Jus Post Bellum: The Case for a Light Footprint "Plus" Approach to Post-Conflict Peacebuilding

by

Shaina C. Leonard

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University of Alberta

Abstract

The term *jus post bellum* is used increasingly to refer to the legal frameworks applied in post-conflict peacebuilding projects. This thesis considers the recent application of three *jus post bellum* frameworks in states emerging from conflict to determine which framework has the greatest potential for success in terms of securing lasting peace and security in the post-conflict state. The three frameworks considered are: the law of occupation applied in Iraq, the United Nations-led interim administrations applied in Kosovo and East Timor, and the light footprint approach applied in Afghanistan. The thesis concludes that the light footprint approach, with its focus on local ownership over the peacebuilding process, should be considered for future post-conflict states, but with enhanced attention to security and coordination. A light footprint "plus" approach that includes increased international support and mentorship is advocated as the clearest route to lasting peace and security.

This thesis concludes that the law of occupation is not an effective tool for post-conflict peacebuilding because it restricts the types of changes that can be made within the post-conflict state and it only arises in rare instances of international armed conflict. In Kosovo and East Timor, the UN-led interim administrations took control of all aspects of governance and made significant changes. While UN-led interim administrations can bring about significant post-conflict change, the lack of popular consultation and perceived lack of accountability makes them less desirable as post-conflict peacebuilding frameworks. In Afghanistan, peace builders were wary of the risks of imposing change on the Afghan people and adopted a light footprint approach that allowed Afghan authorities to lead post-conflict rebuilding efforts. Unfortunately, the international community did not provide sufficient support to the Afghans, the result of

which was a poor security environment, an uncoordinated approach, and a failure to incorporate existing judicial frameworks into the new institutions of government. Although the light footprint approach is considered a failure in Afghanistan, a light footprint "plus" approach cannot be discounted for future peacebuilding initiatives.

for my son, Hudson

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Abbreviations

CPA	Coalition Provisional Authority
ECHR	*European Convention for the Protection of Human Rights and Fundamental Freedoms*
FRY	Federal Republic of Yugoslavia
ICRC	International Committee of the Red Cross
ICJ	International Court of Justice
ICCPR	*International Covenant on Civil and Political Rights*
IHL	International humanitarian law
ISAF	International Security Assistance Force
KFOR	Kosovo Implementation Force
NATO	North Atlantic Treaty Organisation
OSCE	Organisation for Security and Co-operation in Europe
UN	United Nations
UNAMA	United Nations Assistance Mission in Afghanistan
UNAMET	United Nations Mission in East Timor
UN Charter	*Charter of the United Nations*
UNMIK	United Nations Interim Administration Mission in Kosovo
UNTAET	United Nations Transitional Administration in East Timor

INTRODUCTION

Where the international community of states engages in peacebuilding activities in a state emerging from conflict, an effective strategy for intervention is necessary to ensure lasting peace and security. [1] The creation of the United Nations (UN) Peacebuilding Commission[2] serves as recognition of the important role to be played by the international community, as does the work of the International Commission on Intervention and State Sovereignty which argued that if military intervention is taken in a country, it should be followed by a "genuine commitment to helping to build a durable peace, and promoting good governance and sustainable development."[3] The purpose of this thesis is to examine three legal frameworks that have been employed recently in a number of post-conflict peacebuilding situations. The frameworks to be examined in this thesis are occupation, interim administrations, and the so-called light footprint approach, each having been used to justify significant transformative changes to the post-conflict state. I argue that there are important insights to be drawn from an analysis of each of these frameworks and while each approach has its flaws, I conclude that the light footprint approach, with additional support from the UN or other members of the international community, is the post-conflict peacebuilding framework that is most likely to result in lasting peace and stability.

In this thesis, I have treated the legal framework applied in the post-conflict peacebuilding process as being part of the emerging concept within international law of a *jus*

[1] Report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Ottawa, 2001) at para. 5.3.

[2] *The Peacebuilding Commission*, GA Res. 60/180, UN Doc. A/RES/60/180 (2005).

[3] The Responsibility to Protect, *supra* note 1 at para. 5.1.

post bellum. In contrast to the highly defined areas of the law that govern when states engage in an armed conflict and how that armed conflict must be conducted (the *jus ad bellum* and the *jus in bello*), the *jus post bellum*, being the law that governs the post-conflict period, has been given much less attention in the scholarly literature.[4] As noted by Professor Kristen Boon of Seton Hall Law School, there is "no uniform legal framework regulating transitions from conflict to peace, nor is there consensus on the obligations that unilateral or multilateral actors incur when they engage in transformative occupations and interventions."[5] According to Professor Carsten Stahn, of the University of Leiden, the *jus post bellum* is the "law of transition."[6] Traditionally, the law governing the post-conflict period is linked to the "rights and duties of victorious states and post-war justice;"[7] however, modern scholars have argued that the concept of a *jus post bellum* should be interpreted more broadly to include the post-conflict creation of a just society.[8] This thesis aims to contribute to discussions concerning the concept of a *jus post bellum* by attempting to delineate rules of practice that might assist in the development of future frameworks for post-conflict peacebuilding. As noted by Dr. Dieter Fleck, a respected expert in international humanitarian law, it is difficult to list specific *jus post bellum* rules; however, as he writes in a recently published chapter: "What may be noted is best practice, pragmatically tailored to specific requirements, yet sometimes of a more general nature that could be taken as a useful example for future activities."[9]

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[4] Carsten Stahn, "Jus Post Bellum: Mapping the Discipline(s)" (2007-2008) 23 Am U Int'l L Rev 311 at 312.

[5] Kristen E. Boon, "Obligations of the New Occupier: The Contours of a Jus Post Bellum" (2009) Loy L A Int'l & Comp L Rev 57 at 57.

[6] Stahn, *supra* note 4 at 335.

[7] Carsten Stahn, "The Future of Jus Post Bellem" in Carsten Stahn & Jann K. Kleffner, eds, *Jus Post Bellum: Towards a Law of Transition from Conflict to Peace* (New York: Cambridge University Press, 2008) 231 at 233.

[8] Brian Orend, "Just Post Bellum: A Just War Theory Perspective" in Stahn & Kleffner, *ibid*, 31 at 45.

[9] Dieter Fleck, "Jus Post Bellum as a Partly Independent Legal Framework" in Carsten Stahn, Jennifer S. Easterday & Jens Iverson, eds, *Jus Post Bellum: Mapping the Normative Foundations* (New York: Oxford University Press, 2014) 43 at 53.

The research conducted for this thesis is based on a review and analysis of the relevant legal texts, including the key treaties and UN Security Council resolutions, the commentary associated with the application of these legal texts as found within the legal literature, drawn primarily from the field of international humanitarian law, as well as consideration of the applicable case law from the European Court of Human Rights and the International Court of Justice. The three legal frameworks for post-conflict peacebuilding were assessed by examining their application in Iraq, Kosovo, East Timor and Afghanistan. Reports concerning these case studies, prepared by the UN and other organizations such as the Organization for Security and Cooperation in Europe, the United States Institute for Peace, the International Crisis Group, and Human Rights Watch were consulted as well as some newspaper commentary for amplification of key events.

This thesis is organized in three Parts. In Part I, I consider the law of occupation as a framework for post-conflict peacebuilding. The recent application of the law of occupation to the activities of the United States and the United Kingdom in Iraq makes this once antiquated aspect of international humanitarian law relevant to the discussion. The law of occupation is a codified framework that derives its authority from the regulations found within the Hague Convention (IV) Respecting the Laws and Customs of War on Land (the Hague IV Regulations of 1907).[10] and is intended to prevent the occupier from making significant changes to the occupied state. Although the strict requirements of the law of occupation were relaxed with the adoption in 1949 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)[11] so as to provide greater protections for the human rights of civilian populations, the law of occupation remains of limited use to justify transformative objectives in

[10] 18 October 1907, 36 Stat 2277, TS 539, 1 Bevans 631 (entered into force 26 January 1910).

[11] 12 August 1949, 75 UNTS 287, Can TS 1965 No. 20 (entered into force 21 October 1950).

post-conflict states. Within Part I, I also discuss how, with respect to Iraq, the law of occupation was augmented through the adoption of a number of UN Security Council resolutions that required the occupiers to bring about change in the post-conflict state. However, the subsequent involvement of the UN in this regard did not change the law of occupation. It remains a strict, codified area of international humanitarian law that can only be invoked where each state is a party to the Hague IV Regulations of 1907, where the territory is under the complete control of the occupier, and where there is an international armed conflict. I therefore conclude that the law of occupation is not a viable framework for post-conflict peacebuilding initiatives and that the example of Iraq is best viewed within the context of this analysis as illustrating the power of the UN Security Council to authorize transformative objectives in a post-conflict state.

In Part II of this thesis, I consider UN-led interim administrations as an option for post-conflict peacebuilding initiatives by examining the implementation of this framework in both Kosovo and East Timor. In both of these instances, the UN exercised complete authority over all aspects of governance and was additionally responsible for rebuilding governmental institutions and providing security. The UN derives this broad authority to act as an interim administrator from Chapter VII of the Charter of the United Nations.[12] However, in both Kosovo and East Timor, the UN-led interim administrations faced a number of difficulties. I have chosen to examine the selection of new laws and the re-establishment of the judiciary in each country as illustrative examples of these difficulties. As I explain in Part II, the challenge in both Kosovo and East Timor was to introduce a set of laws that would be respected and accepted by the local population, a project made more difficult by the UN's failure to engage in meaningful consultation. In addition, in both Kosovo and East Timor, the UN-led missions faced additional difficulties in rebuilding the judiciaries, due in large part to an inability to find and employ

[12] *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7 (entered into force 24 October 1945) [UN Charter].

qualified people following the cessation of hostilities. But perhaps the most significant shortcoming apparent with UN-led interim administrations is that illustrated best by reference to this framework's application in Kosovo where the interim administration in that state failed to comply with human rights standards of a civil and political nature, particularly with regard to pre-trial detentions. A review of the jurisprudence of the European Court of Human Rights illustrates the difficulty of holding UN-led interim administrations to account in a judicial forum for these human rights violations. The perceived lack of accountability on the part of the UN interim administration in Kosovo undermined the peacebuilding mission and created significant tension between the mission and the population of Kosovo. I conclude that the UN-led interim administration is a powerful tool for transformative change but its lack of consultation and its ability to avoid certain mechanisms of accountability seriously undermine its effectiveness as a peacebuilding framework.

In Part III of this thesis, I examine the implementation of the so-called light footprint approach in Afghanistan. This approach arose out of a recognized need for local support for the post-conflict peacebuilding project. Due to a history of failed foreign interventions in Afghanistan, those leading the post-conflict peacebuilding project, particularly Mr. Lakhdar Brahimi, the Special Representative to the Secretary-General for Afghanistan, felt that a different approach was necessary so as to allow the local population to lead the project with support from the international community. However, as I describe in Part III, the light footprint approach, as it was termed, was implemented in an uncoordinated fashion with a minimal focus on security outside the capital, which in turn permitted the Taliban to regain strength and lead a significant insurgency in 2006. I consider the aggressive timeline that was imposed for the creation of a new constitution and for democratic presidential elections. In hindsight, it can be argued that such a short timeline did not assist with the overall peacebuilding effort and in fact undermined that effort. I also consider the disjointed manner in which laws were created for Afghanistan and the

considerable difficulties that were faced in rebuilding the judiciary, with many of these difficulties, in contrast to those in Kosovo and East Timor, attributable to a lack of support and coordination. Finally, within Part III, I consider the failure of the international community to accept and work with the informal justice system that existed in Afghanistan. While this system was viewed by the international community as failing in the application of a number of internationally recognized human rights standards, particularly in relation to the equal treatment of women, the informal justice system continues to enjoy broader popular support than the formal system. I conclude Part III by considering Mr. Brahimi's critical assessment in 2007 of the application of the light footprint approach in Afghanistan. While this approach was adopted to encourage Afghans to lead the post-conflict peacebuilding process, it was never intended to imply that a lower level of international involvement would be required to achieve peace and security.[13]

Having reviewed the three most prominent legal frameworks likely to apply to any future post-conflict peacebuilding scenario, I conclude that a light footprint "plus" approach should be considered as the option of choice. The "plus" represents an approach that builds on the lessons learned in Afghanistan to include increased mentorship and support by the UN or other members of the international community. The selection of this approach would address the pitfalls associated with having too little local involvement, as with the UN-led interim administrations in Kosovo and East Timor and would also avoid the limitations of the law of occupation. The light footprint "plus" approach seeks to strike a balance between local initiatives buoyed by popular support and the need to provide mentorship and support to ensure security and human rights standards are incorporated into new state institutions.

[13] Lakhdar Brahimi, "State Building in Crisis and Post-Conflict Countries," a speech delivered at the 7th Global Forum on Reinventing Government - Building Trust in Government, Vienna, 26-29 June 2007, at 17, online: http://unpan1.un.org/intradoc/groups/public/documents/un/unpan026896.pdf.

PART I

The Law of Occupation as a Framework for Post-Conflict Peacebuilding

A. Introduction

I begin my analysis with reference to the law of occupation as the first framework of relevance to guiding and developing modern peacebuilding initiatives. The seemingly archaic law of occupation,[14] which is part of the *jus in bello*, is relevant to this analysis because of its recent use to justify the operations of the United States and the United Kingdom (the coalition partners) in Iraq following the fall of Sadam Hussein's regime in 2003. However, in this situation, the law of occupation was supplemented by Security Council resolutions which relied on Chapter VII of the Charter of the United Nations (UN Charter) to expand the scope of the coalition partners' authority to engage in transformative objects. This analysis will demonstrate that the law of occupation alone is an extremely limited, codified framework, which is not intended to be used to justify post-conflict peacebuilding initiatives. Although the law of occupation does impose upon an occupier a duty to bring some domestic laws into compliance with human rights standards (as discussed below), it does not permit other transformative objectives. Because of the important role that the United Nations (UN) plays in post-conflict peacebuilding initiatives, I also consider whether the law of occupation applies to the UN. I conclude that it does not because the UN is not a party to the applicable conventions. The law of occupation on its own, is therefore not an appropriate framework for modern peacebuilding

[14] Recent work on the law of occupation includes Yoram Dinstein, *The International Law of Belligerent Occupation* (Cambridge: Cambridge University Press, 2009); Yutaka Arai-Takahashi, *The Law of Occupation – Continuity and Change of International Humanitarian Law, and its International with International Human Rights Law* (Boston: Martinus Nijhoff, 2009); and Eyal Benvenisti, *The International Law of Occupation*, 2nd ed (Oxford: Oxford University Press, 2012).

initiatives. That being said, the UN Security Council can employ the power of Chapter VII of the UN Charter to add an additional layer of authority pursuant to which transformative objectives in a post-conflict state can be pursued. While the example of Iraq serves as an illustration of the power of the Security Council to authorize post-conflict peacebuilding initiatives, the Iraqi experience does not change or otherwise relax the limits of the law of occupation.

B. Circumstances giving rise to occupation

A true legal occupation is the product of a narrow set of circumstances. Although the term "occupation" is sometimes used broadly within the literature, it does not necessarily reflect the concept of occupation as defined by international humanitarian law. For example, the term "occupation" has been used to describe the UN-led administrations in Kosovo and East Timor;[15] however, these were not occupations as defined in the Hague IV Regulations of 1907 and the Fourth Geneva Convention.[16] As explained by Professor Boon, there are three conditions that must be present to trigger the applicability of the law of occupation: 1) the states must be parties to the Hague IV Regulations of 1907 and the Fourth Geneva Convention, 2) the occupation must result in territory being under the complete authority of the occupier as per article 42 of the Hague IV Regulations of 1907, and 3) the conflict must be of an international character, i.e. between opposing states.[17]

[15] See generally Breven C. Parsons, "Moving the Law of Occupation into the Twenty-First Century" (2009) 57 NAVLR 1.

[16] Kristen Boon, "The Future of the Law of Occupation" (2008) 46 Can YB Int'l Law 107 at 131. See also David Scheffer "Beyond Occupation Law" (2003) 97 AJIL 842 at 852.

[17] Boon, *ibid* at 113.

In relation to the first requirement, as the Hague IV Regulations of 1907 and the Fourth Geneva Convention regulate conduct between parties to the conventions,[18] if states are not parties to the conventions then the law of occupation does not apply. Territorial control, the second requirement for the law of occupation to apply, is defined by article 42 of the Hague IV Regulations of 1907:

> Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.

Although an occupation only exists where a hostile army controls the territory of the occupied state, it does not necessarily follow that military force is a pre-condition to an occupation. According to Professor Yoram Dinstein, a leading scholar on the law of occupation and Professor Emeritus at Tel Aviv University, an occupation "may constitute the sole manifestation of a state of war between" two states.[19] Finally, the third requirement for the law of occupation to apply is that the states be engaged in an international armed conflict. While the Hague IV Regulations of 1907 are silent as to this requirement, article 2 of each of the four Geneva Conventions deals with the applicability of the conventions. Article 2 states:

> In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.
>
> The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.[20]

[18] Hague IV Regulations of 1907, *supra* note 10 at art 2 and Fourth Geneva Convention, *supra* note 11 at art 2.

[19] Dinstein, *supra* note 14 at 32. The Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda), [2005] ICJ Rep 168 illustrates a situation where an occupation occurred without the resort to force.

[20] Fourth Geneva Convention, *supra* note 11 at art 2.

Further, to meet this final requirement, there must be a lack of consent to the presence of foreign troops in the territory. As Professor Dinstein has clearly stated, armed conflicts of an international character do not occur where there is consent.[21]

i. The law of occupation as a component of international humanitarian law

The provisions relevant to the law of occupation are found at articles 42 to 56 of the Regulations that are annexed to the Hague IV Regulations of 1907.[22] Both the convention and its regulations remain relevant today. According to Professor Dinstein, these articles remain the "keystone of the law of belligerent occupation"[23] and the rules contained therein were recognized by the International Military Tribunal at Nuremberg as forming part of customary international law.[24] The International Court of Justice (ICJ) agrees, having opined in its Advisory Opinion concerning the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (the Wall Advisory Opinion), that Israel, despite not being a party to the Hague IV Regulations of 1907 was nonetheless bound by its terms and, in particular, by the law of occupation in its dealings in the West Bank and Gaza.[25]

Article 43 of the Hague IV Regulations of 1907 is critical to the analysis of the scope of the law of occupation. Article 43 reads as follows:

> The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure,

[21] Dinstein, *supra* note 14 at paras. 76-8.

[22] Hague Regulations of 1907, *supra* note 10.

[23] Dinstein, *supra* note 14 at 6.

[24] See *International Military Tribunal (Nuremberg)*, 1946, (1947) 41 AJIL 172 at 248-9.

[25] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Rep 136 at para. 89.

