LEGALITY IN A COLLAPSED STATE: THE SOMALI EXPERIENCE

THE ouster of the Siad Barre regime in January 1991 and the civil war which followed led to a complete breakdown of law and order in Somalia. The human tragedy of the situation has been well publicised; less well known is the complete collapse of the institutions associated with constitutional governance and the administration of justice in Somalia, namely the federal and regional governments, legislatures, courts, the police and prisons.

In the absence of a central or regional governmental authority, these institutions had the force of authority taken away from them, and consequently their ability to render even the most routine services to civil society.[1] Somalia literally assumed the status of a lawless State.[2]

It is important immediately to discount the notion that Somalia may have lost its Statehood (a possible error especially given the scale and extent of UN intervention). The mere fact that a "foreign" legal order is imposed or imposes[3] itself on a State does not necessarily terminate Statehood; neither does the absence of effective government or extensive civil strife obliterate Statehood.[4]

1. The last Security Council mission to Somali faction leaders (26–27 Oct. 1994) described the situation as having presented "a vacuum of civil authority and governmental structure" (see Message of Security Council Mission to Somali Faction Leaders on behalf of the Council, 26 Oct. 1994).

2. If the defining characteristic of a State is, as Kelsen argues, the existence of a national legal order, then it would seem to follow that a "lawless State" is a contradiction in terms: see Hans Kelsen, *General Theory of Law and State* (1961), p.181. But it would appear that even where a national legal order (or independent "government") does not exist, if foreign control does not amount to annexation or the vesting of sovereign authority in some other way, then the question of loss of Statehood does not arise: Jennings, "Government in Commission" (1946) 23 B.Y.I.L. 120 *et seq*.

3. But see *Haile Selassie* v. *Cable and Wireless Ltd (No.2)* [1993] Ch. 182 (CA).

4. Iraq's belligerent occupation of Kuwait did not terminate Kuwait's Statehood. The Security Council in Res.687(1991) "welcomed the restoration to Kuwait of its sovereignty, independence and territorial integrity and the return of its legitimate government". The wording of the Res. demonstrates at least implicitly that the Security Council recognised the continued existence of Kuwait as a State, even though its government and sovereignty might have been impaired by the occupation. Brownlie acknowledges that foreign control of a State (either by a treaty of protection or consensual agreement of representation or agency) does not necessarily extinguish Statehood, especially where the representation or agency exists in fact and in law. He, however, bemoans the conceptual confusion created by writers who accept independence as an aspect of Statehood but then also acknowledge the existence of "dependent States" as some sort of an aberrant category. A prominent feature of this category is that the incidents of personality are not sufficiently distinguished from its existence. He highlights six situations or combinations of situations generally considered as bringing a State within the "dependent" classification: (a) The absence of Statehood, where the entity concerned is subordinated to a State so completely as to be within its control and the origin of the subordination does not establish agency or representation; (b) A State which has made concessions to another State in matters of jurisdiction and administration to such an extent that it has in some sense ceased to be sovereign; (c) A State which has legally conferred wide powers of agency and representation in foreign affairs on another State; (d)

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What is clear is that the country may have lost major legal capacities inherent in a State, e.g. power to make laws and treaties and maintenance of law and order. It is in this restricted sense that it is possible to contend that Somalia lost or suffered a severe diminution of its sovereignty[5] as a result of the civil war and the consequent intervention of the UN.

As we shall see later, it would appear that the phenomenon created by the absence of an effective politico-legal authority and UN intervention to fill the vacuum escapes categorisation by existing precedents. It is neither a trusteeship nor does it find a place within the concept of the so-called internationalised territories[6] or kindred concepts.

Starting in 1993, the UN operations in Somalia (UNOSOM) effectively began the rebuilding and resuscitation of key Somali institutions.[7] The Justice Division of UNOSOM, for example, opened several new district, regional and appeal courts.[8] At least eight prisons[9] had also been resuscitated and were fully operational under UNOSOM control. UNOSOM also reconstituted the Somali Police Force. As at May 1994 a total of 7,799 police recruits were at various stages of training.[10] The Mogadishu Port Operation Corporation (MPOC) and the Mogadishu Port Authority (MPA) were similarly created, and were responsible for running the Mogadishu port on a commercial basis.[11] Political/administrative institutions were also set

A State which in fact suffers interference from another State and may be a client State politically, but which quantitatively is not under the complete and permanent control of the "patron"; (e) A legal person of a special type, appearing on the international plane for certain purposes only, in the case of mandated and trust territories and some protectorates; (f) A State which fails to qualify as an "independent" State for the purpose of a particular instrument: *Principles of Public International Law* (4th edn, 1970), pp.75 *et seq*. Also see the Montevideo Convention on Rights and Duties of States (signed 26 Dec. 1933): Hudson, *International Legis*, Vol.VI, p.620 (quoted in Brownlie, *idem*, p.72). For conditions of Statehood see Fitzmaurice (1957) 92 Hag.Rec. 13.

