling public confidence and respect for the operation. More importantly, action by a military force towards the establishment of the legal system could also encourage the local population to collaborate in the development of a sustainable and credible legal system that is founded on respect for the rule of law. And in the absence of the rule of law, there is only anarchy.

¹ The views expressed in this paper do not necessarily represent those of the Australian Government or the Australian Defence Force. I gratefully record my appreciation of the work of my staff officer, Major Bronwyn Worswick, in the preparation of this paper.

² H. Strohmeyer, 'Policing the Peace: Post-Conflict Judicial System Reconstruction in East Timor' (2001) 24(1) *University of New South Wales Law Journal* 171, 172.

³ Article 33 of the Charter of the United Nations.

⁴ M.J. Matheson, 'United Nations Governance of Post Conflict Societies' (2001) 95 *American Journal of International Law* 76, 83

⁵ Article 33 of the Charter of the United Nations.

⁶ Security Council Resolution 1264, 54 UN SCOR (4045th mtg), UN Doc S/Res/1264 (1999).

⁷ See M.J. Kelly, 'INTERFET Detainee Management Unit in East Timor' (Paper presented at the Swiss Seminar on the Law of Armed Conflict, Chavannes-de-Bogis, Geneva, 27 October 2000) <<http://www.vbs.admin.ch/internet/gst/kvr/SLAC2000-exp-Timor.htm>> at 10 March 2001

⁸ Matheson, above n 4, 83

⁹ Exchange of Diplomatic Notes Constituting an Agreement between the Government of Australia and the Government of Indonesia Concerning the Status of the Multinational Force in East Timor which came into effect on 24 September 1999 and was known as the Status of Forces Agreement.

¹⁰ A. Roberts, 'What is a Military Occupation?' (1984) 55 *British Yearbook of International Law* 250.

¹¹ See M.J. Kelly, *Peace Operations – Tackling the Military, Legal and Policy Challenges* (1997).

¹² Strohmeyer, above n 2, 174.

¹³ *UNTAET Regulation No 1999/1 on the Authority of the Transitional Administrator in East Timor* UNTAET/REG/1999/1 (deemed to have entered into force on 25 October 1999).

¹⁴ S. Chesterman, 'Justice Under International Administration: Kosovo, East Timor and Afghanistan' The International Peace Academy's Project on Transitional Administrations (2002) 1 <<<http://www.ipacademy.org/Publications/Reports/Research>>> at 10 July 2003.

¹⁵ See Report of the Secretary-General on the Implementation of the Report of the Panel on United Nations Peace Operations, UN Doc.A/55/502 (20 October 2000). This Report (also known as the Brahimi Report) confirmed that issues of accountability and law and order are inescapably related to the maintenance of peace in both the short and long term. One of the recommendations flowing out of the Report was the desirability of developing a model criminal code which could be used by the United Nations in all future peace operations. In response to this recommendation, the United States Institute of Peace engaged in a multi-dimensional project concerning peace-building and the administration of justice in post-conflict territories. One part of that project is to develop a criminal code along the lines of that contemplated in the Brahimi Report. The project is developing a code that would incorporate offence provisions, provisions setting out criminal trial procedure and rules of evidence.

¹⁶ The Stanley Foundation, 'Accountability and Judicial Response: Building Mechanisms for Post-Conflict Justice' (Conference Report of the Thirty-Eighth Strategy for Peace, US Foreign Policy Conference, Virginia, 23-25 October 1997) <<http://www.stanleyfdn.org>> at 15 July 2003.

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- ¹⁷ A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed, 1959) 185-193.
- ¹⁸ S. Chesterman, 'Tiptoeing Through Afghanistan: the Future of UN State-Building' *The International Peace Academy's Project on Transitional Administrations* (2002) 1 <<http://www.ipacademy.org/Publications/Reports/Research>> at 10 July 2003.
- ¹⁹ B.M. Oswald, 'Interfet Detainee Management Unit in East Timor' (2000) 3 *Yearbook of International Humanitarian Law* 347.
- ²⁰ M.J. Kelly, 'Responsibility for Public Security in Peace Operations' in H. Durham and T.L.H. McCormack (eds.), *The Changing Face of Conflict and the Efficacy of International Humanitarian Law*, (1999) 142.
- ²¹ Strohmeyer, above n 2, 173.
- ²² Strohmeyer, above n 2, 177; Chesterman, above n 13.
- ²³ Chesterman, above n 13.
- ²⁴ See *Cameron v The Queen* (2002) 209 CLR 339; [2002] HCA 6.
- ²⁵ Strohmeyer, above n 2, 182.
- ²⁶ UNTAET/REG/2000/15 (entered into force 6 June 2000).
- ²⁷ Opened for signature 17 July 1998, UN Doc A/CONF.183/9, 37 ILM 999 adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998.
- ²⁸ S. Linton, 'Rising from the Ashes: The Creation of a Viable Criminal Justice System in East Timor' (2001) 25(1) *Melbourne University Law Review* 122, 149.
- ²⁹ *Ibid* 180.
- ³⁰ S. Chesterman, 'Kosovo in Limbo: State-Building and "Substantial Autonomy"' *The International Peace Academy's Project on Transitional Administrations* (2001) 11 <<http://www.ipacademy.org/Publications/Reports/Research>> at 10 July 2003.
- ³¹ See *Farey v Burvett* (1916) 21 CLR 433 at 440-441, 449 and 452-453. See generally A.D. Mitchell and T. Voon, 'Defence of the Indefensible? Reassessing the Constitutional Validity of Military Service Tribunals in Australia', (1999) 27 *Federal Law Review* 499, 500; G. Sawyer, 'The Defence Power of the Commonwealth in Time of War' (1946) 20 *Australian Law Journal* 295.
- ³² Chief Justice M. Gleeson, 'Courts and the Rule of Law' (Paper presented at Rule of Law Series, Melbourne University, 7 November 2001) << http://www.highcourt.gov.au/speeches/cj/cj_ruleoflaw.htm>> at 6 August 2003.