> as far as possible, public order and safety, while respecting, *unless absolutely prevented*, the laws in force in the country.[26] [emphasis added]

The phrase, *unless absolutely prevented,* is restrictive and, as described in the research undertaken by Professor Yutaka Arai-Takahashi, a senior lecturer at the University of Kent, the phrase is intended to address issues of military necessity.[27] The traditional view was that article 43 of the Hague IV Regulations of 1907 did not permit regime change or transformative objectives to be pursued. This view was reinforced by Jean Pictet, then Director for General Affairs of the International Committee of the Red Cross (ICRC) in a commentary published in 1958.[28] In reference to the changes made by occupying powers during World War II, [29] including forming new governments and new political entities, Pictet's ICRC Commentary stressed:

> International law prohibits such actions, which are based solely on the military strength of the Occupying Power and not on a sovereign decision by the occupied State. […] Such practices were incompatible with the traditional concept of occupation (as defined in Article 43 of the Hague Regulations of 1907) according to which the occupying authority was to be considered as merely being a de facto administrator.[30]

Thus, as a general rule, the law of occupation, as contained in the Hague IV Regulations of 1907, did not permit any changes to the occupied state. However, as will be discussed below, the rigidness of the law of occupation was relaxed in response to an identified need to protect the basic human rights of civilian populations during periods of armed conflict.

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[26] Hague IV Regulations of 1907, *supra* note 10, art 43.

[27] Arai-Takahashi, *supra* note 14 at 102. See also Benvenisti, *supra* note 14 at 91.

[28] Jean S. Pictet, ed, *Commentary on the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva: International Committee of the Red Cross, 1958) [Pictet's ICRC Commentary]. Pictet's ICRC Commentary consists of four volumes that correspond to each of the Four Geneva Conventions. Each volume indicates that although the work is published by the ICRC, "the Commentary is the personal work of its authors."

[29] See chapters 5 and 6 of Benvenisti, *supra* note 14 for a discussion of the occupations that occurred during the two World Wars and the failure of states to comply with the strict requirements of the law of occupation.

[30] Pictet's ICRC Commentary, *supra* note 28 at 273.

In response to the atrocities of World War II, states recognized that a distinct instrument was required to protect civilian populations, leading to the adoption of the Fourth Geneva Convention.[31] The convention delivers on the desired objective by requiring that civilians be treated humanely (article 27) and by ensuring the provision of a minimum level of care when civilians are subject to occupation by a belligerent force (articles 47-78). In addition, as understood by the ICRC and as expressly confirmed in article 154, the Fourth Geneva Convention is intended to supplement the Hague Conventions of 1899 and 1907,[32] thus adding to protections already found within international law. As such, the Fourth Geneva Convention has been correctly described as "a bill of rights for the population of occupied territories."[33] Pictet's ICRC Commentary of 1958 makes the following observations with respect to the Fourth Geneva Convention:

> [T]he text in question is of an essentially humanitarian character; its object is to safeguard human beings and not to protect the political institutions and government machinery of the State as such. The main point, according to the Convention, is that changes made in the internal organization of the State must not lead to protected persons being deprived of the rights and safeguards provided for them. Consequently it must be possible for the Convention to be applied to them in its entirety, even if the Occupying Power has introduced changes in the institutions or government of the occupied territory.[34]

By imposing on the occupier an obligation to provide a minimum level of care to civilian populations, the Fourth Geneva Convention expanded an occupier's ability to make some fundamental changes in the occupied territory, at least in relation to human rights. Further, because the Fourth Geneva Convention mandates minimum standards for the treatment of

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[31] Fourth Geneva Convention, *supra* note 11.

[32] Pictet's ICRC Commentary, *supra* note 28 at 272. See also Fourth Geneva Convention, *ibid*, art 154 which provides that the convention "shall be supplementary to Sections II and III of the Regulations annexed to the above-mentioned Conventions of The Hague.

[33] Marco Pertile, "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: A Missed Opportunity for International Humanitarian Law?" (2004) 14 Italian YB Int'l L 121 at 145.

[34] Pictet's ICRC Commentary, *supra* note 28 at 274.

citizens in occupied states, it can be argued that if an occupied populace does not already benefit from these minimum standards, then the occupying state has a duty to ensure their implementation. As noted by Professor Boon: "The rights of individuals guaranteed by the Convention therefore trump the laws of the former sovereign."[35] However, while this understanding of the law may provide scope for some change to ensure that local populations are provided with access to public health[36] and humanitarian relief,[37] it does not permit broad regime change.

The Fourth Geneva Convention also clarified the authority of an occupier to change or suspend existing laws to facilitate its own safety and maintain the government. Article 64 is the treaty provision of most significance in terms of the scope of this permissible change, and thus, I will discuss it in some detail here. Article 64 addresses the penal legislation of the occupied state, but its effect is arguably much broader. Article 64 provides:

> The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.
>
> The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power,

[35] Kristen Boon, "Legislative Reform in Post-Conflict Zones: Jus Post Bellum and Contemporary Occupants' Law-Making Powers" (2005) 50 McGill LJ 285 at 303.

[36] Fourth Geneva Convention, *supra* note 11, art. 56. See also David Glazier, "Ignorance is not Bliss: The Law of Belligerent Occupation and the U.S. Invasion of Iraq" (2005) 58 Rutgers L Rev 122 at 174 ("…while Hague law seems to stress the preservation of the status quo, Geneva IV recognizes the possibility that an existing regime may fail to measure up to contemporary human rights standards and allows the replacement of repressive laws for the purposes of protecting the internationally recognized rights of the in habitants").

[37] Fourth Geneva Convention, *ibid*, art 59.

> of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.[38]

In Pictet's view: "Article 64 expresses in a more precise and detailed form, the terms of Article 43 of the Hague Regulations, which lays down that the Occupying Power is to respect the laws in force in the country *unless absolutely prevented*."[39] A textual reading of article 64 indicates that reference is made only to the penal laws of a country. Nonetheless, Pictet argues that "there is no reason to infer *a contrario* that the occupation authorities are not also bound to respect the civil law of the country, or even its constitution."[40] Pictet's interpretation is supported by Professor Dinstein who has written: "…logic dictates that article 64 should be construed as applicable, if only by analogy, to every type of law (including civil or administrative legislation)."[41] This expansive interpretation is also consistent with the structure and wording of the two paragraphs that constitute article 64. While the first paragraph relates solely to penal laws, the second paragraph, relating to changes that an occupier can make, "creates an exception to the preceding paragraph" which is limited to penal laws, and has broader application.[42] The explanation provided in the Final Record of the Diplomatic Conference further supports this interpretation and states, "in addition to promulgating penal provisions necessary to ensure its security,"[43] an occupying power is permitted to create "provisions [that] are essential to enable the Occupying

[38] Fourth Geneva Convention, *ibid*, art 64.

[39] Pictet's ICRC Commentary, *supra* note 28 at 335.

[40] *Ibid.*

[41] Dinstein, *supra* note 14 at 111.

[42] See Benvenisti, *supra* note 14 at 96-101. See also Eyal Benvenisti, "The Security Council and the Law on Occupation: Resolution 1483 on Iraq in Historical Perspective" (2003) 1 IDF LR 19 at 29-30.

[43] Federal Political Department of Switzerland, *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol II, Sec A (Berne) at 833.

Power to fulfil its obligations under [the Fourth Geneva Convention]"[44] and to "maintain the orderly government of the territory."[45]

The combined effect of article 43 of the Hague IV Regulations of 1907 and the humanitarian protections contained in the Fourth Geneva Convention, in particular article 64, is a legal approach which expresses an intention to maintain the *status quo* in occupied countries except where it is necessary to bring about changes to comply with the basic human rights obligations, maintain security, and uphold government institutions. As noted by David Glazier, professor of law at Loyola Law School:

> Modern usage can thus grant an occupier considerably more flexibility than the historic language suggests. It would thus seem quite reasonable to hold today that the concept of 'necessary' would include changes needed to bring the occupied state's law into compliance with the full scope of modern international human rights law.[46]

However, while the combined effect of the Hague IV Regulations of 1907 and the Fourth Geneva Convention permit the occupier to impose some changes to comply with human rights law and maintain government and security, articles 43 and 64 do not have the cumulative effect of permitting transformative occupations. This is an extension of the law of occupation that is out of reach.

[44] Fourth Geneva Convention, *supra* note 11, art 64.

[45] *Ibid*.

[46] Glazier, *supra* note 36 at 191.

ii. Application of the International Covenant on Civil and Political Rights during an occupation

As noted by Sarah Joseph and Melissa Castan in their work on the topic, the International Covenant on Civil and Political Rights (ICCPR),[47] which protects the rights to life, liberty and a fair trial, among others, "is probably the most important human rights treaty in the world…"[48] There is authority for the proposition that the ICCPR applies during an occupation and that its extra-territorial application expands an occupier's liabilities where the occupier is a party to the convention. In this section, I will consider the views of the ICCPR's monitoring body, the Human Rights Committee, as well as the jurisprudence of the ICJ regarding the extra-territorial application of the ICCPR. I will then consider the contrary view that the ICCPR does not apply outside a state's territory, as expressed by Michael J. Dennis, an adviser with the US Department of State. I conclude that the combined views expressed by the Human Rights Committee and the ICJ lead to a strong argument that the ICCPR does indeed apply extra-territorially. That being the case, the ICCPR imposes additional obligations on an occupier to ensure the laws of the occupied state comply with the human rights obligations contained in the ICCPR.

The Human Rights Committee published a general comment in March 2004 concluding that the ICCPR applies extra-territorially. In its *General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, the Committee advises states that in its opinion:

> States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or

[47] 19 December 1966, 999 UNTS 171, Can TS 1976 No. 47 (entered into force 23 March 1976).

[48] Sarah Joseph & Melissa Castan, eds, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 3rd ed (New York: Oxford University Press, 2013) at 3-4.

> effective control of that State Party, even if not situated within the territory of the State Party.[49]

In July 2004, the ICJ expressed a similar, non-binding view that the ICCPR applies extra-territorially. In the Wall Advisory Opinion, the ICJ considered whether or not Israel, which was an occupier and therefore bound by the Fourth Geneva Convention,[50] was also bound by human rights law in respect of its treatment of the inhabitants of the occupied Palestinian territory by virtue of it being a party to the ICCPR. Although Israel had ratified the ICCPR, it argued that the human rights protections contained therein were limited to the protection of "citizens from their own Government in times of peace."[51] In support of its argument, Israel relied on the conjunctive reading of article 2(1) of the ICCPR which provides that each party to the covenant "undertakes to respect and to ensure to all individuals within its territory *and* subject to its jurisdiction the rights recognized" [emphasis added]. The ICJ rejected this argument and found that the ICCPR "is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory."[52] Noting that the occupied Palestinian territory had been subject to Israel's "territorial jurisdiction as an occupying Power"[53] for over 37 years, the ICJ concluded that the ICCPR applied to the actions of Israel, as an occupying power, in the occupied state of Palestine.

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[49] *General Comment No. 31 (80) on Article 2 of the Covenant: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, adopted by the Human Rights Committee on 29 March 2004, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004) reprinted in Report of the Human Rights Committee, UN GAOR, 59th Sess., Supp. No. 40, vol. 1 at para. 10, UN Doc. A/59/40 (2004).

[50] See Wall Advisory Opinion, *supra* note 25 at para. 90. Much of the lands at issue were occupied by Israel in 1967 during the armed conflict between Israel and Jordan. The court noted Israel's argument that this territory was not sovereign prior to its annexation by Jordan and Egypt and therefore could not be considered a high contracting party. The Court concluded that because Jordan was a contracting party at the time armed conflict broke out between Israel and Jordan, the Fourth Geneva Convention applied.

[51] Wall Advisory Opinion, *supra* note 25 at para. 102.

[52] *Ibid* at para. 111.

[53] *Ibid* at para. 112.

Assuming that the ICCPR applies, the difficult issue is the scope of that application. The binding decision of the ICJ in the Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) [the Armed Activities Case][54] provides further guidance. In that case, the court held that Uganda was obligated, in relation to the territory it occupied, "to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party."[55] This holding means that the ICCPR does not simply regulate the conduct of the occupying state party; it imposes a positive obligation on the occupying state party to protect citizens under occupation from violations at the hands of others. However, it remains unclear whether there is a requirement to "secure the full compliance with human rights treaty provisions throughout the territory."[56]

The conclusions of the ICJ are significant, but not without controversy. According to Dennis, writing in his personal capacity, the conclusion of the ICJ in the Wall Advisory Opinion may have been the result of "the unusual circumstances of Israel's prolonged occupation."[57] It is not clear that the opinion expressed by the ICJ should be extended to mean that human rights treaties apply in all cases of occupation or armed conflict. By way of explanation, the ICJ relied on three elements in concluding that the ICCPR could apply extra-territorially: 1) previous views of the Human Rights Committee that the ICCPR applied "where the State exercises its

[54][2005] ICJ Rep 168. Between mid-1997 and the early part of 1998, the Congo consented to Uganda engaging in military operations against anti-Ugandan rebels on Congolese territory, in a region known as Ituri. In 1998, the president of the Congo announced "the end of the presence of all foreign military forces in the Congo" (para. 49). Despite this statement, Ugandan forces remained in the Congo. The ICJ found that the continued presence in the Congo of Ugandan troops without the consent of the Congolese government resulted in Uganda being an occupying power of Ituri (para. 178).

[55] *Ibid* at para. 178.

[56] Malcolm Langford et al, eds, *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge: Cambridge University Press, 2013) at 169.

[57] Michael J. Dennis, "Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation" (2005) 99 AJIL 119 at 122. But see Karen DaCosta, *The Extraterritorial Application of Selected Human Rights Treaties* (Leiden: Martinus Nijhoff, 2013) at 80 noting that the ICJ found that the ICCPR applied in Congolese territory occupied by Uganda despite the much shorter duration of the occupation.

jurisdiction on foreign territory;"[58] 2) the *travaux préparatoires* of the ICCPR that demonstrated an intent by the drafters not to allow states "to escape from their obligations when they exercise jurisdiction outside their territory;"[59] and 3) the Human Rights Committee's observations of Israel's "long-standing presence … in [the occupied territories], Israel's ambiguous attitude towards their future status, as well as the exercise of effective jurisdiction by Israeli security forces therein."[60] Despite the ICJ's reliance on these elements to conclude that the ICCPR applies extra-territorially, Dennis argues in his research on the subject that that the ICJ misinterpreted the *travaux préparatoires*. He asserts instead that the addition of the phrase "within its territory" was intended to limit the extra-territorial application of the treaty.[61] He further asserts that the earlier works of the Human Rights Committee relied upon by the ICJ "support the position that the provisions of the Covenant do not apply extraterritorially in situations of armed conflict and military occupation."[62]

The United States takes the position that article 2 limits the application of the ICCPR to the Parties' territory.[63] This conclusion is based on both the plain reading of the text and the negotiating history which reveals that the article, as adopted, was intended to limit the covenant's application.[64] The Netherlands takes a similar approach, relying on a plain reading of article 2 of

[58] Wall Advisory Opinion, *supra* note 25 at para. 109, referring to arrests carried out by Uruguayan agents in Brazil and Argentina and the confiscation of a Uruguayan passport in Germany, in particular.

[59] *Ibid*.

[60] *Ibid* at para. 110.

[61] Dennis, *supra* note 57 at 123-124.

[62] *Ibid* at 124-125.

[63] *Summary record of the 1405th meeting; United States of America*, HRC, UN Doc. CCPR/C/SR.1505 924 April 1995) at para. 20.

[64] Opening Statement by Matthew Waxman on the Report Concerning the International Covenant on Civil and Political Rights (17 July 2006) Geneva, Switzerland (online: http://2001-2009.state.gov/g/drl/rls/70392.htm).

the ICCPR which limits the application of the covenant.[65] In 2011, the United States expressed a more nuanced view in its Fourth Periodic Report to the United Nations Committee on Human Rights concerning the International Covenant on Civil and Political Rights,[66] noting that the *lex specialis* during an armed conflict is international humanitarian law.[67] Rather than asserting that the ICCPR does not apply extra-territorially, the United States adopts the position that during an armed conflict it complies with the human rights protections contained in Common article 3 of the Geneva Conventions of 1949 as well as the principles contained in article 75 of Additional Protocol I to the Geneva Conventions of 1949[68] and that "the rules within these instruments… parallel the ICCPR."[69]

The combined effect of the Wall Advisory Opinion, the Armed Activities Case, and the position taken by the Human Rights Committee in General Comment No. 31 may be an expansion of the scope of changes that an occupying power is required to make to accommodate the human rights objectives of the ICCPR. An examination of how this analysis might be applied to other human rights treaties is beyond the scope of this thesis. However, I am nonetheless of the view that if a party to the ICCPR acting as an occupying power is required to comply with the terms of the ICCPR in the occupied state, then it may require the occupying power to "adopt

[65] *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, The Netherlands*, HRC, UN Doc. CCPR/CO/72/NET/Add.1 (29 April 2003) at para. 19.

[66] *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Fourth Periodic Report of the United States of America*, HRC, UN Doc. CCPR/C/USA/4 (22 May 2012).

[67] *Ibid* at para. 507.

[68] *Ibid* at para. 509. The report also indicates the US Senate has been urged to ratify Additional Protocol II to the Geneva Conventions of 1949. See Fourth Geneva Convention, *supra* note 11, art 3 which applies to armed conflicts not of an international character and imposes on parties to the conflict a requirement to treat non participants humanely. See also *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978), Can TS 1991 No. 2 (entered into force 20 May 1991), art 76 which provides a minimum guarantee of humane treatment for people who are under the power of a party to a conflict and who do not otherwise benefit from the protections in the Geneva Conventions or the Additional Protocols.

[69] Fourth Periodic Report of the United States, *ibid*.

such laws or other measures as may be necessary to give effect to the rights recognized in the [ICCPR]."[70]

C. Iraq as a case study on occupation as a legal framework for post-conflict peacebuilding

After Sadam Hussein was deposed in 2003, the law of occupation was used in Iraq in combination with Security Council resolutions to justify numerous transformative objectives in the occupied state. The question that remains is whether the application of the law of occupation in Iraq illustrates an evolved state of the law that accommodates transformative occupation or whether it simply amounts to a unique situation that is unlikely to reoccur. In this section, I will discuss the circumstances in Iraq, starting in 1991, that led to the invasion in 2003 and the subsequent assertions by the UN that the United States and the United Kingdom were occupying powers of Iraq. Consideration will be given to whether or not the occupation of Iraq has changed the law of occupation.

Following the liberation of Kuwait from Iraqi occupation, on 3 April 1991, the UN Security Council passed a resolution requiring Iraq to "unconditionally accept the destruction, removal, or rendering harmless … of … all chemical and biological weapons."[71] Over the next decade, efforts were made by UN inspectors to assess Iraq's compliance with this resolution. On 8 November 2002, the UN Security Council adopted Resolution 1441 (2002), giving Iraq a final opportunity to comply with its disarmament obligations.[72]

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[70] ICCPR, *supra* note 47, art 2(2).

[71] SC Res. 687 (1991), UNSC, 2981st Mtg, UN Doc. S/RES/687 (1991) at para. 8.

[72] SC Res. 1441 (2002), UNSC, 4644th Mtg, UN Doc. S/RES/1441 (2002) at para. 2.