5. Sovereignty in this context describes the legal competence which States have in general. Jurisdiction, legislative competence over a geo-political territory would qualify as embodiments of sovereignty. (Note also that the term sovereignty itself is open to considerable confusion. It may be used in the sense of a criterion for Statehood or as a synonym for independence (or legal personality).) See Brownlie, *idem*, p.78. See generally E. N. Van Kleffens, "Sovereignty In International Law" (1953) 82 Hag. Rec. 1, cited in M. S. Raja, *United Nations and Domestic Jurisdiction* (1961), pp.18 *et seq*.

6. The expression has been used to describe situations of entities such as the free cities of Danzig and Trieste, which were given status by treaty between the allied powers and defeated Germany, and protected by the League of Nations.

7. The scale of UNOSOM is probably unprecedented in UN peace-keeping history. At its peak there were about 28,000 personnel and the operation itself cost $1.5 billion annually.

8. As of Feb. 1995 UNOSOM had re-established regional courts in 10 of the 18 regions of Somalia, district courts in 43 of about 105 districts, and 10 courts of appeal. UNOSOM was also paying salaries for about 233 judicial and administrative staff of the courts.

9. The largest prison, the Mogadishu Central Prison, had as of Feb. 1994 an inmate population of about 300. UNOSOM in collaboration with international aid agencies such as WHO, FAO and the International Red Cross set up vegetable farms, ran clinics and generally kept order.

10. See Further Report of the Secretary-General on the United Nations Operations in Somalia submitted in pursuance to para.14 of Res.897(1994) S/1994/614, 21 May 1994.

11. MPOC monthly statistics show that the port did reasonably good business. In July 1994 e.g. a total of 22 ship calls were recorded, 442 incoming containers and 215 outgoing containers were recorded (MPOC, *Monthly Port Statistics*, July 1994).

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up. As of February 1994 district councils[12] and regional councils were in place all over Somalia. These institutions largely functioned with commendable success under UNOSOM control,[13] especially given the general instability in the country. UNOSOM remunerated most of the functionaries of these institutions (except councillors in the district and regional councils).

UNOSOM's mandate in Somalia formally expired on 31 March 1995 with the final withdrawal of UN personnel and troops from the country. It would seem apposite that some account should be taken of the obviously novel issues which arose and are likely to continue to arise in this unique UN operation.

This article considers some of these issues. It examines the source or basis of authority of the UNOSOM-run institutions in Somalia, it raises the question of their legitimacy as well as of the legality of their acts. In the case of the courts we ask the question: on what legal basis of authority were the courts established and upon what authority were their decisions based? Answers to some of these questions invariably involve a consideration of the larger question of where political/legal or sovereign authority lay during the period of UN intervention in Somalia.

A. United Nations Resolutions Establishing the UNOSOM-Assisted Somali Institutions

The concerted intervention of the world in Somalia, especially through the instrumentality of the UN, began about April 1992. Resolution 751(1992) created UNOSOM.[14] The mission was largely to provide assistance in the delivery of humanitarian aid. A US-led intervention (UNITAF—United Task Force) followed with the objective of establishing a secure environment for humanitarian relief. UNITAF officially ended on 4 May 1993 with the handing over of the mission to UNOSOM II.

The mandate of UNOSOM II appears to have anticipated the Addis Ababa agreement signed on 27 March 1993,[15] where Somali political leaders agreed, *inter alia*, to seek the assistance of UNOSOM, aid agencies and donor countries in the task of restoring and maintaining peace, stability and order, and rebuilding Somalia's political and other institutions destroyed by the conflict. UNOSOM II was, however, established by Resolution 814(1993),[16] which requested UNOSOM to assist in the:

> Restoration of peace, stability, law and order, including investigation and facilitation of the prosecution of serious violations; such violations include mass murders of Somali citizens, murder and attempted murder and threats of bodily harm, against international assistance workers and UNOSOM employees ...
>
> ... re-establishment of national and regional institutions and civil administration in the entire country ...

12. 55 district councils were established out of 66 districts excluding Benadir and North-West Regions, 8 regional councils, and 819 councillors in 39 districts had been trained.

13. See Further Report of the Secretary-General submitted pursuant to para.4 of Res.886 (1993) S/1994/12, 6 Jan. 1994, for figures as at 6 Jan. 1994.

14. 24 Apr. 1992.

15. Addis Ababa Agreement of the First Session of the Conference on National Reconciliation in Somalia, 27 Mar. 1993.

16. S/RES/814 (1993) 26 Mar. 1993.

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> ... re-establishment of Somali Police, as appropriate at the local, regional or national level ...

Pursuant to Resolution 814 the Secretary-General's report of 17 August 1993[17] provided a detailed plan of action for the judiciary, prisons and human rights in Somalia. The plan proposed the establishment of an interim three-tier judicial system.[18] Judges and magistrates within the system were to be remunerated by UNOSOM. Courts and administrative offices were to be renovated. The interim judicial system was to be in operation until 31 March 1995, by which time the Transitional National Council (we shall discuss this issue later) would determine the type of judicial system and laws the country required. The interim judicial system would then be adjusted to accommodate the system called for by the Transitional National Council.