On 20 March 2003, "Operation Iraqi Freedom" began with the invasion of Iraq by a coalition comprised of military forces from the United States and the United Kingdom (known as the coalition partners). President George W. Bush justified the invasion on the basis of Iraq's failure to disarm, stating that "[t]he people of the United States and our friends and allies will not live at the mercy of an outlaw regime that threatens the peace with weapons of mass murder."[73] Following the defeat of the Iraqi government, questions emerged regarding the legal status of the coalition partners in Iraq and the source of their authority to engage in transformative efforts. Despite the presence of all three of the earlier identified pre-conditions for an occupation,[74] the United Kingdom and the United States did not accept initially their status as occupiers. Some within the United States government[75] viewed themselves as liberators and concluded that the law of occupation did not apply.[76]

With growing uncertainty and disagreement over what authorized the continued presence of the coalition partners in Iraq, the UN Security Council attempted to clarify the situation. Use of the term "Occupying Power" appeared formally for the first time in Security Council Resolution 1472 (2003), where without naming the United States or the United Kingdom, the Security Council noted that "the Occupying Power has the duty of ensuring the food and medical supplies of the population."[77] This acknowledgement was followed by

[73] "Bush declares war – U.S. President George W. Bush has announced that war against Iraq has begun" CNN (19 March 2003), online: http://www.cnn.com/2003/US/03/19/sprj.irq.int.bush.transcript/.

[74] Iraq, the United Kingdom and the United States were parties to the necessary conventions, there was an armed conflict of an international character, and the coalition partners gained complete authority over the territory of Iraq.

[75] See Glazier, *supra* note 36 at 189.

[76] Adam Roberts, "Transformative Military Occupation: Applying the Laws of War and Human Rights" (2006) 100 AJIL 580 at 608.

[77] SC Res. 1472 (2003), UNSC, 4732nd Mtg, UN Doc. S/RES/1472 (2003) at preamb. para. 1.

correspondence from the coalition partners to the UN, specifically a letter dated 8 May 2003.[78] Although the May 2003 letter did not contain the term "occupation," it referenced the necessary legal elements of an occupation making it clear that the coalition partners recognized their status as occupiers. The May 2003 letter opens with the coalition partners acknowledging that they "will strictly abide by their obligations under international law."[79] It then states that the coalition partners have created a Coalition Provisional Authority (CPA) to "exercise powers of government temporarily."[80] The CPA will engage in a number of activities related to the safety and security of Iraq, most notably it will maintain "civil law and order."[81] Finally, the May 2003 letter concludes with the coalition partners asserting that their "goal is to transfer responsibility for administration to representative Iraqi authorities as early as possible."[82]

Any lingering doubt regarding the status of the coalition partners was eliminated by Security Council Resolution 1483 (2003) which was adopted on 22 May 2003.[83] Resolution 1483 (2003) began by: "Reaffirming the sovereignty and territorial integrity of Iraq."[84] The Security Council went on to express "resolve that the day when Iraqis govern themselves must come quickly."[85] The Security Council acknowledged the May 2003 letter and recognized the coalition partners as "occupying powers"[86] that had "specific authorities, responsibilities, and obligations

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[78] *Letter dated 8 May 2003 from the Permanent Representatives of the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations addressed to the President of the Security Council*, UN Doc. S/2003/538 (2003).

[79] *Ibid*.

[80] *Ibid*.

[81] *Ibid*.

[82] *Ibid*.

[83] SC Res. 1483 (2003), UNSC, 4761st Mtg, UN Doc. S/RES/1483 (2003).

[84] *Ibid* at preamb. para. 3.

[85] *Ibid* at preamb. para. 5.

[86] *Ibid* at preamb. para. 14.

under applicable international law."[87] The Security Council further "call[ed] upon all concerned to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907."[88]

However, Security Council Resolution 1483 (2003) went much further than simply recognizing a situation of occupation; it also stressed the need to create the institutions of representative government in Iraq. Given this emphasis, and the focus of this thesis on the legal frameworks used in post-conflict peacebuilding, it is necessary to consider the impact of Resolution 1483 (2003) on the law of occupation. As will be discussed below, it has been argued that Resolution 1483 (2003) may be an expansion of the law of occupation; however, it is not clear that the Resolution did anything other than clarify that the coalition partners were bound by the traditional law of occupation, while also setting out separate roles and responsibilities for the United Nations. The Security Council resolved that "the United Nations should play a vital role in humanitarian relief, the reconstruction of Iraq, and the restoration and establishment of national and local institutions for representative government [emphasis added]."[89] In fact, while the coalition partners were called upon to "promote the welfare of the Iraqi people through the effective administration of the territory"[90] [emphasis added] a request was made to the Secretary-General "to appoint a Special Representative for Iraq whose independent responsibilities [would] involve reporting regularly to the Council on his activities under this resolution, [and] coordinating activities of the United Nations in post-conflict processes in Iraq [emphasis added]."[91] It was the proposed Special Representative that was tasked with "facilitating the

[87] *Ibid*.

[88] *Ibid* at para. 5.

[89] *Ibid* at preamb. para. 8.

[90] *Ibid* at para. 4.

[91] *Ibid* at para. 8.

reconstruction of key infrastructure"[92] and was asked to work with the coalition partners, Iraqis, and others "to advance efforts to restore and establish national and local institutions for representative governance."[93] This textual analysis confirms that the coalition partners were bound by the law of occupation and the UN was responsible for transformative efforts.

Security Council Resolution 1483 (2003) attempted to distinguish between the occupation of Iraq and the reconstruction of Iraq by assigning separate roles to the coalition partners and to the UN. However, there remained confusion regarding these two distinct post-conflict roles. According to former US ambassador David Scheffer, now a law professor at Northwestern University, Resolution 1483 (2003) fell short of clarifying the roles as it "did not attempt to reconcile any conflict between what the [coalition partners] might decide is appropriate and what the special representative might determine is necessary other than to require both to act in coordination."[94] There was nothing contained in the text of the resolution to help differentiate between the law of occupation and the transformative objects that the resolution permitted. As noted by Sir Adam Roberts, now Emeritus Professor at Oxford University: "The resolution did not explain the relation between transformative purposes of this occupation and the more conservative purposes of the existing body of law on occupations."[95]

In practice, the coalition partners through the CPA made significant institutional changes to the government and society of Iraq. It is clear that they were not restricted in their activities by the limits of the traditional law of occupation. Although the CPA only governed Iraq for one year, from June 2003 to May 2004, it enacted 12 regulations, promulgated 100 orders,

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[92] *Ibid* at para. 8d.

[93] *Ibid* at para. 8c.

[94] Scheffer, *supra* note 16 at 845.

[95] Roberts, *supra* note 76 at 613.

and published 17 memoranda.[96] According to Nehal Bhuta, professor of public international law at the European University Institute, these instruments "went far beyond the exigencies of preserving order and ensuring compliance with international law."[97] Further, the changes made were outside the scope of human rights protections afforded by both the Fourth Geneva Convention and by the ICCPR. For example, CPA Order 39[98] opened Iraq to foreign investment, CPA Order 37[99] restructured the Iraqi tax system, and CPA Order 64[100] streamlined the requirements for the creation of companies. The changes made in Iraq far exceeded the traditional notions of the law of occupation as well as the expanded view that would encompass internationally accepted human rights standards.

The occupation of Iraq brought the scope of the law of occupation into question. It has been argued that Security Council Resolution 1483 (2003) changed the customary international law of occupation and expanded the authority of the occupier beyond that of a "mere trustee."[101] Eyal Benvenisti, professor of human rights law at Tel Aviv University, argues that Resolution 1483 (2003) "signals an endorsement of a general view that regards modern occupants as subject to enhanced duties toward the occupied population."[102] He argues that:

> As long as the restructuring of the political process and the market are compatible with the specific obligations imposed by the law of occupation … or

[96] See Coalition Provisional Authority, CPA Official Documents, online: http://www.iraqcoalition.org/regulations/index.html#Regulations (last accessed 29 March 2014).

[97] Nehal Bhuta, "The Antimonies of Transformative Occupation" (2005) 16:4 EJIL 721 at 736.

[98] CPA, Order 39, *Foreign Investment*, CPA/ORD/20 December 2003/39.

[99] CPA, Order 37, *Tax Strategy for 2003*, CPA/ORD/19 September 2003/37.

[100] CPA, Order 64, *Amendment to the Company Law No. 21 of 1997*, CPA/ORD/5 March 2004/64.

[101] Nicholas F. Lancaster, "Occupation Law, Sovereignty, and Political Transformation: Should the Hague Regulations and the Fourth Geneva Convention still be considered Customary International Law?" (2006) Military L Rev 51 at 91.

[102] Benvenisti, *supra* note 4 at 270.

> by human rights law … the demands of the law of occupation would seem to be fulfilled.[103]

The key question to consider is whether the law of occupation actually changed or whether Resolution 1483 (2003) simply authorized the coalition partners to engage in transformative efforts beyond the law of occupation. Professor Boon has argued that the Resolution "lifted key restrictions on the … [coalition partners'] authority."[104] This position is consistent with the approach taken by Marten Zwanenburg, senior legal adviser at the Ministry of Defence of the Netherlands. In his work on the issue, he suggested that acting under Chapter VII of the UN Charter, the Security Council has the power to derogate from "those rules of the law of occupation which do not constitute peremptory norms of international law." [105] The Security Council may have deliberately derogated from the requirements of international law by acting under Chapter VII of the UN Charter when it adopted Resolution 1483 (2003). Zwanenburg's approach finds some support in article 103 of the UN Charter which provides that "in the event of a conflict between the obligations" under the UN Charter and the "obligations under any other international agreement," the obligations under the UN "Charter shall prevail."

However, not all experts accept that Resolution 1483 (2003) was an appropriate modification to the law of occupation. Professor Scheffer takes a more modest approach and argues that Resolution 1483 (2003) went "beyond the constraints" of occupation law.[106] He argues that Resolution 1483 (2003) lacked clarity in respect of the transformative steps that were authorized. Scheffer proposes that:

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[103] Benvenisti 2005, *supra* note 112 at 31.

[104] Boon, *supra* note 35 at 308.

[105] Marten Zwanenburg, "Existentialism in Iraq: Security Council Resolution 1483 and the law of occupation" (2004) 86:856 IRRC 745 at 767 with Zwandenburg providing a complete analysis of the legal argument that the Security Council can derogate from international law.

[106] Scheffer, *supra* note 16 at 846.

> [t]he legal environment in Iraq would be better rationalized with a fresh UN mandate setting forth the responsibilities and mission objectives of the military powers operating in Iraq and by establishing UN civilian administrative functions that would assume powers held by the authority under Resolution 1483.[107]

He concludes by stating that the law of occupation "should be returned from the box from which it came"[108] and advocates for the development of "a more effective and legally acceptable means to respond to civilian populations that are at risk."[109]

In my view, Resolution 1483 (2003) created a unique and significant relationship between the law of occupation and the powers of the UN Security Council. Unfortunately, Resolution 1483 (2003) also created a great deal of confusion by not clearly defining the roles of the CPA and the roles of the UN Special Representative. In practice, the CPA relied on Resolution 1483 (2003) to engage in a host of transformative objectives that went well beyond the implementation and protection of human rights. Although it is tempting to conclude that the law of occupation has been expanded to permit broad transformative objectives, the better view is that the circumstances of Iraq are unique. Without Security Council endorsement, the law of occupation on its own would not have justified the types of changes that were made.

D. The arguments for and against the UN as an occupier

The question of whether or not the UN can act as an occupier pursuant to the laws of occupation is relevant to determining whether the law of occupation is an appropriate framework

[107] *Ibid* at 859.

[108] *Ibid* at 859.

[109] *Ibid* at 859.

for post-conflict peacebuilding initiatives. Some have argued that instances of UN involvement in post-conflict states, either through peacekeeping or interim administrations, should be classified as occupations.[110] While Professor Dinstein is of the view that these circumstances "cannot possibly be viewed as belligerent occupation,"[111] Sir Roberts adopts a contrary view, arguing:

> [n]either the fact of formal consent of the government of the country nor formal UN authorization makes is impossible for the law on occupations to be considered applicable to these cases. When troops from abroad interact with the population of another country, there must always be a strong case for viewing the law on occupations as a necessary safety net.[112]

Because the law of occupation is an element of international humanitarian law, Roberts' argument is limited and represents, at most, a policy statement regarding the standards of conduct that should be applied when foreign military troops interact with the population of another country. It is clear that in order for the law of occupation to apply, the circumstances must trigger the applicability of the Hague IV Regulations of 1907 and the Fourth Geneva Convention. Because the UN is not a party to these conventions, the UN can never be bound by the law of occupation.[113]

At a 2012 expert meeting held by the International Committee of the Red Cross examining the laws of occupation and other forms of interim administration, the applicability of the law of occupation to the UN was discussed. Some experts were of the view that the laws of occupation can never apply *de jure* to the UN.[114] They made the point that the Hague IV

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[110] Benvenisti, *supra* note 14 at 62-66. See also Eyal Benvenisti, "Applicability of the Law of Occupation" (2005) 99 ASIL Proc 29.

[111] Dinstein, *supra* note 14 at para. 85.

[112] Roberts, *supra* note 76 at 604.

[113] Boon, *supra* note 35 at 311.

[114] Tristan Ferraro, ed, *Expert Meeting – Occupation and Other Forms of Administration of Foreign Territory* (Geneva: International Committee of the Red Cross, 2012) at 33 [ICRC Expert Meeting on Occupation].

Regulations of 1907 only applies between Contracting Powers,[115] by which they meant states, and thus the UN simply does not meet the threshold criteria. A majority of the assembled experts that participated in the ICRC Expert Meeting on Occupation came to a contrary opinion. They agreed that the laws of occupation could apply to the UN where the following legal preconditions were present: "the presence of UN forces, their ability to exercise authority over the territory… and the absence of consent from the local government,"[116] or where a "a functional approach ... [is applied] which would entail the *de facto* application of occupation law when UN forces perform tasks similar to those normally assigned to an occupying power under IHL [international humanitarian law]."[117]

While some have espoused that the UN administration of Kosovo could be viewed as a *de facto* occupation,[118] a majority of the experts that participated at the ICRC Expert Meeting on Occupation concluded that "the UN administration of Kosovo could [not] be compared to an occupation for the purposes of IHL, mainly because of the consensual nature of the UN's presence."[119] The Federal Republic of Yugoslavia (FRY) gave its consent[120] to the creation of an interim administration under Security Council Resolution 1244 (1999).[121] Although there may be reason to doubt the voluntariness of the consent in light of the extensive bombing campaign that

[115] Hague IV Regulations of 1907, *supra* note 10, at art 2.

[116] Ferraro, *supra* note 114 at 33-4.

[117] *Ibid* at 34.

[118] *Ibid* at 33.

[119] *Ibid* at 80.

[120] *Letter dated 7 June 1999 from the Charge D'affaires A.I. of the Permanent Mission of Yugoslavia to the United Nations Addressed to the President of the Security Council*, UN Doc. S/1999/655, accepting the Ahtisaari-Chernomyrdin peace plan contained in a *Letter dated 7 June 1999 from the Permanent Representative of Germany to the United Nations Addressed to the President of the Security Council*, UN Doc. S/1999/649, Annex, para. 5. See also UNSC, 54th Year, 4011th Mtg, UN Doc. S/PV.4011 (1999) at 4.

[121] SC Res. 1244 (1999), UNSC, 4011th Mtg, UN Doc. S/RES/1244 (1999).

preceded the end of hostilities,[122] FRY's consent takes the United Nations Interim Administration Mission in Kosovo (UNMIK) out of the category of occupier. A similar conclusion was reached at the ICRC Expert Meeting on Occupation with respect to the UN administration of East Timor.[123] With respect to the situation in East Timor, the government of Indonesia had consented to the UN operations, including the establishment of the United Nations Transitional Administration in East Timor (UNTAET).[124] Therefore, the law of occupation could not apply. It is appealing to conclude that the law of occupation can apply to the UN in some circumstances because it provides a framework within which the UN can be held accountable for its actions. However, the fact remains that the UN is not a party to the necessary conventions. I am therefore of the view that the law of occupation does not apply to the UN notwithstanding the absence of consent of the post-conflict nation.

E. Conclusions regarding the law of occupation as a framework for post-conflict peacebuilding

For these reasons, I argue that the law of occupation is of limited application as a legal framework for post-conflict peacebuilding. The law of occupation is part of international humanitarian law and is codified in the Hague IV Regulations of 1907. As such, it is a field of law that only arises in situations of international armed conflict, where there is a lack of consent, between contracting states. The law of occupation permits, and perhaps even requires, some

[122] See Ferraro, *supra* note 114 at 80-81. Epaminontas E. Triantafilou, "Matter of Law, Question of Policy: Kosovo's Current and Future Status under International Law" (2004-2005) 5 Chi J Int'l Law 355 at 359. Aleksandar Momirov, *Accountability of International Territorial Administrations: A Public Law Approach* (The Hague: Eleven International, 2011) at 116; and Bernhard Knoll, *The Legal Status of Territories Subject to Administration by International Organisations* (Cambridge: Cambridge University Press, 2008) at 45.

[123] Ferraro, *ibid* at 81.

[124] Ferraro, *ibid.* See also *Report of the Secretary-General: Question of East Timor*, UN Doc. A/53/951, S/1999/513 (5 May 1999), Annex I ("Agreement between the Republic of Indonesia and the Portuguese Republic on the question of East Timor").

changes to bring existing laws into compliance with human rights standards as required by the Fourth Geneva Convention. Further, the jurisprudence of the ICJ and the commentary of the Human Rights Commission suggests that parties to the ICCPR are required to apply the human rights standards of that convention extra-territorially, in situations of occupation. Despite the requirement that occupiers make changes to bring the existing institutions and laws of the occupied state into compliance with human rights standards, the law of occupation is not an effective tool for accomplishing regime change on its own. Although Security Council Resolution 1483 (2003) was relied upon by the coalition partners in Iraq to justify significant regime change, this unique interplay between the law of occupation and Security Council resolutions is unlikely to be repeated. Not only does it require a situation of occupation to arise, but it requires the Security Council to endorse that occupation. The invasion of Iraq was tolerated because there was such widespread fear regarding Sadam Hussein's regime and the potential for weapons of mass destruction. The situation in Iraq is an example of the Security Council's authority to independently authorize post-conflict peacebuilding initiatives; it does nothing to alter the existing law of occupation. Further, because of the requirement that there be an international armed conflict, the law of occupation is not applicable in most modern post-conflict peacebuilding situations. In Parts II and III, I will discuss the post-conflict peacebuilding efforts that occurred in Kosovo, East Timor and Afghanistan, where international humanitarian law did not trigger situations of occupation.

PART II

Interim Administrations as a Framework for Post-Conflict Peacebuilding

A. Introduction

The second legal framework to be examined with a view to determining the most effective legal framework for ensuring the rule of law in a time of post-conflict peacebuilding is that offered by interim administrations. An interim administration occurs where an outside party takes charge of the functions of statehood in aid of a country that is emerging from conflict. The UN and its predecessor, the League of Nations, have assumed historically some degree of authority over states undergoing transition from war to peace. The League of Nations administered the Saar Territory and the Free City of Danzig while the UN administered aspects of Eritrea, Italian Somaliland and Libya.[125] The UN missions in Kosovo and East Timor in particular, represent important steps in the evolution of interim administrations in that they are examples of post-conflict peacebuilding initiatives where the UN assumed "[f]ull administrative powers"[126] over a state and implemented a "comprehensive governance model"[127] in order to assist a territorial entity transition toward stability. The examples of Kosovo and East Timor provide a distinct lens through which UN-led interim administrations can be viewed and assessed. In March 2000, the UN Secretary-General convened a panel, chaired by Mr Brahimi to

[125] See generally Erika de Wet, "The Direct Administration of Territories by the United Nations and its Member States in the Post Cold War Era: Legal Bases and Implications for National Law" (2004) 8 Max Planck YB UNL 291 at 292-3. See also: Ralph Wilde, *International Territorial Administration – How Trusteeship and the Civilizing Mission Never Went Away* (Oxford: Oxford University Press, 2008) at 47-98.

[126] Eric De Brabandere, *Post Conflict Administrations in International Law – International Territorial Administration, Transitional Authority and Foreign Occupation in Theory and Practice* (Lieden: Martinus Nijhoff, 2009) at 37.

[127] Carsten Stahn, *The Law and Practice of International Territorial Administration* (Cambridge: Cambridge University Press, 2008) at 348.

review UN peace operations and make recommendations to improve future operations. According to the Mr. Brahimi's report, the missions in Kosovo and East Timor are unique because:

> No other operations must set and enforce the law, establish customs services and regulations, set and collect business and personal taxes, attract foreign investment, adjudicate property disputes and liabilities for war damage, reconstruct and operate all public utilities, create a banking system, run schools and pay teachers and collect the garbage – in a war-damaged society. [128]

As with the example of Iraq discussed in Part I, the experiences of Kosovo and East Timor illustrate the power of the UN to engage in transformative peacebuilding objectives. Unfortunately the UN-led interim administrations in Kosovo and East Timor were not without problems, caused in large part by a perceived lack of accountability and a failure to consult with the local populace.

In this Part, I will begin by discussing the source from which UN authority is derived to act as an interim administrator. There can be no doubt that the UN has authority to act in this capacity; however, the source of that authority is not clear. I will then outline the circumstances that led to the establishment of UN-led interim administrations in both Kosovo and East Timor. Although these two interim administrations are similar, the interim administration of East Timor lasted only three years while the interim administration in Kosovo began in 1999 and continues to this day. Having set out the circumstances leading to, first the interim administrations in Kosovo, and second, East Timor, this analysis will then closely examine three specific difficulties faced by those interim administrations. These three difficulties concern 1) choosing the proper law to govern the state, 2) building a judiciary to administer those laws, and 3) in the case of Kosovo, upholding human rights standards while also creating the conditions for post-

[128] *Identical Letters dated 21 August 2000 from the Secretary-General to the President of the General Assembly and the President of the Security Council*, UN Doc. A/55/305-S/2000/809 (2000) at para. 77 [the Brahimi Report].

conflict security. In contrast to East Timor, Kosovo had a more volatile security environment during this period.[129] One of the ways the UN-led interim administration in Kosovo attempted to maintain security was through executive detentions of people who were perceived as threats to security. As will be discussed in this Part, these executive detentions were criticized as being in violation of internationally accepted human rights standards. The conclusion to be drawn from the discussion of the difficulties encountered is that interim administrations do not provide an adequate framework for post-conflict peacebuilding. Although interim administrations have broad authority to make sweeping changes, the lack of public consultation and accountability prevents lasting change because of the risk that the local population may not accept the changes that have been made on their behalf. The conclusions reached in this Part reveal a need for a post-conflict peacebuilding framework that is led by the local population.

B. Legal authority of the UN to act as an interim administrator

The first consideration in the assessment of interim administrations for post-conflict peacebuilding is the UN's authority to administer a state. The starting point for this analysis is the UN Charter. Early interpreters of the UN Charter espoused the view that the UN could not "exercise sovereignty over a territory."[130] Although there is little dispute now that the UN has authority to act as an interim administrator,[131] the source of that authority remains unclear. Professor Stahn has opined that "it is difficult to find an express legal basis for the creation of

[129] Simon Chesterman, "Justice under International Administration: Kosovo, East Timor and Afghanistan" (2001) 12 Finnish YB Int'l L 143 at 152.

[130] Hans Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems* (New York: Frederick A. Praeger, 1950) at 651.

[131] See generally de Wet, *supra* note 125 at 315.

transitional administrations under the UN Charter."[132] For those in search of an authority, two options are advanced: Chapter XII or Chapter VII. As will be discussed below, Chapter XII contemplates an international trusteeship system and is not, in my view, the basis for this power. Chapter VII is the better option, even though it does not grant specific authority to the UN to engage in peacebuilding initiatives.

The trusteeship system was created at the conclusion of the Second World War pursuant to Chapter XII of the UN Charter. The trusteeship system was intended to cover territories that had been administered under the former mandate system of the League of Nations, with article 77 of the UN Charter also including territories that were "detached from enemy states as a result of the Second World War; and … territories voluntarily placed under the system by states responsible for their administration."[133] Of note, article 78 of the UN Charter also made clear that the trusteeship system would not apply to UN member states. This limited the application of the system to states undergoing decolonisation. Actual operation of the trustee remained vested with the former colonial power. According to Michael Matheson, a former US State Department legal adviser and now a faculty member at the George Washington University Law School, "the UN role with respect to such territories was prescribed by agreement with the states involved, and typically amounted only to very general supervision, as actual governance was carried out by the state that granted the trusteeship."[134] The Trusteeship Council, created pursuant to the trusteeship provisions of the UN Charter, "suspended operation on 1 November 1994, with the

[132] Stahn, *supra* note 127 at 423.

[133] UN Charter, *supra* note 12, art 77.

[134] Michael J. Matheson, "United Nations Governance of Postconflict Societies" (2001) 95 AJIL 76 at 76. See also Triantafilou, *supra* note 122 at 359.

independence of Palau, the last remaining United Nations trust territory"[135] and has not exercised its powers since.

The circumstances under which Kosovo and East Timor came to be administered by the UN do not meet the requirements of the trusteeship system. Thus, the trusteeship system could not have been implemented in these two regions. Further, as Professor (and former Judge) Bruno Simma has opined, the trusteeship system may not have been considered to be appropriate to modern instances of failed states because of its link to colonialism.[136] Although East Timor was arguably emerging from a state of colonialism, albeit over a significant period of time, its most recent experience had been as an occupied state of Indonesia. The agreements between Portugal, Indonesia and the UN which resulted in the creation of the United Nations Assistance Mission in East Timor did not constitute agreements that would place East Timor under UN trusteeship.[137] Similarly, Kosovo was not an emerging colony of the FRY. Rather, it was part of the FRY, which itself was a member of the UN. Finally, there was no intent for either East Timor or Kosovo to continue to be governed by their previous rulers. Rather, the intent was that the UN would assume complete control over every aspect of governance in both of these territories. I have therefore concluded that the models invoked in East Timor and Kosovo are not within the scope of the now defunct trusteeship system, and it is clear that the authority of the UN to act as an interim administrator is not derived from Chapter XII of the UN Charter.

Other than the provisions related to the trusteeship system, the UN Charter does not contain provisions that explicitly grant authority to third parties to engage in post-conflict

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[135] United Nations, Trusteeship Council, online: http://www.un.org/en/mainbodies/trusteeship/. See also De Brabandere, *supra* note 126 at 57.

[136] Bruno Simma, et al, eds, *The Charter of the United Nations: A Commentary*, 3rd ed (Oxford: Oxford University Press, 2012) at 1884.

[137] de Wet, *supra* note 163 at 307.

peacebuilding initiatives in sovereign states. However, despite this apparent gap in the legal framework, the fact remains that the UN did act as an interim administrator in both Kosovo and East Timor, engaging in significant transformative efforts. As will be noted in section C, Chapter VII of the UN Charter was indeed invoked by the Security Council to create both of these interim administrations. Chapter VII does not specifically mention the UN's authority to act in this capacity. However, in light of the ICJ opinion regarding the UN's legal status, the UN "must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties."[138] The authority of the UN to act as an interim administrator is therefore derived from its "implied or customary powers."[139]

The purposes of the UN Charter are broadly worded and are viewed as being "political objectives" rather than being legally binding.[140] Article 1 of the UN Charter provides that the UN is to "maintain international peace and security, and to … take effective collective measures for the prevention and removal of threats to the peace."[141] Similarly, in pursuing the broad purposes contained in article 1, article 2 provides a series of principles by which the UN and its members shall act. These principles include an obligation for the peaceful settlement of disputes[142] and a requirement to "give the United Nations every assistance in any action it takes in accordance with the present Charter."[143] Although Chapter VII does not explicitly set out the power to create or act as an interim administration, I would agree with the analysis of one commentator that "this

[138] *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion, [1949] ICJ Rep 174 at 182.

[139] de Wet, *supra* note 125 at 308.

[140] Simma, *supra* note 136 at 108-9.

[141] UN Charter, *supra* note 12, art 1.

[142] *Ibid*, at chapter I, art 2.

[143] *Ibid*.

power can be inferred as necessary to uphold the principles enumerated in articles 1 and 2 of the UN Charter."[144]

The Security Council is also given "primary responsibility for the maintenance of international peace and security"[145] and is authorized to carry out the powers contained in, *inter alia*, Chapter VII.[146] Pursuant to Chapter VII, it is the Security Council that is authorized to "determine the existence of any threat to the peace … and [it] shall make recommendations, or *decide* what measures shall be taken [emphasis added]."[147] Further, article 41, found in Chapter VII of the UN Charter, gives the Security Council the authority to decide "what measures not involving the use of armed force are to be employed to give effect to its decisions."[148] As noted by Professor Stahn, the power contained in article 41 gives the Security Council "wide discretion in the choice of response necessary to react to a threat to international peace and security, including the possibility of taking atypical measures, such as the creation of international administering institutions."[149]

In addition to the ability of the UN to act as an interim administrator by virtue of the implied powers contained in the UN Charter, the international community has accepted the UN's actions in Kosovo and East Timor. This is evident in the records of the General Assembly's plenary meetings wherein UNMIK's financing was discussed. During those discussions, countries as diverse as Finland, the Philippines, Guatemala, Venezuela, and the United States expressed their support for the mission, with the United States delegate noting:

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[144] Triantafilou, *supra* note 122 at 359.

[145] UN Charter, *supra* note 12 at art 24.

[146] *Ibid*.

[147] *Ibid*, art 39.

[148] *Ibid*, Chapter VII, article 41.

[149] Stahn, *supra* note 127 at 424.

> [t]he United States attaches great importance to the United Nations Interim Administration Mission in Kosovo. We believe that this funding resolution provides the critical monetary support for Security Council resolution 1244 (1999), which lays out a concrete plan for ending the humanitarian tragedy in Kosovo.[150]

As noted by Professor Erika de Wet of the University of Amsterdam:

> The fact that the Security Council was able to muster support for… these mandates…as well as the fact that these missions have all been endorsed by General Assembly resolutions are clear indications that the international community supports this type of civil administration as a legitimate measure for the maintenance or restoration of international peace and security.[151]

Based on this review, I therefore conclude that the UN has the authority to administer sovereign states pursuant to Chapter VII of the UN Charter with a view to assisting a state's post-conflict recovery.

C. Establishing a UN Administration: The Cases of Kosovo and East Timor

Having established that the legal authority for the UN to act rests with the UN Charter, I will now examine in detail two recent illustrations of the exercise of this authority by examining the interim administrations in Kosovo and East Timor. This part begins with a discussion of the events leading to the establishment of the interim administration in Kosovo. I will then review the circumstances leading to the interim administration of East Timor.

[150] UNGA, 53rd Sess, 105th Mtg, UN Doc. A/53/PV.105 (1999) (Mr. Burleigh). See also *Financing of the United Nations Interim Administration Mission in Kosovo*, GA Res. 53/241, UN Doc. A/RES/53/241 (1999). Similar comments were made by members of the General Assembly with respect to East Timor. See UNGA, 53rd Sess, 103rd Mtg, UN Doc. A/53/PV.103 (1999) and the associated resolution, *Question of East Timor*, GA Res. 53/240, UN Doc. A/RES/53/240 (1999).

[151] de Wet, *supra* note 125 at 315.

In response to a Serbian campaign of ethnic cleansing in Kosovo which saw "at its high point … [the expulsion] of 800,000 Kosovar Albanians from their homes,"[152] the North Atlantic Treaty Organization (NATO) began aerial bombing against the Federal Republic of Yugoslavia (FRY) in the spring of 1999. The 78-day bombing campaign ended on 10 June 1999 when the UN Security Council adopted Resolution 1244 (1999)[153] which demanded that the FRY "put an immediate and verifiable end to violence and repression in Kosovo."[154] Resolution 1244 (1999), adopted pursuant to Chapter VII of the UN Charter, also acknowledged that the situation in Kosovo "constituted a threat to international peace and security."[155] The resolution authorized the drastic step of establishing "an international civil presence … to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within"[156] the FRY. The resolution also requested that the Secretary-General appoint "a Special Representative to control the implementation of the international civil presence."[157]

The United Nations Interim Administration Mission in Kosovo (UNMIK) assisted with the creation of the provisional institutions of self-government in Kosovo which consisted of "the Assembly of Kosovo, the government, the president and the Kosovo courts."[158] These institutions were established while also attempting to honour the spirit of Resolution 1244 (1999) which reaffirmed both the sovereignty of the FRY and the concept of substantial autonomy for

[152] Henry H. Perritt, Jr., "Final Status for Kosovo" (2005) 80 Chicago-Kent L Rev 3 at 8.

[153] SC Resolution 1244 (1999), *supra* note 121.

[154] *Ibid*, para. 3.

[155] *Ibid*, preamb. para. 12.

[156] *Ibid*, para. 10.

[157] *Ibid*, para. 6.

[158] Robert Muharremi, "Kosovo's Declaration of Independence: Self-Determination and Sovereignty Revisited" (2008) 33 Rev Cent & E Eur L 401 at 410. See also SC Resolution 1244 (1999), *supra* note 121 at para. 11(c) listing one of the primary responsibilities of UNMIK as "organizing and overseeing the development of provisional institutions for democratic and autonomous self-government."

Kosovo, principles that are seemingly at odds with one another.[159] Despite its declaration of independence on 17 February 2008,[160] Kosovo remains under the administration of UNMIK. The Security Council has not rescinded nor changed the authority of the interim administration, although the declaration of independence did result in the UN Secretary-General directing the Special Representative in Kosovo to reconfigure UNMIK.[161] While approximately 100 countries have recognized Kosovo's independence,[162] a number of states have not, including Serbia and the Russian Federation. According to Professor de Wet, the experiences in Kosovo illustrate the difficulties of "open-ended mandates for civil administration under Chapter VII of the Charter."[163] The resulting confusion in status demonstrates one of the difficulties with the interim administration's approach to post-conflict peacebuilding.

East Timor was colonized by Portugal in the mid-16th century and remained a Portuguese colony until 28 November 1975, when it declared its independence. Eight days later, East Timor was invaded by Indonesia.[164] Although Indonesia attempted to incorporate East Timor as one of its provinces, this status was not recognized by the UN. Internationally, the occupation of East Timor by Indonesia was condemned.[165] In January 1999, the Indonesian President indicated a willingness to consider giving East Timor autonomous status within

[159] SC Resolution 1244 (1999), *ibid*, para. 2.

[160] *Kosovo Declaration of Independence*, (2008) 47 ILM 467.

[161] *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, UN Doc. S/2008/692 (24 November 2008) at para. 22.

[162] US Department of State, Bureau of European and Eurasian Affairs, "Fact Sheet: US Relations with Kosovo," 13 September 2013, online: http://www.state.gov/r/pa/ei/bgn/100931.htm.

[163] Erika de Wet, "The governance of Kosovo: Security Council Resolution 1244 and the establishment and functioning of EULEX" (2009) 103 AJIL 1.

[164] Henry, Kamm, "The Silent Suffering of East Timor," *New York Times*, Late Edition (East Coast) (15 February 1980) A35.

[165] SC Res. 384 (1975), UNSC, 1869th Mtg, UN Doc. S/RES/384 (1975) and SC Res. 389 (1976), UNSC, 1914th Mtg, UN Doc. S/RES/389 (1976).

Indonesia or full independence.[166] The United Nations Mission in East Timor (UNAMET) was created to oversee a referendum to determine whether or not East Timor would exist as a special autonomy within Indonesia.[167] On 30 August 1999, the East Timorese overwhelmingly rejected the concept of a special autonomy, with 78.5% voting against the proposal.[168] The ensuing violence by the opponents of independence resulted in deaths and large numbers of internally displaced persons.[169] In response to the violence, the UN created a multi-national force to assist UNAMET and restore peace and security in East Timor.[170] With the humanitarian crisis continuing, the Security Council determined that the situation amounted to a "threat to international peace and security" and therefore acted pursuant to Chapter VII of the UN Charter, invoking Security Council Resolution 1272 (1999).[171] Resolution 1272 (1999) established United Nations Transitional Administration in East Timor (UNTAET) and granted authority for the administration of East Timor[172] with the power "to exercise all legislative and executive authority, including the administration of justice."[173]

As with UNMIK, a Special Representative to the UN Secretary-General was appointed to act as transitional administrator with the title, Special Representative in East Timor.[174] However, in contrast to UNMIK, the Security Council acknowledged that the East Timorese

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[166] Hilary Charlesworth, "The Constitution of East Timor, May 20, 2002" (2003) 1 Int'l J Const L 325 at 326.

[167] SC Res. 1246 (1999), UNSC, 4013th Mtg, UN Doc. S/RES/1246 (1999). See also *Report of the Secretary-General,* A/53/951, S/1999/513 (5 May 1999), *supra* note 124.

[168] *Letter dated 3 September 1999 from the Secretary-General Addressed to the President of the Security Council*, UN Doc. S/1999/944 (1999) at para. 2.

[169] *Report of the Secretary-General on the Situation in East Timor*, UN Doc. S/1999/1024 (4 October 1999) at para. 3. See also Charlesworth, *supra* note 166 at 326.

[170] SC Resolution 1264 (1999), *supra* note 167 at para. 3.

[171] SC Res. 1272 (1999), UNSC, 4057th Mtg, UN Doc. S/RES/1272 (1999).

[172] *Ibid*, para. 1.

[173] *Ibid.*

[174] *Ibid*, para. 6.

people had expressed a desire to transition toward independence and sought to facilitate this.[175] East Timor attained independence on 20 May 2002. After that time, only a small UN contingent remained in East Timor to assist in continued peacebuilding efforts. The UN mission ended on 31 December 2012, as scheduled.[176]

D. Selecting the law applicable during an interim administration

One of the most significant problems faced by the UN in both Kosovo and East Timor was how best to select the law that would govern in these states. A modern, peaceful society cannot function without a proper foundation of law to regulate the interactions between its people and its territory. However, the legal system selected must be one that is appropriate for the people it would govern. In my view, serious errors were made with the choice of law to operate in Kosovo, and these errors undermined the post-conflict peacebuilding efforts and delayed the progress of the mission. The peace builders in East Timor, wary of the problems experienced in Kosovo, chose a more palatable law that was more widely accepted but there were detractors nonetheless.