As a contingency in the event of intimidation of or threats against Somali judges appointed to the interim courts, foreign judges were to be engaged.[19] Significantly, the plan provided for UNOSOM military forces to be in a position to provide security for judicial proceedings until the Somali police forces were able to provide the required level of security.[20] Similarly, the re-establishment of the police force and the formation of councils derived impetus from Resolution 814.

Resolution 897(1994) put the nature and rationale of UNOSOM intervention in perspective where it noted that: "Determining that the situation in Somalia continues to threaten peace and security having regard to the exceptional circumstances including in particular absence of a government in Somalia and acting under Chapter VII of the Charter of the United Nations ..."[21] The Resolution further noted, *inter alia*, the UNOSOM obligation in "Assisting in the re-organisation of the Somali Police and judicial system".[22] However, this "assistance" notion has been neither consistently nor seriously asserted by the Security Council. Resolution 923(1994), for example, states that the Security Council "Further welcomes the progress made by UNOSOM II in *establishing* the justice and police programmes and calls for their acceleration".[23]

17. See Further Report of the Secretary-General submitted in pursuance of para.18 of Res.814(1993) S/26317, 17 Aug. 1993, Annex 1: The Re-Establishment of Security in Somalia: The Police, Judicial and Penal System.

18. Annex 1, *idem*, para.29, p.24.

19. *Idem*, para.35, p.25, Note also that this was the case in Somali courts in the 1960s.

20. *Ibid.*

21. S/1994/115, 3 Feb. 1994.

22. *Idem*, para.1(d). See also Res.865(1993) which enjoined UNOSOM to implement a policy of resuscitation of the Somali administration of justice system. The Res. provided, *inter alia*, that the Security Council "Welcomes the Secretary-General's intention to maintain and utilize the fund established pursuant to resolution 794 (1992) and maintained in resolution 814 (1993) for the additional purpose of receiving contributions for the re-establishment of the Somali judicial and penal system". Also in Res.886(1993) the Security Council again emphasised its commitment to ensuring the re-establishment of the administration of justice system in Somalia when it stressed: "The importance it attaches to the accelerated implementation by the Somali people, with the assistance of the United Nations and donor countries of the recommendations contained in Annex I of the Secretary-General's report of 17th August and endorsed by the Security Council in its Resolution 865, and in particular the establishment of an operational police, penal and judiciary system at the regional and district level as soon as possible."

23. S/C 5853, 31 May 1994.

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This prevarication in the language of the Security Council resolutions somewhat reflects the reluctance of the international community to face up to and accept the reality of the nature of UN intervention in Somalia—which was entirely without a political authority or any institutions of civil governance. There are good reasons for this reluctance. First, the UN found itself in completely uncharted waters. There was no clear precedent for the scale or circumstances of the UN intervention in Somalia.

Second, an aggressive assertion of authority by the UN could have generated hostility from the populace, who could have seen UNOSOM as a force of occupation. However, these reservations can hardly remove the overall implications of the mandates by which UNOSOM came into being. In any case the realities on the ground in Somalia in terms of how UNOSOM has had to execute its mandate compel the conclusion that UNOSOM was the political authority in Somalia during the subsistence of its mandate. This is particularly evident in the steps taken to re-establish Somali judicial institutions and infuse those institutions with the vital legality required for their functioning. The appointment of judicial personnel is especially illustrative. This is because the question of how and by whom judges are appointed and remunerated would usually have direct implications for the issue of who enforces the decisions of the courts or, put differently, who has the ultimate responsibility for law enforcement.

Before the civil war the Higher Judicial Council (HJC)[24] was responsible for judiciary matters generally. It was the HJC which made recommendations to the government (the appointing authority) through the Minister of Grace and Justice for the appointment of judges. Recommendations of the HJC regarding appointments, transfers, promotions and terminations of judicial officers were binding on the appointing authority.[25] The HJC itself consisted of the Attorney-General (a government appointee) and three members who could not be deputies or practising attorneys, and they were elected for a period of three years by the National Assembly.[26] The appointment of judges were therefore a matter which was regulated by law, and which required substantial input by the sovereign authority and even some input by the legislative authority.

Upon the intervention of the UN in Somalia none of the institutions involved in constituting the HJC was in existence. UNOSOM was of course eager to ensure that the actual selection of judges was done by a body of Somalis, although ultimate authority still lay with UNOSOM to scrutinise nominations and certify them before paying salaries. At the direction of UNOSOM, the Judicial Selection Committee (JSC) was set up, and this later metamorphosed into the Judicial Re-establishment Council (JRC). It is noteworthy that the Judicial Selection Committee was conceived of in the Secretary-General's report on the strategies for the re-establishment of security in Somalia.[27] First, the HJC's legitimacy was conferred by the law of Somalia and backed by the force of the sovereign legal/political authority then in Somalia, while the JSC (or JRC) was essentially a UNOSOM creation. Second, the government of Somalia was bound by the recommendations

24. See Organisation of Judiciary Law, Chap.III, Arts.27–29.
25. *Idem*, Art.28(2)(b).
26. *Idem*, Art.27(2).
27. See Report, *supra* n.17, at para.34.

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of the HJC whereas UNOSOM was not bound by the recommendations of the JRC. In terms of the scope of powers in the appointment of judicial officers UNOSOM effectively stood in a more powerful position than the pre-civil-war Somali government.

UNOSOM was also clearly the sole legislative authority in Somalia during the currency of its mandates. UNOSOM specifically provided that the penal codes,[28] the civil[29] and criminal codes[30] were to apply in the courts of Somalia. UNOSOM also maintained the pre-Siad Barre structure of the courts in accordance with the judiciary organisation law.[31] Several of these laws had either been abrogated or modified to suit the requirements of military dictatorship. Consequently, the military regime's decrees, including those establishing the dreaded National Security Court[32] (decisions from which were not appealable), which suspended *habeas corpus* and other fundamental freedoms, were implicitly repealed.

As we noted earlier, UNOSOM also resuscitated other institutions within the administration of justice system: the police and the prison service. Enlistment, re-enlistment and training of police officers were done by UNOSOM police advisers. The advisers were also largely responsible for defining policies and regulations. Since relevant Somali legislation was in abeyance, general guidelines and policies were formulated by the advisers. The rules on arrest of persons, investigations and questioning of suspects were based on these guidelines and not on Somali laws.[33]

Technically the courts exercised jurisdiction over all persons resident in Somalia. While there were no reported cases of foreigners involved in criminal offences, there was at least one civil suit against a foreign entity by a Somali before a Somali regional court. The foreign entity (a UNOSOM contractor) was sued for the wrongful dismissal of a local staff member and was found liable. The foreign company was not represented at the trial. Offences or wrongful acts by UNOSOM troops were handled by the office of the Provost-Marshal. UNOSOM civilian staff, on the other hand, were generally subject to internal disciplinary measures.

As for the prison system, before the civil war a comprehensive law on prisons was in use.[34] The law covered issues such as establishment and administration of prisons, treatment and welfare of prisoners, remission of imprisonment and conditional release on licence. Upon UNOSOM intervention, experts in the Corrections Section of the Justice Division took over complete control and direction of all prison matters—and directly supervised the work of the custodial corps. General guidelines and directives were issued on many issues such as welfare of inmates, discipline of custodial corps, etc. Actual cases were handled largely on a case-by-case basis.

28. Legislative Decree No.5 of 16 Dec. 1962.
29. Law No.9 of 27 July 1974, Civil Procedure Code.
30. Legislative Decree No.1 of 1 June 1963, Criminal Procedure Code.
31. Legislative Decree No.3 of 12 June 1962, Organisation of Judiciary.
32. Law No.3 of 10 Jan 1970, Institution of National Security Court.
33. These guidelines included the Standard Operating Procedure (SOP) for apprehension, investigation and detection by UNOSOM. The SOP was drawn up by the Justice Division of UNOSOM in collaboration with the office of the Legal Counsel to the Special Representative of the Secretary-General.
34. Prison Law, Law No.7 of 30 Dec. 1971.

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The MPOC and the MPA are examples of UNOSOM-run government commercial/administrative entities. The MPOC/MPA ran the Mogadishu port. This involved policy formulation, negotiation and fixing of tariffs, employment of staff (truck loaders, stevedores, etc.) and contractual obligations with suppliers of goods and services.

The programme of establishing district councils is another case in point. As in the case of the JRC this was an attempt to shift political authority to Somali political leaders. The regional and district councils were conceived of in the Addis Ababa agreement.[35] The agreement provided for the establishment of regional councils in all 18 regions of Somalia. The regional councils were to be entrusted with the maintenance of law and order in their regions through the instrumentalities of the regional police force and the judiciary. Each district was also to form a district council, whose members were to be elected or appointed through a "broad based selection in accordance with Somali traditions". The district councils were to be responsible for managing the affairs of the district including public safety, health, education and reconstruction. Regional councils were to be constituted by representatives from each district within a region. The regional council was then to function through the Transitional National Council, which was to be the "prime political authority having legislative functions" during the recommended two-year transition period. All these issues were to be formally documented in a "Transitional Charter".

The district councils were meant to provide the politico-legal basis for the institutions to be rebuilt by UNOSOM. Judicial and law enforcement authorities were ostensibly to derive authority from and report to their district councils. Two problems frustrated this strategy. First, district councils could not be constituted in some regions due to instability and, in some cases, failure of local warlords to reach consensus on their membership. The second problem was more fundamental. By what authority were the councils formed? From where did they derive legality (even leaving aside the issue of legitimacy)? By the Addis Ababa agreement the formation of regional and district councils and the exact modalities for effecting this were to be documented in a Transitional Charter. This was never done. And the Transitional National Council, which was to supervise the councils (as we shall see later), never saw the light of day. The district councils which were subsequently formed appear to have derived no more than inspiration from the Addis Ababa agreement. In order to ensure a measure of local participation in governance, UNOSOM actively sought consensus on the choice of representatives to the councils in co-operative regions. Names of such representatives were forwarded to UNOSOM for certification.