[175] *Ibid.*

[176] "UN Peacekeeping mission ends operations as Timor-Leste continues path to 'brighter' future" UN News Centre (31 December 2012) online: http://www.un.org/apps/news/story.asp?NewsID=43861&Cr=timor-leste&Cr1=#.Uj-_TRX4D84). See SC Res. 2037 (2012), UNSC, 6721st Mtg, UN Doc. S/RES/2037 (2012).

i. Choosing and creating the law in Kosovo

On 25 July 1999, following the release of the Report of the UN Secretary-General on the Mission of UNMIK,[177] the UN Special Representative in Kosovo (and subsequently the French foreign minister), Dr. Bernard Kouchner, issued UNMIK's first regulation dealing with the authority of the interim administration in Kosovo.[178] In addition to asserting UNMIK's "legislative and executive authority with respect to Kosovo,"[179] UNMIK Regulation 1999/1 established that the "laws applicable in the territory of Kosovo prior to 24 March 1999"[180] would continue to apply "insofar as they do not conflict with"[181] human rights standards. The laws that would therefore apply in Kosovo were the laws of the FRY, or in other words, Serbian law.[182]

The decision to implement Serbian law in Kosovo met with significant resistance from Kosovo Albanians. These laws were seen as being "one of the most potent tools of a decade-long policy of discrimination against and repression of the Kosovar Albanian population."[183] The Legal Systems Monitoring Section of the Organisation for Security and Co-operation in Europe (OSCE) noted in its report on the criminal justice system in Kosovo:[184]

> Members of the mainly Kosovo Albanian legal communities resented and resisted the applicable law enforced by UNMIK; namely the 'Serbian' laws of the repressive Milosevic regime… many Kosovo Albanian judges and public

[177] UN Doc. S/1999/779 (12 July 1999) at para. 1.

[178] *On the Authority of the Interim Administration in Kosovo*, UNMIK/REG/1999/1 (25 July 1999), online: http://www.unmikonline.org/regulations/1999/re99_01.pdf.

[179] *Ibid*, at s. 1.

[180] *Ibid*, at s. 3.

[181] *Ibid*, at section 3 and see section 2 which set out the requirement to observe internationally recognized standards of human rights.

[182] Wendy S. Betts, Scott N. Carlson & Gregory Gisvold, "The Post-Conflict Transitional Administration of Kosovo and the Lessons-Learned in Efforts to Establish a Judiciary and Rule of Law" (2000-2001) 22 Mich J Int'l L 371 at 373-4.

[183] Hansjörg Strohmeyer, "Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor" (2001) 95 AJIL 46 at 59.

[184] Organization for Security and Co-operation in Europe, Legal Systems Monitoring Section, *Review 1: The Criminal Justice System in Kosovo (February – July 2000)* (10 August 2000), online: http://www.osce.org/kosovo/13053 .

> prosecutors disregarded Regulation 1999/1 and instead applied the KPC [Kosovo Penal Code], which had been annulled and replaced by the Socialist Yugoslav Republic of Serbia Criminal Code (SPC)… in 1989-90.[185]

The impact of selecting Serbian laws to govern the population of Kosovo without public consultation on the matter[186] was palpable. As explained by Hansjoerg Strohmeyer, a former Deputy Principal Legal Advisor to UNTAET:

> …the political representatives of the Kosovar Albanian community … threatened to cease cooperating with the United Nations, and newly appointed judges and prosecutors resigned from office, demanding an immediate return to the laws applicable in Kosovo before the revocation of its autonomy status within Serbia.[187]

In addition to the political ramifications, abhorrence of the Serbian laws resulted in an inconsistent application of these laws by the various law enforcing authorities in Kosovo. According to one study: "the interim judges, the Kosovo Implementation Force (KFOR), and the UNMIK Civilian Police each applied a diverse collection of legal provisions and standards, including the FRY/Serbian law, pre-1989 criminal law, and Albanian Criminal law."[188] Adam Day's research further suggests that in some situations, judges applied laws "in a discriminatory fashion against the Serb population."[189]

In an effort to bring consistency to the rule of law in Kosovo, on 12 December 1999, the Special Representative in Kosovo promulgated Regulation 1999/24.[190] This regulation noted the existence of Regulation 1999/1 and simply stated that the laws applicable in Kosovo would be

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[185] *Ibid*, at 12.

[186] Betts et al, *supra* note 182 at 374.

[187] Strohmeyer Collapse and Reconstruction, *supra* note 183 at 59.

[188] Betts et al, *supra* note 182 at 374-5.

[189] Adam Day, "No Exit Without Judiciary: Learning a Lesson from UNMIK's Transitional Administration in Kosovo" (2005) 23:2 Wis Int'l L J 183 at 186.

[190] *On the Law Applicable in Kosovo*, UNMIK/REG/1999/24 (12 December 1999), online: http://www.unmikonline.org/regulations/1999/re1999_24.htm.

"the law in force in Kosovo on 22 March 1989,"[191] the date that Kosovo lost its autonomy within the FRY. The new regulation also explicitly incorporated human rights standards by listing a number of international human rights conventions that would apply to "all persons undertaking public duties or holding public office in Kosovo."[192] Although this change occurred relatively early in UNMIK's mission, the failure to implement a legitimate legal system at the start of the mission and delaying the implementation of appropriate laws by six months "expended valuable goodwill and credibility."[193] While it is tempting to criticize UNMIK for what seems to be a careless and thoughtless implementation of Serbian laws in Kosovo, there was very little time to develop a comprehensive legal framework that would meet the needs of the local population, reflect proper consultation, and incorporate human rights standards that were previously unknown in the region. That being said, the fact that no public consultation occurred at all, undermined the process as the resulting choice of law was reviled and rejected by the citizens.

ii. Choosing and creating the law in East Timor

Similar to the initial steps that were taken by the Special Representative in Kosovo, one of the first acts of the Special Representative in East Timor was to promulgate UNAMET Regulation 1999/1, which dictated the laws that would apply in East Timor. This regulation selected the same laws that had applied to the territory prior to 25 October 1999, in other words, Indonesian law.[194] These laws applied only to the extent that they did not conflict with

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[191] *Ibid*.

[192] *Ibid*. Downplaying the issue somewhat, the UN Secretary-General noted in his report that month "that regulation 1999/1 should be amended so as to give explicit validity to the practices followed by the courts." See *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, UN Doc. S/1999/1250 (23 December 1999) at para. 55.

[193] Betts et al., *supra* note 182 at 375.

[194] *On the Authority of the Transitional Administration in East Timor*, UNTAET/REG/1999/1 (27 November 1999), online: http://www.jornal.gov.tl/lawsTL/UNTAET-Law/Regulations%20English/Reg1999-01.pdf.

internationally accepted standards for the protection of human rights or with the mandate given to UNTAET.[195] According to Strohmeyer, the decision to apply these laws:

> …was made solely for practical reasons: first, to avoid a legal vacuum in the initial phase of the transitional administration, and second, to avoid a situation in which local lawyers, virtually all of whom had obtained their law degrees at domestic universities, had to be introduced to an entirely foreign legal system.[196]

Imposition of Indonesian law was not without controversy. There was no method to determine what aspects of the law would be applied and what aspects were deemed to be contrary to internationally accepted standards of human rights.[197] There were no texts of the applicable laws as everything was destroyed in the aftermath of the referendum on independence. Finally, as Strohmeyer has noted in his writing on the topic, some East Timorese "objected to the very idea of continuing the application of the same laws that had been used for more than two decades by the Indonesian regime, and which were, therefore, widely perceived as being tools of the Indonesian occupation of East Timor."[198] An interesting aspect of the choice to apply Indonesian law is the fact that members of UNTAET were unfamiliar with it.[199] UNTAET avoided the necessity of applying local laws by undertaking its tasks through the regulations and decrees it promulgated. According to Jonathan Morrow and Rachel White, "the Transitional Administration paid little attention to applicable Indonesian law and the question as to whether its enforcement might better serve the interests of the Administration than its own creations."[200]

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[195] *Ibid*.

[196] Hansjoerg Strohmeyer, "Policing the Peace: Post-Conflict Judicial System Reconstruction in East Timor" (2001) 24 UNSWLJ 171 at 174.

[197] *Ibid*. See also Suzannah Linton, "Rising from the Ashes: The Creation of a Viable Criminal Justice System in East Timor" (2001) 25 Melbourne UL Rev 122 at 137.

[198] Strohmeyer Policing the Peace, *supra* note 196 at 174.

[199] Jonathan Morrow & Rachel White, "The United Nations in Transitional East-Timor: International Standards and the Reality of Governance" (2002) 22 Aust YBIL 1 at 9

[200] *Ibid*.

Strohmeyer has suggested that the objection to Indonesian law may have stemmed "from a lack of appreciation that UNTAET [was] simply a transitional administration and the choice of law that will eventually be applied … is a decision to be made by the new state and its officials."[201] Further, the rejection of Indonesian law was not universal. As one commentator has concluded: "the East Timorese leadership did not reject the application of Indonesian law as the Kosovo Albanians had rejected pre-intervention Yugoslav law."[202] Professor Stahn suggests that this difference may have been due to "the absence of ethnic rivalries"[203] in East Timor which meant that the imposition of Indonesian laws was not as abhorrent to the local population as the imposition of Serbian law was in Kosovo.

iii. The case for a model code

The experiences in Kosovo and East Timor illustrate the pitfalls associated with imposing existing legal systems during UN-administered interim administrations. There has since been recognition that "an interim, off-the-shelf UN criminal law"[205] would have been helpful during the initial periods of the missions. In March 2000, Mr. Brahimi completed his report that reviewed UN peace operations and made recommendations to improve future operations. Mr. Brahimi's report was provided to the Security Council and the General Assembly in August 2000.[206] Based on the experiences in Kosovo and East Timor, the Brahimi Report

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[201] Linton, *supra* note 197 at 137.

[202] Joel C. Beauvais, "Benevolent Despotism: A Critique of U.N. State-Building in East Timor" (2000-2001) 33 NYUJ Int'l L & Pol 1101 at 1151-2. See also generally Megan A. Fairlie, "Affirming Brahimi: East Timor Makes the Case for a Model Criminal Code" (2002-2003) 18 AM U Int'l L Rev 1059 at 1071-3.

[203] Stahn, *supra* note 127 at 338.

[205] Beauvais, *supra* note 202 at 1156.

[206] Brahimi Report, *supra* note 128.

recommended the creation of "an interim legal code to which mission personnel could have been pre-trained while the final answer to the 'applicable law' question was being worked out."[207] According to commentators, this legal code should be "based on international fair trial and due process standards."[208]

The recommendations contained in the Brahimi Report provide a clinical solution to the choice of law issue that is so pressing in the early days of an interim administration mission. Presumably, such a code would be balanced and contain internationally accepted standards for the protection of human rights. However, a generic off-the-shelf model that can be used in any eventuality is not without its own problems. Determining who would draft it and what it would contain would be problematic. Further, a model code might work for countries with a civil or common law tradition, but drafting a document that could be applied universally in countries with diverse or tribal based systems would be challenging. Similarly, training local judges and lawyers in the interpretation and application of the new laws would be necessary and time consuming. While the creation of a model code is an attractive solution, there is nothing to suggest that it would have garnered any better results than those obtained by UNMIK and UNTAET.

E. Rebuilding institutions: Creating a judiciary

The judiciary is likely to be one of a number of state institutions that must be rebuilt after conflict, and both UNMIK and UNTAET were tasked with re-establishing the domestic judiciaries. The difficulties faced in this regard demonstrate the larger problems endemic to

[207] *Ibid* at para. 81.

[208] Betts, et al., *supra* note 182 at 383.

building an institution by way of UN interim administration. Recruiting qualified candidates and teaching them to work in a system that requires accountability and the application of the rule of law is no easy task, particularly in countries where these institutions were non-existent or severely eroded by the pre-conflict regime in place. In the case of Kosovo, the challenge was to create a judiciary that was capable of enforcing the rule of law fairly, without regard to ethnic biases. UNMIK has been criticized for its failure to consult with the local population on this project and for the extent to which it controlled the judiciary that was created. UNTAET tried to avoid the mistakes made by UNMIK, but faced a different hurdle in that it was difficult to find people with the requisite knowledge to become judges in East Timor. In the next two sections, I will examine the challenges faced by UNMIK and UNTAET to rebuild effective judiciaries in Kosovo and East Timor.

i. Rebuilding the judiciary in Kosovo

When UNMIK arrived in Kosovo it discovered that "there was no functioning court system."[209] The challenge for UNMIK was to create an ethnically balanced judiciary. As noted by the UN Secretary-General, under the previous Serb regime, only 30 out of the 756 judges were ethnically Kosovo Albanians.[210] The majority of judges were Serbs and with the end of the Serb regime in Kosovo, most of these judges left, which "accelerated the collapse of the judicial system."[211] The Albanian lawyers who remained lacked the experience necessary to carry out the functions and duties of judges.[212] In June 1999, UNMIK passed Emergency Decrees 1991/1 and

[209] OSCE Review 1, *supra* note 184 at 11.

[210] Report of the Secretary-General S/1999/779 (12 July 1999), *supra* note 177 at para. 40.

[211] *Ibid*.

[212] Betts, *supra* note 182 at 377.

1991/2 which permitted the appointment of judges and prosecutors to serve in the emergency judicial system in Kosovo.[213] Between June and September 1999, 55 judges and prosecutors were appointed to serve as part of the emergency judicial system.[214] Of these, seven were Kosovo Serbs, all of whom had resigned by October 1999.[215] David Marshall, chief of the Legal System Monitoring Section of the Human Rights and Rule of Law Division for the OSCE Mission in Kosovo, and Shelly Inglis, a legal advisor with the same section of the OSCE Mission in Kosovo, have noted that the inability to retain judges during this period led to "a significant increase in serious criminal activity."[216]

UNMIK took the first steps to create a permanent judiciary in September 1999 through the promulgation of Regulations 1999/6 and 1999/7.[217] Despite conducting numerous interviews for both judges and prosecutors, UNMIK had difficulty creating an ethnically balanced court.[218] The departure of "Kosovo Serb judges for security reasons"[219] made this a difficult task. As the Independent International Commission on Kosovo observed: "Establishment of a multi-ethnic criminal justice system has been hampered by the reluctance of members of minorities to serve on the bench as well as the pronounced bias of many Albanian judges. Fair trials for inter-ethnic

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[213] Organization for Security and Co-operation in Europe, Mission in Kosovo, *Report 1 – Material Needs of the Emergency Judicial System* (7 November 1999), online: http://www.osce.org/kosovo/13042.

[214] OSCE Review 1, *supra* note 184 at 11.

[215] *Ibid* at para. 5.

[216] David Marshall & Shelly Inglis, "The Disempowerment of Human Rights-Based Justice in the United Nations Mission in Kosovo" (2003) 16 Harv Hum Rights J 95 at 101.

[217] Betts, *supra* note 182 at 378.

[218] *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, UN Doc. S/1999/987 (16 September 1999) at para. 54.

[219] *Ibid*.

conflicts are all but impossible."[220] These difficulties were compounded by the fact that "Belgrade had instructed Serbian judges not to participate."[221]

By March 2000, the Secretary-General reported that the Special Representative in Kosovo had appointed "301 judges and prosecutors and 238 lay judges." Despite these appointments, there remained difficulties with the independence of those acting as judges, particularly in the region of Mitrovica[222] where minority tensions continued to be problematic.[223] UNMIK took action to resolve this problem by enacting Regulation 2000/6 which authorized the appointment of international judges and prosecutors in that region.[224] The presence of international judges was intended to reduce the disparity in treatment that minorities suffered at the hands of courts. However, the combination of international judge and local judges resulted in the inconsistent application of the law. Local lawyers and judges had a complete "lack of understanding of the relevant international human rights laws"[225] while the international judges were equally unfamiliar with local laws.[226]

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[220] Independent International Commission in Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (Oxford: Oxford University Press, 2009) at 113.

[221] OSCE Review 1, *supra* note 184 at 13.

[222] See Independent International Commission in Kosovo, *supra* note 220 at 109 (noting that "[t]he city of Mitrovice/Kosovska Mitrovica has become the focal point for inter-ethnic conflict. The town is divided into a Serb Northern part, which has provided a haven for Serbs from all over Kosovo and an Albanian Southern Part").

[223] See *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, UN Doc. S/2000/177 (3 March 2000) at paras. 107 and 110; Betts, *supra* note 182 at 378. See also *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, UN Doc. S/2000/878 (18 September 2000) at para. 38.

[224] *On the Appointment and Removal from Office of International Judges and International Prosecutors*, UNMIK/REG/2000/6 (15 February 2000), online: http://www.unmikonline.org/regulations/2000/re2000_06.htm. *Amending UNMIK Regulation No. 2000/6 on the Appointment and Removal from Office of International Judges and International Prosecutors*, UNMIK/REG/2000/34 (27 May 2000), online: http://www.unmikonline.org/regulations/2000/re2000_34.htm extended the authority of the Special Representative to appoint international judges in all of the territories of Kosovo.

[225] Report of the Secretary-General S/2000/878 (18 September 2000), *supra* note 223 at para. 39.

[226] Betts, *supra* note 182 at 379.

A 2001 report of the OSCE noted the appointment of only 11 international judges.[227] This resulted in two unique problems. Firstly, not all defendants were tried by an international judge. The lack of sufficient international judges "…has resulted in the unequal treatment of certain defendants before the courts."[228] The second problem related to the fact that trial panels were generally composed of five members: two professional judges and three lay-judges.[229] The international judge on a panel did not have the ability to make any significant difference in reducing ethnic bias because the international judge only had one of the five potential votes on the panel.

One of the consequences of UNMIK's ongoing influence was to decrease the independence of the judiciary. The international judges that were appointed were hired as employees of the UN for six-month renewable terms, thus undermining the well-known principles of independence and security of tenure.[230] Further, the Special Representative was vested with the authority for appointments to trials, thus breaching the principle of separation of powers between the executive and the judiciary.[231] As Marshall and Inglis have noted: "The stated objective of the regulation, to ensure independence and impartiality, has garnered a perverse result. The lack of any mechanism to ensure a random assignment of judges creates the perception that the executive may interfere at any time with any given case."[232] As one other

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[227] Organization for Security and Co-operation in Europe, Mission in Kosovo, Department of Human Rights and Rule of Law, *A Review of the Criminal Justice System 1 September 2000 – 28 February 2001* (28 July 2001) at 76, online: http://www.osce.org/kosovo/13050.

[228] OSCE Review 1, *supra* note 184 at 2.

[229] *Ibid*.

[230] *Ibid* at 122; Gjylbehare Bella Murati, "The Ombudsperson Institution vs the United Nations Mission in Kosovo (UNMIK)" in Jan Wouters, et al., *Accountability for Human Rights Violations by International Organisations* (Antwerp: Intersentia, 2010) at 380-1.

[231] *On Assignment of International Judges/Prosecutors and/or Change of Venue*, UNMIK/REG/2000/64 (15 December 2000) at paras. 1.2 and 1.3, online: http://www.unmikonline.org/regulations/2000/re2000_64.htm.

[232] Marshall & Inglis, *supra* note 216 at 122.

commentator has noted, the failure to recognize the need for a separation of powers "discouraged the entire society since it undermined the independence of the judiciary."[233]

ii. Rebuilding the judiciary in East Timor

The violence that erupted following the referendum on 30 August 1999 on the independence of East Timor from Indonesia resulted in the complete destruction of the judiciary including the infrastructure of the courts. In essence, the judiciary of East Timor had "ceased to exist."[234] UNTAET began the task of rebuilding the judiciary by locating qualified East Timorese jurists and lawyers. Under Indonesian occupation, only Indonesians had been appointed to serve as prosecutors and judges.[235] It was estimated that "[f]ewer than ten lawyers … remained, and these were believed to be so inexperienced as to be unequal to the task of serving in a new East Timorese justice system."[236] Lawyers were found by word-of-mouth and, according to Strohmeyer, by dropping leaflets from planes throughout the territory.[237] Within a week, "seventeen jurists had been identified"[238] and within two months, "over sixty East Timorese jurists had formally applied for judicial or prosecutorial office."[239]

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[233] Murati *supra* note 230 at 379.

[234] Report of the Secretary-General S/1999/1024 (4 October 1999), *supra* note 169 at para. 22.

[235] Strohmeyer Policing the Peace, *supra* note 196 at 175.

[236] Strohmeyer Collapse and Reconstruction, *supra* note 183 at 50.

[237] *Ibid* at 54.

[238] *Ibid*.

[239] *Ibid*.

Despite the difficulties associated with locating and training East Timorese jurists, UNTAET initially tried to avoid appointing international judges and lawyers. According to Strohmeyer:

> …experience gained from other UN missions has shown that the appointment of international lawyers leads to a myriad of practical concerns that can place a huge burden on missions in their set-up phases, such as costly requirements of translating laws, files, transcripts and even the daily conversations between local and international lawyers, as well as the enormous time and expense incurred in familiarising international lawyers with local and regional legal systems.[240]

An emphasis was placed on ensuring that the judiciary would be comprised of locals. In so doing, it was recognized that this necessitated a compromise in terms of obtaining qualified staff.[241] Ultimately; however, this approach was not sustainable and resulted in the issuance of UNTAET Regulation 2001/26, which permitted the appointment of international judges to preside over specific matters, primarily serious criminal offences.[242] Although this development was necessary, the mission attempted to limit the role of international judges.

The judiciary created by UNTAET continued to suffer from problems related to skill and qualification long after the formal mission had ended and East Timor had gained its independence. Although training programs were established to assist, the Judicial Training Centre, which was opened in 2004 reported that "none of the 22 judges who participated in the first training programme managed to pass the exam and obtain the required qualification."[243]

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[240] Strohmeyer Policing the Peace, *supra* note 196 at 177.

[241] Chesterman,, *supra* note 129 at 151.

[242] *On the Amendment of UNTAET Regulation No. 1999/3 on the Establishment of a Transitional Judicial Service Commission and on the Amendment of UNTAET Regulation No. 2000/16 on the Organization of the Public Prosecution Service in East Timor*, UNTAET/REG/2001/26 (14 September 2001), online: http://www.jornal.gov.tl/lawsTL/UNTAET-Law/Regulations%20English/Reg2001-26.pdf.

[243] De Brabandere, *supra* note 126 at 202-3.

iii. Conclusions regarding rebuilding judiciaries in Kosovo and East Timor

The experiences in East Timor and Kosovo with respect to the judiciary differ significantly, likely because of the absence of ethnic division in East Timor. Although there has been a great deal of criticism regarding UNMIK's approach in Kosovo, which saw the interim administrator take more and more power over the judiciary as the mission progressed, I am of the view that such measures were necessary in order to counteract the judiciary's inability or refusal to adjudicate in an impartial manner. Without this level of involvement, there would have continued to be serious human rights violations based on ethnicity, thus perpetuating the original conflict in the region. Unfortunately, the result was a piecemeal approach which saw UNMIK gaining more and more control over the judiciary. In the face of human rights violations that were being committed within the criminal justice system, it is difficult to assert that UNMIK had any alternatives in its approach. However, the degree of control exerted by UNMIK over the judiciary has been heavily criticized. In East Timor, UNTAET resisted the appointment of international judges, likely because of the criticism that occurred in Kosovo. However, the East Timorese judges lacked the experience necessary to carry out their duties. In my view, the presence of more international judges may have actually assisted in East Timor by providing much needed mentorship.

This review of both situations demonstrates that the participation of the local population is necessary at every step of the post-conflict peace and reconstruction project but that intense mentorship and support is required from the international community. As was seen in both Kosovo and East Timor, the imposition of change by the interim administrator, without local consultation undermined the greater rebuilding effort. In their work, Marshall and Inglis have criticized UNMIK for its failure to consult with the local population regarding the steps being taken to create a judiciary. They write that:

> …consultation on substantive issues in the areas of criminal justice and human rights was nearly nonexistent. Critical laws that introduced international judges and prosecutors and expanded domestic law were not adequately explained to local legal actors, and once promulgated, no attempt was made to engage the local population with the reasoning behind such decisions.[244]

While local consultation may not have eliminated all of the difficulties faced by these two states, it may have contributed to a stronger, more legitimate judiciary.

F. Human rights tensions in Kosovo

One of the most significant problems faced in Kosovo was the appropriate application of human rights law by the interim administration in respect of pre-trial detentions. In contrast to East Timor where there were few internal security issues,[245] the security situation in Kosovo remained volatile as a result of continuing acts terrorism.[246] Whereas the conflict in East Timor arose following a period of foreign occupation by Indonesia, the conflict in Kosovo was derived from internal ethnic tensions. The manner in which the UN-led interim administration managed the security threat in Kosovo demonstrates the power of interim administrations to take unilateral action in the face of significant threats to security. Unfortunately, the efforts taken to maintain security in Kosovo also resulted in violations of human rights standards of a civil and political nature by the UN-led interim administration. As this case study demonstrates, there was no independent mechanism in place to address these violations. Although an ombudsman was created in Kosovo in response to criticism over the actions taken by UNMIK, it was without any

[244] Marshall & Inglis, *supra* note 216 at 97.

[245] See *Report of the Secretary-General on the United Nations Transitional Administration in East Timor*, UN Doc. S/2002/432 (17 April 2002) at para. 39 where the Secretary-General indicated: "Within East Timor the reported crime statistics remain low. There has been, however, an increase in traffic accidents…"

[246] See *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, UN Doc. S/2001/565 (7 June 2001) at 2-3.

significant power to act. I conclude that one of the significant drawbacks for UN-led interim administrations as a framework for post-conflict peacebuilding relates to the difficulties of holding them accountable for their actions as illustrated by the failure of UNMIK to uphold human rights standards in Kosovo.

Despite incorporating human rights standards into the laws of Kosovo through UNMIK Regulation 1999/24, some UNMIK and KFOR actions in Kosovo breached the provisions of widely recognized international human rights laws. As noted by the Ombudsperson Institution in Kosovo in 2002:

> UNMIK is not structured according to democratic principles, does not function in accordance with the rule of law, and does not respect important international human rights norms. The people of Kosovo are therefore deprived of protection of their basic rights and freedoms three years after the end of the conflict by the very entity set up to guarantee them.[247]

UNMIK's perceived lack of accountability for its human rights violations created significant tension between the population of Kosovo and their territorial administrators. As argued by Marshall and Inglis: "UNMIK's and KFOR's executive actions have clearly contravened human rights standards but remained beyond any legal challenge."[248] I agree with the argument of these authors that to the extent that one of the missions of UNMIK was to establish the supremacy of human rights standards, the mission failed.[249]

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[247] Ombudsperson Institution in Kosovo, *Second Annual Report 2001-2002* (10 July 2002) at 1, online: http://www.ombudspersonkosovo.org/repository/docs/E6020710a.pdf.

[248] Marshall & Inglis, *supra* note 216 at 96.

[249] *Ibid*.

i. The creation of the Ombudsperson Institution in Kosovo

Respect for human rights and the rule of law emerged as a major theme in the post-conflict development of Kosovo. In December 1999, the OSCE hosted a human rights conference in Kosovo where it was announced that an ombudsman for Kosovo would be created.[250] The Ombudsperson Institution of Kosovo was created pursuant to UNMIK Regulation 2000/38 on 30 June 2000 with the authority to "investigate complaints from any person … concerning human rights violations and actions constituting an abuse of authority by the interim civil administration or any emerging central or local institution."[251] Although an ombudsperson was also created during the tenure of the interim administration in East Timor, it only existed for one year prior to the interim administration of East Timor coming to an end, and according to a 2003 report prepared by Amnesty International, it never functioned.[252] A permanent ombudsperson was created in East Timor after it gained its independence.[253]

A detailed review of the structure and authority of Kosovo's Ombudsperson is not within the scope of this thesis;[254] however, for the purposes of this analysis, it is necessary to note that the Ombudsperson could make recommendations regarding appropriate steps to be taken as a result of its findings but where the recommendations were not acted upon, the only

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[250] Organization for Security and Co-operation in Europe, *Kosovo International Human Rights Conference (10-11 December 1999)* (28 January 2000), online: http://www.osce.org/kosovo/13089.

[251] *On the Establishment of the Ombudsperson Institution in Kosovo*, UNMIK/REG/2000/38 (30 June 2000) at para. 3.1, online: http://www.unmikonline.org/regulations/2000/re2000_38.htm.

[252] Amnesty International, *The Democratic Republic of Timor Leste: A New Police Service – A New Beginning*, ASA 57/002/2003 (30 June 2003) at 34. See also Linda Reif, *The Ombudsman, Good Governance and the International Human Rights System* (Leiden: Martinus Nijhoff, 2004) at 282-3; Carla Bongiorno, "A Culture of Impunity: Applying International Human Rights Law to the United Nations in East Timor" (2001-2002) 33 Colum Hum Rts L Rev 623; and Amnesty International, *East Timor: Justice Past Present and Future*, ASA 57/001/2001 (26 July 2001).

[253] *Report of the United Nations High Commissioner for Human Rights on Technical Cooperation in the Field of Human Rights in Timor-Leste*, ESC, UN Doc. E/CN.4/2005/115 (22 March 2005) at para. 21 noting the Office of the Provedor for Human Rights and Justice was created in May 2004.

[254] See Reif, *ibid* at 273-282 for a detailed review of the Ombudsperson Institution of Kosovo.

recourse was to draw the matter to the attention of the Special Representative in Kosovo.[255] In practice, many of the recommendations made by the Ombudsperson were ignored.[256]

Although human rights standards applied in Kosovo by virtue of Regulation 1999/24, as amended by Regulation 2000/59,[257] KFOR and UNMIK were immune from the consequences of violating the human rights of Kosovars. This immunity was specifically spelled out in Regulation 2000/47,[258] which required both KFOR and UNMIK to "respect the laws applicable in the territory of Kosovo… insofar as they do not conflict with the fulfillment of the mandate"[259] but stipulated that both organs were "immune from any legal process."[260] Although this immunity created difficulties for UNMIK, and was criticised by members of the international legal community, it was intended to serve a valuable purpose. As noted by the European Commission for Democracy Through Law, this form of immunity is intended to "ensure that international organisations can perform their tasks without undue and uncoordinated interference by courts from individual states and other international institutions with their respective different legal systems."[261] The Ombudsperson denied that there was any justification for this immunity. Although it acknowledged that immunities such as this were intended to protect international organizations from "the unilateral interference by the individual government of the state in which

[255] UNMIK/REG/2000/38, *supra* note 251 at para. 4.11.

[256] Second Annual Report of the Ombudsperson Institution, *supra* note 247 at 2.

[257] *Amending UNMIK Regulation No. 1999/24 on the Law Applicable in Kosovo*, UNMIK/REG/2000/59 (27 October 2000), online: http://www.unmikonline.org/regulations/2000/re2000_59.htm.

[258] *On the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo,* UNMIK/REG/2000/47 (18 August 2000), online: http://www.unmikonline.org/regulations/2000/re2000_47.htm.

[259] *Ibid* at paras. 2.2 and 3.5.

[260] *Ibid* at paras. 2.1 and 3.1.

[261] Council of Europe, European Commission for Democracy Through Law, *Opinion on Human Rights in Kosovo: Possible Establishment of Review Mechanisms*, Opinion No 280/2004 (8-9 October 2004) at para. 63.

they are located,"[262] this justification did not exist in Kosovo because UNMIK itself was acting as the state. There was, in the Ombudsperson's view, "no need for a government to be protected against itself."[263]

Although the Ombudsperson lacked any real authority to do anything more than make recommendations, even this limited ability to effect change with respect to the human rights violations of UNMIK was ultimately eliminated in 2006 when Regulation 2006/6 came into effect. This regulation transferred the office of the Ombudsperson to the government of Kosovo and in so doing, eliminated its authority to deal with matters involving UNMIK,[264] except where there was explicit agreement with the Special Representative to the contrary.[265] According to one commentator, the removal of UNMIK from the Ombudsperson's jurisdiction "weakened the institution in the eyes of the citizens who vested their hopes in this institution for seeking justice for the acts committed by UNMIK officials."[266]

ii. Pre-trial detentions

UNMIK's failure to implement and uphold human rights standards was particularly acute in the area of pre-trial detentions. On 8 March 2000, the OSCE released a report on the

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[262] Ombudsperson Institution in Kosovo, *Report No. 1 on the Compatibility with Recognized International Standards of UNMIK Regulation No. 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo* (18 August 2000) at para. 23, online: http://www.ombudspersonkosovo.org/repository/docs/E4010426a_86354.pdf.

[263] *Ibid*.

[264] See Remzije Istrefi, "Should the United Nations Create an Independent Human Rights Body in a Transitional Administration? The Case of the United Nations Interim Administration Mission in Kosovo (UNMIK)" at 364 in Jan Wouters, et al., *Accountability for Human Rights Violations by International Organisations* (Antwerp: Intersentia, 2010).

[265] *On the Ombudsperson Institution in Kosovo*, UNMIK/Reg/2006/6 (16 February 2006) at para. 3.4, online: http://www.unmikonline.org/regulations/unmikgazette/02english/E2006regs/RE2006_06.pdf.

[266] Murati, *supra* note 230 at 383. See also Ombudsperson Institution in Kosovo, *Fifth Annual Report* (11 July 2006) at 60, online: http://www.ombudspersonkosovo.org/repository/docs/E6050711a.pdf.

expiration of detention periods for persons then detained.[267] In that report, the OSCE noted that as of 10 December 1999, one third of detainees being held by KFOR and UNMIK were detained without indictment in excess of six months contrary to domestic law.[268] The OSCE reviewed the applicable international human rights laws and similarly noted concern that without proper review, these pre-trial detentions were in violation of the ICCPR and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).[269]

In addition to the OSCE, the Ombudsperson was also highly critical of UNMIK detentions. In its report on whether detentions pursuant to executive orders complied with international standards,[270] the Ombudsperson considered whether the Special Representative's practice of detaining individuals complied with article 5 of the ECHR concerning liberty and security of the person. As recognized by the Ombudsperson, article 5 of the ECHR provides an exhaustive list of circumstances in which a person may be deprived of his or her liberty.[271] Relying on the jurisprudence of the European Court of Human Rights, the Ombudsperson noted that "[c]oncepts such as 'preventative detention' or general claims of concern for 'national security,' 'public order' or similar terms that appear in other contexts … are not legitimate grounds for deprivations of liberty under paragraph 1 of Article 5 of the ECHR."[272] The

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[267] Organization for Security and Co-operation in Europe, Legal System Monitoring Section, *Report No. 3: Expiration of Detention Periods for Current Detainees* (8 March 2000), online: http://www.osce.org/kosovo/13037.

[268] *Ibid*. For more serious crimes, domestic law permitted a maximum period of detention of six months without indictment and for less serious crimes, 3 months.

[269] 4 November 1950, ETS No. 5, 213 UNTS 221 (entered into force 3 September 1952). See Day, *supra* note 189 at 191 (where the author notes that pre-trial detentions contravened article 9 of the ICCPR: "In Kosovo, this article not only was directly contravened by UNMIK and KFOR arrests and detentions, but the UNMIK regulations passed in 2000 in fact gave prisoners accused of the same crimes different rights and different periods of detention").

[270] Ombudsperson Institution in Kosovo, *Special Report No. 3 on the Conformity of Deprivations of Liberty under 'Executive Orders' with Recognised International Standards* (29 June 2001), online: http://www.ombudspersonkosovo.org/repository/docs/E4010629a.pdf.

[271] Ombudsperson Institution, *Special Report No. 3*, *supra* note 270 at para. 9.

[272] *Ibid.* See *Jecius v Lithuania*, App No. 34578/97, 35 EHRR 16 (31 July 2000) at para. 50 which holds that "a person may be deprived of his liberty only for the purpose specified in Article 5(1). A person may be detained within the meaning of Article 5(1)(c) only in the context of criminal proceedings…"

Ombudsperson observed that persons detained by the Special Representative were detained pursuant to Executive Orders that appeared to be based on perceived threats posed by these individuals and the corresponding duty of UNMIK to ensure a "safe and secure environment" and provide "public safety and order."[273] The Ombudsperson concluded that deprivations of liberty based on these justifications fell "foul of the requirements of paragraph 1 of Article 5."[274] The Ombudsperson went on to consider whether any of the domestic laws of Kosovo might justify detentions ordered by the Special Representative and similarly concluded that "no law currently in force in Kosovo provides for deprivations of liberty grounded solely on the discretion of the" Special Representative.[275] The Ombudsperson called for an immediate stop to detentions pursuant to Executive Order of the Special Representative.[276]

UNMIK justified its reliance on Executive Orders to retain individuals in custody by asserting that the situation in Kosovo constituted an "emergency situation" and that its "mandate was adopted under Chapter VII, which means that the situation calls for extraordinary means and force can be used to carry out the mandate."[277] In a report submitted to the Human Rights Committee, UNMIK set out its policy regarding the applicability of human rights conventions to its actions. The report outlined the human rights framework in Kosovo and explained that human rights treaties "may be part of the applicable law in accordance with section 1 of UNMIK Regulation No. 1999/25."[278] However the report also stressed that "this does not imply that these

[273] *Ibid* at para. 10.

[274] *Ibid.*

[275] *Ibid* at para. 13.

[276] *Ibid* at para. 32.

[277] Carsten Stahn, "Justice Under Transitional Administration: Contours and Critique of a Paradigm" (2004-2005) 27 Hous J Int'l L 311 at 321, citing Press Briefing, Susan Manuel, UNMIK Police (2 July 2001).