Councils were formed only where the UNOSOM certification criteria were met, a crucial feature of which was adequate representation from all clans in the given region. The councils anticipated by the agreement, which were to be entirely free of UNOSOM intervention in the selection process, were clearly different from the eventual outcome.

It is also important to note that the concept of councils in this form was unknown to Somali law before the war. Thus there really was no constitutional or other clear legal basis in Somali law for the councils. All of these UNOSOM-run institutions

35. See *supra* n.15.

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clearly did not function under any known Somali laws. At best general guidelines were drawn up by the responsible UNOSOM officials or agencies aided by existing Somali laws or practices.

Consequently, taking the case of the courts and the judiciary, it may be argued that in the absence of the HJC, or for that matter a government which could confer legitimacy on such a body, the JRC which found its legitimacy not in Somali law but in the relevant guidelines issued by UNOSOM regulating its creation and functions—which in turn derived legality from the UN mandates—was the only legitimate appointing authority. Judges appointed and courts set up thereunder would appear to derive legitimacy from the same source. The implication of this reality for the enforcement of judicial decisions is apparent. It was the obligation of UNOSOM to enforce compliance with the decisions and orders of the courts. As a practical matter this could (and sometimes did) involve the use of UNOSOM troops where the police were unable to cope.

The legality of the acts of UNOSOM experts and advisers running the police force and prison systems is also clearly based on the UNOSOM mandates. Resolution 814, which directed UNOSOM to assist in the "restoration of peace, stability, law and order, including investigation and facilitation of the prosecution for serious violations" as well as the re-establishment of the police force "as appropriate", obviously contemplated the reorganisation of the police and prison systems to functional capacities given the circumstances of the country at the time. This task would invariably involve appointments, re-enlistments, retraining and the redrafting of rules capable of enforcement in a society which had lost the use of major components and complements of its administration of justice system.

The legal basis of the acts of the councils and the MPOC/MPA is of course logically the same as that of the institutions concerned with administration of justice. In the case of the running of the Mogadishu port (and other ports in Somalia), Resolution 814 again provides support where it requests UNOSOM to "assist in the provision of relief aid in the economic rehabilitation of Somalia".

B. Implications of Chapter VII—Intervention for Sovereignty

The UN mandate for intervention in Somalia came, as we have seen, under Chapter VII of the Charter of the United Nations.[36] Article 42 of the UN Charter provides:

> should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea or land forces of members of the United Nations.

Obviously, Article 42 does not confine the UN to the categories of intervention listed, and it would seem that an outright "invasion" or entry into the subject nation will be contemplated. In Resolution 794(1992)[37] the Security Council, act-

36. See Arts.24(2) and 25 of the UN Charter. The Security Council has decision-making powers under Chap.VII of the Charter, and members are obliged to accept and carry out the Council's decisions. See generally Falk, "On the Quasi-legislative Competence of the General Assembly" (1966) 60 J.I.L. 782.

37. S/Res. 794(1992), 3 Dec. 1992.

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ing under Chapter VII, authorised the Secretary-General and member States co-operating to "use all necessary means" to establish an operation which would create a secure environment for humanitarian relief.[38] The Resolution also noted the determination of member States to restore peace, stability and law and order with a view to facilitating the process of a political settlement under the auspices of the UN aimed at national reconciliation in Somalia.

To what extent is the sovereignty[39] of the subject compromised by a Chapter VII intervention, and to what extent does the UN force assume authority in the subject State? Alternatively, is the question one of sovereignty? Or does the nature of things exclude that frame of reference? There is little doubt that to a large extent the UN assumed territorial jurisdiction in Somalia.[40] In practical terms this meant that not only was there a military intervention but a civilian take-over of institutional structures by UN personnel for purposes of re-establishment and rehabilitation was also inevitably contemplated by the wording of the Resolution, and was effected. Although it was initially contemplated that UN personnel should assist Somalis in rebuilding these structures, the reality on the ground was that there were hardly any counterpart professionals to work with as most had been killed or had to flee the country. This was especially so for functionaries of the ousted regime, who invariably would have escaped for fear of reprisals.[41]

Even where professionals were available it would seem that the only way to fulfil the mandate was to establish operational control of the institutional structures while maintaining close consultation with the Somali leadership. This was especially inevitable in the case of the institutions of administration of justice.

This approach was endorsed by the Secretary-General's report,[42] which envisaged consultation with the Somali community and leadership and close operational co-ordination between the UNOSOM police and judicial advisers and the Somali police and justice system, with UNOSOM military forces also providing support and assistance to the Somali police and penal system. UNOSOM was then "gradually [to] hand over more operational responsibilities as Somali capacities increased and the political process moved forward".[43]

38. *Idem*, para.10.

39. Sovereignty is used in the limited sense of the supreme political/legal authority. But see Hans Kelsen, "Natural Law Doctrine and Legal Positivism", in *op. cit. supra* n.2, at p.383.