[278] *Report Submitted by the United Nations Interim Administration Mission in Kosovo to the Human Rights Committee on the Human Rights Situation in Kosovo since June 1999*, UN Doc. CCPR/C/UNK/1 (2006) at para. 123.

treaties and conventions are in any way binding on UNMIK."[279] The authors of the report went on to say:

> It must be remembered throughout that the situation in Kosovo under interim administration by UNMIK is *sui generis*. Accordingly, it has been the consistent position of UNMIK that treaties and agreements, to which the State Union of Serbia and Montenegro is a party, are not automatically binding on UNMIK.[280]

Regardless of the reasons underlying the UNMIK's failure to uphold human rights standards, the fact remains that despite the Ombudsperson's pronouncements, UNMIK was not held accountable for its actions. There is a strong policy argument that the UN should be bound by human rights standards. However, it does not follow that the UN is legally required to implement these standards. In the next section, I discuss the applicability of human rights standards to the UN and highlight the impossibility of holding the UN accountable for violations of those standards.

iii. Applicability of human rights standards to the UN as interim administrator

One of the pitfalls of having the UN act as an interim administrator is that the UN is not bound by human rights conventions. This is consistent with the leading decision of the European Court of Human Rights and the scholarly discussion that this decision has provoked regarding whether human rights standards bind the UN in the context of an interim administration. In the 2007 judgment of the European Court of Human Rights in *Behrami and Saramati*,[281] troop-contributing countries in Kosovo escaped liability for alleged violations of the ECHR on the basis that their actions were attributable to the UN. Although the facts of the *Behrami* case and

[279] *Ibid* at para. 123.

[280] *Ibid* at para. 124.

[281] *Behrami v France*; *Saramati v France,* App Nos. 71412/01 and 78166/01, 46 ILM 746 (2007).

the *Saramati* case differ, both cases raise similar issues. In the *Behrami* case a boy was killed, and his brother injured, by an unexploded cluster bomb dropped during the NATO bombing in 1999. A subsequent investigation revealed that a French KFOR officer was aware of the site and the potential for unexploded ordinance but that it was not a high priority for mine clearance operations.[282] A claim was commenced by the father of the Behrami children alleging that France had not respected its obligations under Security Council Resolution 1244 (1999).[283] Behrami argued that pursuant to article 2 of the ECHR France had failed to mark and/or de-mine the area in question and was therefore liable.[284] In the *Saramati* case the claimant argued that human rights as guaranteed by the ECHR, had been violated as a result of his extra-judicial detention by KFOR, lasting approximately six months.

The European Court of Human Rights reviewed the circumstances of each case and found that in both cases, the actions were attributable to the UN. The Court found that "KFOR was exercising lawfully delegated Chapter VII powers of the [Security Council] so that the Mr. Saramati's detention was … 'attributable' to the UN."[285] In the case of *Behrami*, the Court concluded that the failure to demine was attributable to UNMIK as a "subsidiary organ of the UN,"[286] and the failure to demine was therefore attributable to the UN.[287] Because of these findings, the European Court of Human Rights concluded that it did not have jurisdiction to deal with the claims. Although the UN has legal personality, it is not a contracting party to the ECHR. The Court stated:

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[282] *Ibid* at para. 6.

[283] *Ibid* at para. 7.

[284] *Ibid* at para. 61.

[285] *Ibid* at para. 141.

[286] *Ibid* at para. 143.

[287] Contrast the result in *Behrami and Saramati* to the judgment in *Al-Jedda v United Kingdom*, App. No. 27021/08 [2011] ECHR 1092 where the court declined to find that the actions of British forces were attributable to the UN. The relevant UN Security Council resolutions did not give the UN a military role, nor did they give the UN effective control or ultimate authority.

> …the Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC Resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court. To do so would be to interfere with the fulfilment of the UN's key mission in this field including… with the effective conduct of its operations. It would also be tantamount to imposing conditions on the implementation of the UNSC Resolution which were not provided for in the text of the Resolution itself.[288]

The *Behrami and Saramati* decision has been severely criticized by scholars and experts. According to Marko Milanovic and Tatjana Papic, one of the primary weaknesses of the judgment was the court's linkage of the issue of delegation to the question of attribution.[289] This issue was also noted by Aurel Sari in his work, where he said:

> While the Security Council might have retained such 'ultimate authority and control' over the international security presence as was necessary to render the delegation of its powers lawful under the Charter, the question the ECtHR should have asked itself is whether or not the Security Council exercised such control over KFOR that was sufficient to render the conduct of KFOR attributable to the UN in accordance with the law of international responsibility. The necessary level of control required in this context is that of 'effective control,' not overall control or ultimate authority.[290]

The European Court of Human Rights cited a report prepared by the International Law Commission wherein the authors of that report provide draft articles for the attribution of conduct as between a state and an international organization.[291] However, as noted by Milanovic and Papic,[292] the court failed to address the International Law Commission's commentary which states:

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[288] *Ibid* at para. 149.

[289] Marko Milanovic & Tatjana Papic, "As Bad as it Gets: The European Court of Human Rights's *Behrami and Saramati* Decision and General International Law" (2009) 58 Int'l & Comp LQ 267 at 279. See also Marko Milanovic, *Extraterritorial Application of Human Rights Treaties* (New York: Oxford University Press, 2011) at 149.

[290] Sari, Aurel, "Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati Cases" (2008) 8 Hum Rts L Rev 151 at 164.

[291] *Behrami and* Saramati, supra note 281 at paras. 29-34. See *Report of the International Law Commission*, UN Doc. A/59/10 (2004).

[292] Milanovic & Papic, *supra* note 289 at 286.

> [T]he articles do not say, but only imply, that conduct of military forces of States or international organizations is not attributable to the United Nations when the Security Council authorizes States or international organizations to take necessary measures outside a chain of command linking those forces to the United Nations.[293]

The difficulty with the reasoning of the Court in the *Behrami and Saramati* is that it leads to the conclusion that "the conduct of national contingents taking part in authorised operations is attributable to the UN alone."[294] By exonerating troop-contributing nations and NATO from accountability for their inactions or actions, aggrieved persons were left with no recourse to a court to redress human rights violations. According to Milanovic and Papic: "Kosovo has now truly become a lawless land in Europe, a legal black hole over which there is no independent human rights supervision."[295]

The UN's failure to comply with international human rights standards in Kosovo, and the corresponding lack of an independent adjudicative forum or court in which to address these violations, raised the ire of the international community and undermined the support of the local population. While there may be valid reasons for exempting the UN from the application of human right standards when it acts as a territorial administrator, there are strong policy reasons for the UN to apply human rights standards to all of its operations. The conclusion of the European Court of Human Rights in the *Behrami and Saramati* case illustrates one of the major drawbacks of having the UN act as interim administrator in a post-conflict state.

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[293] *Ibid* at 286, citing the work of the International Law Commission in 2004. And see *Report of the International Law Commission*, UN Doc. A/66/10 (2011).

[294] Sari, *supra* note 290 at 167.

[295] Milanovic & Papic, *supra* note 289 at 295.

G. Conclusions regarding interim administrations

UN-administered interim administrations are a powerful tool in the post-conflict peacebuilding arsenal. In contrast to occupations, interim administrations provide a legally sound framework that can be implemented in a variety of geo-political situations. They do not require international armed conflicts; they do not require the consent of the host nation; and they are not limited in the transformative objectives they can undertake. However, the power and flexibility of such an approach creates significant difficulties for actual implementation. A foreign-made solution that ignores the local history and cultural mores may lead to resentment, criticism and failure. Although the interim administration in East Timor was more successful than the interim administration in Kosovo, both missions suffered from a lack of public support. Public support is difficult to achieve when local government and infrastructure is swept aside by the interim administration who itself is not bound by the same human rights standards it is trying to impose. Although interim administrations can provide a strong framework for the *jus post bellum*, the imposition of a new government, new laws and a new judiciary is not always the most effective way to move forward and connect with a population. For this reason, a third approach to post-conflict peacebuilding needs to be considered, namely the light footprint approach.

PART III

The Light Footprint Approach

A. Introduction

The peacebuilding model used in Afghanistan differs from the models applied in Iraq, East Timor, and Kosovo in that the authority to govern the state remained vested with the Afghan people. Rather than taking control of the state, the UN adopted an approach that has become known as the light footprint approach, whereby UN and international resources deployed to assist the Afghans develop their own post-conflict solution. By supporting an Afghan solution, it was thought possible to avoid the pitfalls previously experienced with interim administrations and better address Afghanistan's unique cultural circumstances. However, as will be discussed in Part III, it is my view that the light footprint approach may have provided insufficient support resulting in serious human rights violations and difficulty with the implementation of the rule of law. Nevertheless, I have concluded that for future post-conflict peacebuilding, the light footprint approach, with extensive UN involvement, offers the most possibilities for success.

In this Part, I will summarize the background to recent international involvement in Afghanistan beginning with the events that led to the fall of the Taliban regime in 2001. I will then discuss the plan that was developed for Afghanistan's post-conflict reconstruction and outline the timetable to establish democratic governance, leading to a presidential election. I will discuss the reasons the light footprint approach was adopted and the consequences of adopting this approach, particularly with regard to security and the establishment of the rule of law. As in Kosovo and East Timor, Afghanistan faced a number of difficulties related to drafting new laws

and the re-establishment of a judiciary. In addition to these problems, peace builders were faced with the challenge of how best to deal with the informal justice system. As I will discuss below, the informal justice system continued to thrive, often at the expense of the new formal system that was being developed by the international community.

I have concluded that the light footprint approach, as implemented in Afghanistan, did not provide Afghan authorities with the level of support that was required. Afghanistan required significant assistance and mentorship in its reconstruction efforts and due to the piecemeal approach adopted by the international community, the most important goals of the reconstruction effort were not implemented in a timely manner, thus undermining the overall reconstruction. However, in my view, because the light footprint approach encourages the local population to take responsibility for rebuilding efforts, the poor results obtained in Afghanistan should not lead to the conclusion that the light footprint approach can never work. Rather, I advocate a light footprint "plus" approach whereby local authorities lead post-conflict peacebuilding with extensive mentorship and support from the international community. A light footprint "plus" approach should include a UN-lead to centralize the decision making process and help streamline reconstruction priorities. Further, post-conflict peacebuilding efforts should consider and incorporate existing internal justice systems and not seek to replace them with systems that are at odds with local traditions.

B. Background to international involvement in Afghanistan

Following the attack on the United States by Al-Qaeda on 11 September 2011, the UN Security Council adopted Resolution 1368 (2001), condemning the attacks "in the strongest terms" and recognizing "the inherent right of individual and collective self-defence in

accordance with the Charter." [296] On 7 October 2001, the United States and the United Kingdom began Operation Enduring Freedom, a military operation in Afghanistan "against Al-Qaeda terrorist training camps and military installations of the Taliban regime."[297] Other members of NATO including, Australia, Canada, France and Germany ultimately supported the operation, though they were not involved in the initial military strikes.[298] On 8 October 2001, the Secretary-General of NATO issued a statement supporting the attack, pledging support, and indicating an intent to play a role in the eradication of terrorism.[299]

By November 2001, the Taliban regime had lost its foothold in the capital of Kabul and its hold on the country overall was weakening. On 13 November 2001, the UN Security Council met to discuss UN involvement in Afghanistan. It was at this meeting that Mr. Brahimi, presented a plan for Afghanistan's reconstruction. Mr. Brahimi's plan included the following recommendations: a meeting of key Afghan interest holders to develop a framework for reconstruction; a security force for Kabul; and the creation of a provisional council composed of Afghans to be followed by a transitional administration, also composed entirely of Afghans.[300] Mr. Brahimi recommended that the transitional administration draft a new constitution for Afghanistan that would lead to the creation of an Afghan government.[301] The plan was endorsed by UN Security Council Resolution 1378 (2001).[302]

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[296] SC Res. 1368 (2001), UNSC, 4370th Mtg, UN Doc. S/RES/1368 (2001) at preamb. para. 3 and para. 1.

[297] "Bush's Remarks on U.S. Military Strikes in Afghanistan," *New York Times, Late Edition (East Coast)* (8 October 2001) B6.

[298] *Ibid*.

[299] North Atlantic Treaty Organization, Press Release (2001) 138, "Statement by NATO Secretary General, Lord Robertson" (8 October 2001), online: http://www.nato.int/cps/en/natolive/opinions_18992.htm?mode=pressrelease.

[300] UNSC, 56th Year, 4414th Mtg, UN Doc S/PV.4414 (2001) at 5 and 6.

[301] *Ibid* at 6.

[302] SC Res. 1378 (2001), UNSC, 4415th Mtg, UN Doc. S/RES/1378 (2001) at preamb. para. 8.

A meeting of Afghan stakeholders was held in Bonn, Germany in December 2001, resulting in the Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions[303] of 5 December 2001 (the Bonn Agreement). The Bonn Agreement set out the framework for Afghanistan's post-conflict reconstruction and included detailed timelines for the establishment of an independent Afghan government. An interim authority was to be created which would convene an emergency grand assembly, known as a Loya Jirga, within six months.[304] The Loya Jirga would then create a transitional authority, tasked with convening a constitutional Loya Jirga within 18 months. The timeline set out in the Bonn Agreement was very aggressive. Nonetheless presidential elections were successfully held on 9 October 2004. Unfortunately, the security situation in Afghanistan remained volatile throughout this entire period and the country suffered a significant resurgence of violence in 2006.[305]

It is worth noting that unlike Kosovo, the UN declined to take control of the state as a whole and chose to follow a more modest approach. According to Professor (now Dean) Simon Chesterman, the UN mission in Afghanistan "represents a correction to the increasing aggregation of sovereign powers exercised in U.N. operations since the mid-1990s."[306] Mr. Brahimi's light footprint approach was developed as a result of his meetings with Afghan tribal leaders, representatives of various Afghan communities, and the presidents of Iran and Pakistan. The approach was based on the principle, expressed particularly by the presidents of Iran and Pakistan, that:

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[303] UN Doc. S/2001/1154 (5 December 2001).

[304] *Ibid* at 3.

[305] *Report of the Secretary-General: The Situation in Afghanistan and its Implications for International Peace and Security*, UN Doc. A/61/799-S/2007/152 (15 March 2007) at para. 2.

[306] Simon Chesterman, "Rough Justice: Establishing the Rule of Law in Post-Conflict Territories" (2005) 20 Ohio St J on Disp Resol 69 at 70-71.

> …it was not a good idea for outsiders to impose a solution on the people of Afghanistan and … that the international community should help the Afghans to find [a] political solution on their own because only such a home-grown solution would be credible, legitimate and sustainable.[307]

Following this approach and using the Bonn Agreement as a guide, the Secretary-General outlined the proposed structure of the United Nations Assistance Mission in Afghanistan (UNAMA).[308] In his report, dated 18 March 2002, the Secretary-General proposed a mission structured in support of an Afghanistan built by Afghans. Specifically, he wrote:

> UNAMA should aim to bolster Afghan capacity … relying on as limited an international presence and on as many Afghan staff as possible, and using common support services where possible, thereby leaving a light expatriate 'footprint'.[309]

C. Creating security in Afghanistan

With its emphasis on Afghans leading the post-conflict peacebuilding efforts, the Bonn Agreement contained only limited provisions for security. The Agreement requested only a small UN-mandated security force for Kabul[310] and it called on all Afghan factions to withdraw their forces from the capital.[311] It did not contain any other requests for military forces or contemplate how security would be created for the rest of the country. The request for an International Security Assistance Force (ISAF)[312] was met with approval by Security Council Resolution 1386 (2001).[313] According to the resolution, the purpose of ISAF was to provide security so that the

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[307] UN Doc S/PV.4414 (13 November 2001), *supra* note 300 at 4.

[308] *Report of the Secretary-General: The Situation in Afghanistan and its Implications for International Peace and Security*, UN Doc. A/56/875-S/2002/278 (18 March 2002).

[309] *Ibid* at 16.

[310] Bonn Agreement, *supra* note 303, annex I, para. 3.

[311] *Ibid*, annex I, para. 4.

[312] Initially, ISAF was led by nations on rotating six-month terms. In 2003, NATO assumed the leadership of ISAF.

[313] SC Res. 1386 (2001), UNSC, 4443rd Mtg, UN Doc S/RES/1386 (2001) at para. 1.

capital could be demilitarized, thereby allowing the political settlement to be implemented without a devolution to civil war. Mr. Brahimi reported to the Security Council that this type of security was required to prevent the capital from being controlled by any one power.[314]

While the UN focussed on security in Kabul, the United States continued to lead Operation Enduring Freedom, hunting for members of the Taliban and Al Qaeda throughout greater Afghanistan. Unfortunately, this fractured security arrangement resulted in three separate and distinct problems. First, as reported by Klaus-Peter Klaiber, the European Union Special Representative in Afghanistan from December 2001-July 2002: "major regions of Afghanistan … were left without any protection with the effect that the emerging central administration only exercised control over a small part of the country."[315] This situation in turn "impeded the development of effective government institutions at the provincial and local levels."[316] The second problem developed as a result of the continued actions of Operation Enduring Freedom in supporting local warlords. From time to time, coalition forces relied on the help of warlords to root out members of Al Qaeda and the Taliban.[317] This cooperation undermined the work of the UN by obstructing militia demobilization, permitting the narcotics trade to thrive, and undermining state-sponsored justice forums by permitting warlords to dominate informal community-based forums.[318] Furthermore, some of the warlords that were supported by the Operation Enduring Freedom were "suspected of egregious war crimes against Afghan civilians

[314] UN Doc S/PV.4414 (13 November 2001), *supra* note 300 at 6.

[315] Klaus-Peter Klaiber, "The European Union in Afghanistan: Lessons Learned" (2007) 12 Eur Foreign Aff Rev 7 at 8.

[316] *Report of the Secretary-General: The Situation in Afghanistan and its Implications for International Peace and Security*, UN Doc. A/60/224-S/2005/525 (12 August 2005) at para. 24.

[317] See Ebrahim Afsah & Alexandra Hilal Guhr, "Afghanistan: Building a State to Keep the Peace" (2005) 9 Max Planck YB UN L 373 At 454.

[318] *Ibid* at 454.

during the civil war years."[319] Support of these suspected criminals by Operation Enduring Freedom undermined the UN's efforts to rebuild a state governed by the rule of law.

The third problem that emerged related to a pattern of human rights abuses and violations committed by states participating in Operation Enduring Freedom. As reported by Human Rights Watch in 2005, the US and coalition forces "continue to arbitrarily detain civilians, use excessive force during arrests of non-combatants, and mistreat detainees."[320] The implications of these allegations were significant given the lack of accountability for US actions in Afghanistan and the lack of forums through which the victims of human rights abuses could obtain redress. Operation Enduring Freedom operated throughout the region with perceived impunity. In early 2005, Human Rights Watch reported:

> Ordinary civilians caught up in military operations and arrested are unable to challenge the legal basis for their detention or obtain hearings before an adjudicative body. They have no access to legal counsel. Release of detainees, where it did occur, is wholly dependent on decisions of the U.S. military command, with little apparent regard for the requirements of international law – whether the treatment of civilians under international humanitarian law or the due process requirements of human rights law.[321]

The impact of these violations cannot be ignored. As was seen in Kosovo, it is impossible to expect the populace to embrace human rights requirements when members of the international community are violating these same standards. The activities of Operation Enduring Freedom resulted in anger and frustration, and ultimately resulted in increased popular support for the Taliban, which further derailed the mission.[322]

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[319] Faiz Ahmed, "Afghanistan's Reconstruction, Five Years Later: Narratives of Progress, Marginalized Realities, and the Politics of Law in a Transitional Islamic Republic" (2007) 10 Gonz J Int'l L 269 at 281.