40. The concept of territorial jurisdiction (in non-mandate or trusteeship situations) of inter-governmental organisations is controversial (see Kelsen, "The Law of the United Nations, 1950). It is, however, not without precedent. The Treaty of Versailles (Arts.45–50) e.g. gave the League of Nations full governmental powers in the Saar. A governing commission was appointed to run the country under the treaty. More restricted jurisdiction was given to the League by the Treaty of Versailles (Arts.100–108, Council Res. of 13 Feb. 1920) in respect of the government of Danzig. The League appointed a High Commission to run the City. Finn Systered (1961) 37 B.Y.I.L. 452–453 rightly notes that the failure of the UN to record a successful attempt to exercise territorial jurisdiction (e.g. Jerusalem where the General Assembly proposed the establishment of a corpus separation under a special international regime, or the case of the free city of Trieste, both of which failed) is no indication of absence of legal capacity but lack of territories. But see Brownlie, *op. cit. supra* n.4, at p.175. Lauterpacht, "UN Cannot Have Territorial Sovereignty" (1956) 5 I.C.L.Q. 409.

41. See Somalia Justice Programme Appeal Document, UN Office in Somalia (UNOSOM) Oct. 1993, Version 2, pp.10 *et seq.*

42. See Report, *supra* n.17, at Annex 1, para.35.

43. Somali Justice Programme, *supra* n.41, at p.7.

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A further indication of the UNOSOM Justice Division game plan can be gleaned from a part of the appeal document which reads: "a core team from the UNOSOM Justice Division will help to manage the judicial ... system assisted by recruited Somali nationals who will be incorporated into the Ministry of Justice as public civil servants after the new government is formed".[44]

It would appear that UNOSOM's mandate envisaged a *de jure* and *de facto* UNOSOM legal authority providing both factual and legal force for the Somali legal/judicial system and other re-established institutions while merely satisfying political and moral requisites by consulting whatever was left of the Somali leadership. The mandate assumed that UNOSOM would inject life into these institutions and sustain them until such time as the Somalis were able to take over. It is important in this context to understand how Somali political leaders perceived the issue of sovereignty or political authority in the absence of a government. The Addis Ababa agreement provided an inkling of the sensitivity of Somali political leadership to this issue.

The agreement provided for the creation of a Transitional National Council, which was to be the "repository of Somali Sovereignty",[45] and function as "the prime political authority having legislative functions"[46] during the transitional period. The Council was also to "interact, as appropriate, with the international community, including UNOSOM"[47] and "establish an independent judiciary".[48] Evidently, the faction leaders recognised the existing vacuum in sovereign authority created by the absence of some form of government. It is of course well known that the Addis Ababa agreement was unable to lead to the formation of the Transitional National Council or of any other form of government.[49] A year later the Somali political leadership implicitly recognised the consequence of this failure when in Nairobi they signed a Declaration on National Reconciliation[50]— where they are also agreed that "in order *to restore the Sovereignty* of the Somali State a National Reconciliation Conference should be convened on the 15th May 1994 to elect a President, Vice-President and to appoint a Prime Minister". To date, the National Reconciliation Conference has not taken place nor is there real hope of its imminently doing so.

It would appear therefore that the Somali political leadership impliedly abdicated authority in Somalia or at least shifted the responsibility to UNOSOM and continued so to do in the absence of a government. This is especially true where it is realised that even the Somali leadership appeared to accept that the only authority capable of enforcing even their agreements and declarations was UNOSOM.

44. *Ibid.*
45. Addis Ababa Agreement, *supra* n.15, at para.1(a).
46. *Idem*, para.1(b).
47. *Idem*, para.1(c).
48. *Idem*, para.1(h).
49. It is noteworthy that three days after the Addis Ababa Agreement the 15 political factions who were signatories to the Agreement signed a further agreement which purported to set out the rules for the appointment of members of the TNC. The Agreement also prescribed the setting up of a charter-drafting committee. The charter was to be approved by the TNC. This agreement was also never implemented. (Agreement Reached Between the Political Leaders At the Consultations Held in Addis Ababa, 30 Mar. 1993.)
50. 24 Mar. 1994.

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In the Addis Ababa agreement the leaders urged "UNITAF/UNOSOM to apply strong and effective sanctions against those responsible for any violation of the cease fire agreement of January 1993", and further stressed "the need for the air, sea and land borders of Somalia to be closely guarded by UNITAF/UNOSOM in order to prevent any flow of arms into the country and to prevent violation of the territorial waters of Somalia".[51]

In concluding the agreement the faction leaders invited the Secretary-General, and his special representative in Somalia, in accordance with the mandate entrusted to them by the UN Security Council, to extend all necessary assistance to the people of Somalia for the implementation of this agreement. This implicit shifting of the legal basis of power and authority is perhaps the strongest argument for the concept of a "UNOSOM government" (a notion roundly rejected by UNOSOM and the Somali leadership).

Nevertheless, in view of the far-reaching nature of UNOSOM's intervention in the socio-legal fabric of Somalia it would be naive and certainly grossly inadequate to suggest that the role of the UN was merely to "assist" in rebuilding Somali institutions. Assistance to the Somali people is of course different from assistance to the Somali government. Only the former was possible in Somalia during the period, and there should be no difficulty in understanding the proposition that a UNOSOM political authority in Somalia (even if it was reluctant to accept its authority) was assisting the Somali people by being a substitute government until the Somali civil strife abated and a government was formed.

It may of course also be argued that the Somali leadership in Addis Ababa had no legal authority to make the pronouncement they made as they were in no way legally representative of the Somali people; in other words, *nemo dat qui non habet*. This argument can only strengthen the position that UNOSOM is and has been the only viable political and legal authority in Somalia since the UN intervention.

There are also significant parallels to be drawn between UNOSOM's intervention in Somalia and the allied occupation of Germany under the Berlin Declaration. The first is that, in both situations, prior to the intervention of the occupying authorities there was no government in which sovereignty could be said to reside. It was therefore logical that these respective authorities should assume the full complement of powers necessary to run a State. Also, in both situations the intervening authorities did not seek to extinguish the Statehood of the "occupied" State, but only to assume governmental powers and thus create an agency through which they would run the affairs of the respective States for a provisional period. Consequently, both States remained viable in international law during the currency of foreign control. The allied occupation of Germany under the Berlin Declaration provided an innovative use of subjugation as an instrument for effecting international control of a conquered State. This is in a sense similar to the creative use of intervention under Chapter VII for the purpose of facilitating UN control of governmental powers in a member State which had lost the capacity to govern itself and provide security and sustenance for its population.

The basic difference is to be found in the juridical basis for the title of the respective authorities and the justification for assumption of control in either case.

51. *Supra* n.15.

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The title of the allied powers to "supreme authority" was acquired by subjugation. This gave the conquering powers a right to annex the conquered State and thus extinguish its Statehood. UNOSOM's intervention, on the other hand, was based on Security Council resolutions pursuant to Chapter VII of the UN Charter, to which Somalia itself is a signatory. UNOSOM's assumption of control did not offer a right to annex Somalia.[52] If Somali political leaders had found common ground and resolved their differences, UNOSOM would have had to give way to a Somali government even if only an interim one.

Yet another argument is that in the absence of a government, sovereign political authority reverts to the people. This argument, however, would appear to equate sovereignty with some shade of national chauvinism. A conquered people, for example, may then argue that the army of occupation—no matter the completeness of its hold on political power—is incapable of acquiring sovereign political authority since it inheres in the conquered people. A more realistic analysis would be to seek sovereignty where effective political authority lies.

However, the concept of sovereignty may be inapplicable to a correct analysis of the UN intervention in Somalia. It may, for example, be suggested that the situation is probably more akin to government under mandate or trust. In any event, the legal attributes of government under trusteeship could be of critical assistance in our search for an appropriate legal identity for the UN involvement in Somalia. It has been suggested that government under a trusteeship is an alternative to, and not a species of, government under sovereignty. Furthermore:[53]

> like the rights of a trustee in our law, so the rights of an international trustee have their foundation in its obligations under the Charter and under the trust agreement: they are tools given to it, in order to achieve the work assigned to it and the measure of its powers, the test by which its possession of any particular power must be determined is that the law has provided it with all the tools that are necessary for its tasks, but with those only.

Going by the UN Charter, however, the Somali situation cannot legally be considered a trust arrangement. Article 78 of the Charter clearly provides that the trusteeship system cannot apply to UN member States.

The position of the UN in Somalia may therefore represent yet another alternative to government by sovereignty: a quasi-trusteeship. Here, as in a trusteeship, the source of authority can be found only in the several mandates and not in any concept of sovereignty.

C. Termination of the Quasi-Trusteeship

The last batch of UNOSOM personnel left Somalia at the expiry of UNOSOM's mandate on 31 March 1995. Judges, custodial corps, the police and other employees of UNOSOM-run institutions were paid salaries up to the withdrawal

52. See Boutros Boutros-Ghali, *An Agenda for Peace* (1992), p.17, and Res.46/182 of 19 Dec. 1991.

53. See J. L. Brierly, *The Law of Nations* (6th edn (ed. Sir Humprey Waldock), 1963), p.189, and "Trusts and Mandates" (1929) B.Y.I.L. 217. See Hall, *Mandates, Dependencies and Trusteeships* (1948), *The Trusteeship System of the United Nations* (1956); Marston, "Termination of Trusteeship" (1969) 18 I.C.L.Q. 1; *The International Status of West Africa* I.C.J. Rep. 1950, 128; Lathan CJ in *Frost* v. *Stevension*, Ann. Dig. 1935, p.98.

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date. Since then UNOSOM has stopped paying salaries and ceased to run Somali institutions.

In place of UNOSOM, a small political office, headed by a representative of the Secretary-General, has been established: the UN Political Office for Somalia (UNPOS).[54] UNPOS has no administrative or even institution-building responsibilities. Its terms of reference are to monitor and report on the situation in Somalia, assist Somali leaders in national reconciliation efforts, liaise with neighbouring countries and organisations, and liaise with the Humanitarian Co-ordinator.[55]

Some of the former UNOSOM-run institutions apparently still function on a voluntary basis. Some district and regional councils, some police and even courts in a few places are believed to function still along the lines of the UNOSOM-established rules. However, institutions which still function obviously do so at the sufferance or with the acquiescence of a local warlord.

Sharia courts are now reportedly springing up rapidly all over Somalia. These were a relative rarity in the UNOSOM era (even in the pre-civil-war days Sharia courts were virtually unknown although aspects of the Sharia formed a part of the civil adjudicatory system). The Sharia courts are also believed to be under the authority of local warlords.[56]

It would therefore seem that Somalia has virtually returned to the pre-UNOSOM days; a State without a government, but with several local chieftains (or warlords) struggling to gain maximum control. The quasi-trusteeship status of Somalia therefore appears to have ended on 31 March 1995 with the final withdrawal of UNOSOM. In the circumstances the UN no longer exercises any real form of political or legal authority over Somalia.

D. Conclusions

The following conclusions can be drawn:

(1) The collapse of the Somali government and institutions in the wake of civil war resulted in a vacation of political authority by its political leadership. The direct implication of this for the intervening authority was that it became the source of legal and political authority.

(2) Alternatively, the UN intervention, in the absence of any domestic political or legal authority, and its take-over of all major institutions gave rise to a quasi-trusteeship, a politico-legal authority deriving authority from the mandates of the Security Council. Consequently, the legality of acts done by functionaries, local and international, of these UNOSOM-established institutions in Somalia is located in the mandates of the Security Council on Somalia. Where such acts are substantially in conformity with the relevant mandates they must be seen as legal. Where the converse is the case such acts are illegal.

54. See Secretary-General's letter to the Security Council 18 Apr. 1995 (S/1995/322), 31 May 1995 (S/1995/451).

55. See generally Report of the Secretary-General on the Situation in Somalia, 19 Jan. 1996, S/1996/42.

56. The harsh punishments for which the Sharia penal system is known are perhaps some

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(3) On 31 March 1995—the date of the final withdrawal of UNOSOM from Somalia—the quasi-trusteeship arrangement terminated and UNOSOM's politico-legal authority was determined. The legal structures left behind by UNOSOM are now in the hands of sundry warlords. It appears that Somalia has again slid into legal chaos with no one quite knowing who is in charge.

YEMI OSINBAJO*

THE AUSTRALIAN HIGH COURT'S USE OF THE *WESTERN SAHARA* CASE IN *MABO*

A. Introduction

Recent cases before the High Court of Australia have raised the question as to the appropriate degree to which international law should influence Australian law and politics.[1] Crucial to the reasoning in the leading judgment of the landmark 1992 *Mabo* case,[2] by which the Australian judiciary recognised for the first time a native title to land, was the finding that Australia had not been *terra nullius* at the time of colonisation. The leading judgment accepted the categorisation of Australia as a settled colony which had been established by the Privy Council in *Cooper* v. *Stuart*.[3] In this judgment Lord Watson had held that Australia, as a "settled" colony, had received transplanted British law "except where explicitly changed or considered irrelevant".[4] This had given rise to the assumption, confirmed by *Milurrpum* v. *Nabalco Ltd* (the Gove Land Rights case of 1971) that, since no legal rights to land of indigenous people existed in British law and none had been explicitly acknowledged in relation to Australia, no basis existed for their later recognition.[5] The leading judgment in *Mabo* went on to declare, however, that the notion that British law had been transplanted into a settled colony had been based on the assumption that the "indigenous people of a settled colony were ... without laws, without a sovereign and primitive in their social organisation".[6] Since "the facts as we know them today" do not "fit this theory" the leading judgment asserted there to be "no warrant for applying in these times rules of the English common law which were a product of that theory".[7]

reasons why these courts will be favoured by local warlords concerned with maintaining order in the territories they control.

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1. Key cases include *Horta* v. *Commonwealth* (1994) 123 A.L.R. 1 and *Minister for Immigration and Ethnic Affairs* v. *Teoh* (1995) 128 A.L.R. 353. For discussion see, *inter alia*, P. Alston and M. Chiam (Eds), *Treaty-Making and Australia: Globalisation versus Sovereignty?* (1995); B. F. Fitzgerald, "*Horta* v. *Commonwealth*: The Validity of the Timor Gap Treaty and its Domestic Implementation" (1995) 44 I.C.L.Q. 643; and M. Kirby, "In Defence of Mabo" (1993) 65 Australian Quarterly 67.

2. *Mabo and Others* v. *State of Queensland* (1992) 107 A.L.R. 1. For discussion see R. D. Lumb, "Native Title to Land in Australia: Recent High Court Decisions" (1993) 42 I.C.L.Q. 84.

3. *Cooper* v. *Stuart* (1889) 14 App. Cas. 286.

4. *Idem*, p.292.

5. *Milurrpum* v. *Nabalco Ltd* (1971) 17 F.L.R. 141, 244–245.

6. *Mabo*, *supra* n.2, at p.24.

7. *Idem*, p.26.

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