[320] Human Rights Watch, "Afghanistan Country Summary" (January 2005) at 4, online: http://www.hrw.org/legacy/wr2k5/pdf/afghan.pdf.

[321] *Ibid.*

[322] Stephen Carter & Kate Clark, *No Shortcut to Stability – Justice, Politics and Insurgency in Afghanistan* (London: Royal Institute of International Affairs, 2010) at 7.

The lack of security outside of Kabul, the effect of Operation Enduring Freedom's actions on the local population, and "popular alienation … [resulting from] … inappropriate Government appointments, tribal nepotism and monopolization of power"[323] enabled warlords to gain control of the regions and install their own personal armies.[324] The Taliban regrouped and mounted an effective insurgency which peaked in 2006.[325] As noted by Professor Paul Miller, of the National Defense University in Washington, D.C., absent a strong governmental presence throughout the territory, combined with a lack of security, "nothing stood in their way."[326] The international community reacted to the insurgency and ultimately bestowed upon ISAF the responsibility for security throughout Afghanistan, with this responsibility taking effect on 5 October 2006.[327] Despite this positive change, in my view, the initial lack of security left lasting scars on the mission's success.

D. Afghan rule of law initiatives

Although the light footprint approach was considerably different than the legal frameworks used in Kosovo and East Timor, the mission in Afghanistan faced many of the same issues concerning the implementation of rule-of-law initiatives. These issues concerned both the development of new laws for Afghanistan as well as rebuilding the judiciary. In addition, peace builders in Afghanistan faced a unique problem related to the existing informal justice system. Despite efforts to strengthen the formal justice system, informal community-based systems

[323] *Report of the Secretary-General*, UN Doc. A/61/799-S/2007/152 (15 March 2007), *supra* note 305 at para. 5.

[324] Klaiber, *supra* note 315 at 8.

[325] *Report of the Secretary-General*, UN Doc. A/61/799-S/2007/152 (15 March 2007), *supra* note 305 at para. 2.

[326] Paul D. Miller, "Finish the Job – How the War in Afghanistan Can Be Won" (2011) 90 Foreign Aff 51 at 59.

[327] *Report of the Secretary-General*, UN Doc. A/61/799-S/2007/152, *supra* note 305 at para. 33.

continued to thrive. As will be discussed, an overall lack of coordination amongst those involved in peacebuilding efforts resulted in little progress being made to rebuild the rule of law in Afghanistan. My discussion will focus on the need for a new constitution, the creation of laws, the rebuilding of the Afghan judiciary and the impact of an existing informal legal system.

i. Creating an Afghan constitution

The Bonn Agreement of 2001 provided that Afghanistan would initially adopt the constitution that had been in effect in 1964, excluding the provisions related to the monarchy.[328] The 1964 constitution was put in place during a time of relative peace in Afghanistan and so, as Chesterman notes, this was "an attempt to connect the peace process with memories of a more stable Afghanistan."[329] A Constitutional Commission was to be created within two months of the commencement of the Transitional Authority with assistance from UNAMA. Within 18 months of the creation of the Transitional Authority, the Bonn Agreement required that a constitutional Loya Jirga be convened.[330] The constitutional Loya Jirga completed its work on 4 January 2004 with "almost unanimous agreement"[331] on the final draft of a new constitution.

Although the new constitution was drafted over a relatively short time period, the drafting process was not without challenges. As reported by the International Crisis Group, factionalism was present within the 35-member Constitutional Commission and its work

[328] Bonn Agreement, *supra* note 303 at II(1)(i).

[329] Chesterman, *supra* note 306 at 90.

[330] Bonn Agreement, *supra* note 303 at I(6).

[331] *Report of the Secretary-General: The Situation in Afghanistan and its Implications for International Peace and Security*, UN Doc. A/58/742-S/2004/230 (19 March 2004) at para 2.

remained "hidden from public view."[332] The Constitutional Commission travelled throughout Afghanistan to give interested parties an opportunity to provide their input. Yet the Commission decided to keep the draft constitution confidential; "a position that UNAMA supported,"[333] according to the International Crisis Group. As a result, the consultation was limited, as the public was not actually able to comment on the proposed document.[334] The draft constitution was released for public viewing on 3 November 2004, only one month prior to the convening of the constitutional Loya Jirga to consider the draft document on 14 December 2004. Although the constitutional Loya Jirga ultimately accepted the draft constitution, the "assembly almost collapsed after a … delegate … accused several participants, including the chairman, of committing war crimes."[335] The International Crisis Group further reported that fighting amongst participants continued with "several more delegates stag[ing] a walkout."[336] Against this backdrop of ongoing civil insecurity and unrest, Human Rights Watch described the process as being "marked by widespread threats and political repression by warlord factions."[337]

Press reports suggest that in the past, the UN had been critical of the International Crisis Group for its reporting on the Afghan constitutional process, with the UN alleging that the Group's report was "ill-informed and based on factual inaccuracies."[338] However, even the report of the Secretary-General, which followed the work of the constitutional Loya Jirga, described the new constitution as being a "significant achievement in view of the many controversial issues

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[332] International Crisis Group, "Reforming Afghanistan's Broken Judiciary: Asia Report No. 195" (17 November 2010) at 8.

[333] *Ibid* at 8.

[334] *Ibid* at 8.

[335] *Ibid* at 8.

[336] *Ibid* at 9.

[337] Human Rights Watch, *supra* note 320 at 3.

[338] Sanjoy Majumder, "UN officals in Afghanistan have rejected a report by an international think-tank describing the process of choosing a new constitution for the country as flawed" BBC News (15 June 2003), online: http://news.bbc.co.uk/2/hi/south_asia/2991592.stm.

that emerged and nearly paralysed the assembly in its final days."[339] The aggressive timeline imposed by the Bonn Agreement also contributed greatly to the disruption of the process. Mr. Brahimi stated that the timeline imposed unnecessary and difficult requirements which may have undermined the development and imposition of the new constitution as a whole. He has written:

> In hindsight, I strongly believe that it would have been much better to keep that constitution for a few more years rather than artificially decide … that a brand new constitution had to be produced barely two years after the adoption of the Bonn Agreement. Actually, the constitutional process in Afghanistan was reasonably successful. But failure confronted the Afghan delegates for a good part of the drafting period and, all in all, the added value brought by the new constitution was not worth the risks taken, the energy and the financial resources spent and for a time, the bitterness produced.[340]

In addition, the final constitution that was ultimately adopted was not without its own problems. It contained provisions that guaranteed equality between men and women while also providing "a framework for the establishment of the rule of law"[341] consistent with "the tenets and provisions" of Islam.[342] The guarantees of equality failed to take into account historic Afghan legal approaches, particularly related to the treatment of women and resulted in a strain between Islamic principles and internationally recognized human rights standards.[343] While this tension continued throughout the period of post-conflict peacebuilding, Professor Miller is of the view that, "this constitution is nonetheless an unmitigated improvement over Taliban lawlessness and one of the most progressive constitutions in Central Asia or the Middle East."[344]

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[339] *Report of the Secretary-General*, UN Doc. A/58/742-S/2004/230 (19 March 2004), *supra* note 331 at para. 2.

[340] Brahimi, State Building in Crisis, *supra* note 13 at 8.

[341] *Report of the Secretary-General*, UN Doc. A/58/742-S/2004/230 (19 March 2004), *supra* note 331 at para. 3.

[342] *The Constitution of Afghanistan*, ratified 26 January 2004, art. 3.

[343] In November 2013, Human Rights Watch was reportedly provided with a draft amendment to the penal code which would have permitted adulterers to be stoned; a common practice in the Taliban era. Following international media coverage, President Hamid Karzai insisted that the practice would not be reintroduced, indicating that the Afghan minister of justice had rejected the proposed amendment. See Emma Graham-Harrison, "Afghanistan considers reintroduction of public stoning for adulterers" *The Guardian* (25 November 2013), online: http://www.theguardian.com/world/2013/nov/25/afghanistan-reintroduction-public-stoning-adulterers. See also Emma Graham-Harrison "Stoning will not be brought back, says Afghan president," *The Guardian* (28 November 2013), online: http://www.theguardian.com/world/2013/nov/28/stoning-not-brought-back-afghan-president-karzai

[344] Miller, *supra* note 326 at 55.

ii. Creating laws for Afghanistan

Although the introduction of the new constitution was a cautious success, development of the rest of the justice sector in Afghanistan was a relative failure. Chesterman has noted that because the UN was not the lead nation on the rule of law projects, "it appeared that the rule of law was simply not a priority."[345] In 2004, the United States Institute for Peace noted that "relatively little attention is being paid to the justice sector; the field has been left largely to 'lead nation' Italy, which is widely seen as focused mainly on implementation of its own projects, rather than coordination of broader efforts."[346]

One of the products of Italy's efforts was a new code of criminal procedure, known as the Interim Criminal Procedure Code for Courts, which was introduced in February 2004. The new code contained provisions that were intended to "extend the justice system to areas of the country where courts … are not functioning."[347] These provisions would allow "the gradual transfer of criminal cases to the formal justice system."[348] The code also contained "[t]ime limits on the initial period of detention upon arrest and phases of investigation."[349] Unfortunately, these time limits ignored the realities of rural Afghanistan where travel is slow making the artificial time limits impossible to obey. Further, in the drafting process, Italy failed to make allowances for the existing legal culture. As explained by Faiz Ahmed, an assistant professor at Brown University specializing in comparative Islamic legal history: "no Afghan or even Islamic jurists were consulted in the code's drafting process, nor was Afghan customary law or Islamic law a

[345] Chesterman, *supra* note 306 at 94-95.

[346] United States Institute for Peace, "Special Report 117: Establishing the Rule of Law in Afghanistan" (March 2004) at 5.

[347] *Ibid* at 8.

[348] *Report of the Secretary-General*, UN Doc. A/58/742-S/2004/230 (19 March 2004), *supra* note 331 at para. 27.

[349] International Crisis Group, "Reforming Afghanistan's Broken Judiciary," *supra* note 332 at 10.

fundamental source for this significant legal document."[350] The International Crisis Group referred to the new code as being "one of the international community's most egregious failures to accommodate and incorporate Afghan concerns."[351] While the UN Secretary-General adopted a less critical position, indicating that the interim code was in need of reform and noting that it had been written "to suit an immediate post-conflict environment,"[352] the code clearly represents a thoughtless and ineffective first attempt, highlighting the difficulty with the imposition of the rule of law by an outside participant.

iii. The Afghan judiciary

In addition to the problems associated with the code of criminal procedure, the implementation of the rule of law was additionally hampered by an inexperienced and corrupt judiciary. In 2006, the UN Secretary-General reported that two thirds of judges lacked proper levels of training and education to carry out their role in the developing nation.[353] The United States Institute for Peace was more emphatic in their reporting, noting that "many judges … do not have a legal education."[354] The process for the appointment of judges was governed more by corruption and political influence, rather than merit. Prior to 2006, it was alleged that the former

[350] Ahmed, *supra* note 319 at 287.

[351] International Crisis Group, "Reforming Afghanistan's Broken Judiciary," *supra* note 332 at 2.

[352] *Report of the Secretary-General*, UN Doc. A/61/799-S/2007/152 (15 March 2007), *supra* note 305 at para. 48.

[353] *Report of the Secretary-General: The Situation in Afghanistan and its Implications for International Peace and Security*, UN Doc. A/61/326-S/2006/727 (11 September 2006) at para. 54

[354] United States Institute for Peace, Special Report 117, *supra* note 346 at 7. According to the Center for Policy and Human Development, *Afghanistan Human Development Report 2007 - Bridging Modernity and Tradition: Rule of Law and the Search for Justice* (Islamabad: Army Press, 2007) at 70, one fifth of judges only have primary or secondary high school education.

Supreme Court Chief Justice "appointed dozens of unqualified mullahs to the bench and parcelled out judicial staff posts to his cronies."[355]

The unstable security situation in Afghanistan also contributed to a lack of impartiality and independence in the judiciary. Two judges were murdered in May and June of 2006. One was shot dead and the other was abducted and killed.[356] In August of 2007, a further four judges were killed.[357] In addition to the physical danger, there were also insufficient processes in place to ensure impartiality. The United States Institute for Peace noted that with salaries of only $36 per month, "corruption in the judiciary is considered to be rampant."[358]

Unlike in Kosovo and East Timor, international judges, who might have provided mentorship and quality control, did not replace or augment local Afghan judges. This was likely not a viable option given that Afghanistan maintained its sovereign government and would not have been amenable to giving up control in this important area. While additional training may have eventually solved the problems with inexperience, training would not have overcome the lack of independence caused by poor security, poor remuneration and the presence of political interference.

[355] International Crisis Group, "Reforming Afghanistan's Broken Judiciary," *supra* note 332 at 2.

[356] *Report of the Secretary-General*, UN Doc. A/61/326-S/2006/727 (11 September 2006), *supra* note 353 at para. 55.

[357] *Report of the Secretary-General: The Situation in Afghanistan and its Implications for International Peace and Security*, UN Doc. A/62/345-S/2007/555 (21 September 2007) at para. 37.

[358] United States Institute for Peace, Special Report 117, *supra* note 346 at 7.

iv. The informal justice system

One of the most profound difficulties faced by the international community in the development of the Afghan justice system was how to manage the informal justice system. Afghanistan has traditionally relied on community-based mechanisms, known as jirgas or shuras, to resolve disputes. According to Ali Wardak, associate professor of criminology at the University of Glamorgan, jirgas and shuras historically dealt with a broad range of issues ranging from boundary disputes to serious criminal matters including murder.[359] Jirgas and shuras are generally composed of community elders who rely on local laws and customs to resolve disputes.[360] A survey conducted in 2012 revealed that 87% of Afghans thought jirgas and shuras were fair and trusted as opposed to 68% who felt that state courts were fair and trusted.[361] As the 2007 Human Development Report notes: "jirgas/shuras are shown to be more accessible, more efficient … perceived as less corrupt, and more trusted by Afghans compared to formal state courts."[362] A 2012 report described consistently similar results in favour of the jirgas/shuras in surveys taken annually since 2008, notwithstanding the ongoing efforts of the international community.[363]

However, despite the popular support, there are a number of issues that make jirgas and shuras unappealing to international donors. Women are generally excluded from decision-making[364] and in some regions, may be offered into marriage as a remedy for disputes.[365] In

[359] Ali Wardak, "State and Non-State Justice Systems in Afghanistan: The Need for Synergy" (2010-2011) 32 U Pa J Int'l L 1305 at 1315.

[360] *Ibid*.

[361] Nancy Hopkins, ed, *Afghanistan in 2012: A Survey of the Afghan People* (San Francisco: Asia Foundation, 2012) at 154.

[362] Human Development Report 2007, *supra* note 354 at 10.

[363] Asia Foundation Survey 2012, *supra* note 361 at 148-156.

[364] Wardak, *supra* note 359 at 1316.

[365] *Ibid* at 1318.

addition, in some regions, local warlords control the process.[366] Because of these problems, jirgas and shuras do not comply with internationally accepted human rights standards. As a result, little international attention has been devoted to developing non-state dispute resolution processes or in finding ways to incorporate them into the broader Afghan justice system. This is problematic, for a number of reasons. First, the laws and processes being developed for the state justice system lack legitimacy because they do not account for cultural and historic legal norms present in Afghan society.[367] Second, despite the lack of formal monitoring mechanisms to ensure compliance with the law, [368] the majority of Afghans take their disputes to the informal jirgas and shuras because there is a lack of trust in the formal, state-run justice system.[369]

v. Conclusions regarding rule of law initiatives

Although the international community rushed to create a new Afghan constitution, the level of attention given to other rule of law initiatives was inadequate. Due to a lack of coordination amongst international donors and insufficient funding, other rule of law initiatives failed to garner the results that were necessary to push Afghanistan forward with its reforms. With the problems compounding existing difficulties and the insurgency mounting, significant efforts were made to create a cohesive plan for "enhanced strategic coordination in justice sector reform."[370] To that end, the governments of Italy and Afghanistan and the UN co-hosted a conference in Rome in July 2007. At the conference, "consensus was reached on the need for a

[366] *Ibid* at 1319. But see the Human Development Report 2007, *supra* note 354 at 10 which asserts that "contrary to public perception … regional commanders and local militia do not often dominate decision making within jirgas/shuras."

[367] Human Development Report 2007, *supra* note 354 at 99.

[368] *Ibid* at 99-100.

[369] Wardak, *supra* note 359 at 1314.

[370] *Report of the Secretary-General*, UN Doc. A/61/799-S/2007/152 (15 March 2007), *supra* note 305 at para. 51.

national justice program" [371] for Afghanistan. Donors also pledged US $360 million to rule of law projects over five years.[373]

As to this development, Mr. Brahimi stated:

> The international community, including the United Nations is just starting to pay enough attention to rule-of-law issues. In Afghanistan, the judicial reform process was largely neglected… Our efforts involved only limited, and mostly inadequate, input from Afghan traditional structures and citizens to ensure legal alignment with existing de jure, and more importantly, de facto legal regulations and practices. Legal experts must collaborate with traditional, local institutions that can provide invaluable contributions to the establishment of the reformed rule-of-law statutes. Laws as well as judicial or police systems cannot be brought in 'off the shelf' from other countries in total disregard for the present conditions, traditions and practices in the country concerned.[374]

Yet, despite increased efforts by the international community, these institutions have failed to take root, a factor which weighs against a positive assessment of the peacebuilding mission. As of 2012, the World Bank ranked Afghanistan as one of the worst countries for the rule of law, behind Iraq, Kosovo and East Timor. Moreover, this report indicated that Afghanistan's rule of law ranking had actually worsened since the international intervention had begun in 2002.[375]

E. The failure of the light footprint approach

It is difficult to attribute the failures in Afghanistan to any one issue or problem, and comparisons to efforts in Kosovo, East Timor and Iraq are affected by each state's unique

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[371] *Report of the Secretary-General*, UN Doc. A/62/345-S/2007/555 (21 September 2007), *supra* note 357 at para. 38.

[373] *Ibid*.

[374] Brahimi, State Building in Crisis, *supra* note 13 at 15.

[375] Afghanistan's percentile ranking in each of 2002, 2007 and 2012 was as follows: 1.44, 0.48 and 0.47. See World Bank, World Databank (last accessed 12 April 2014), online: http://databank.worldbank.org/data/home.aspx.

cultural and ethnic backgrounds. The main difference between post-conflict peacebuilding efforts in Afghanistan and post-conflict peacebuilding efforts in Kosovo and East Timor is the significantly reduced level of UN involvement in Afghanistan and the corresponding perception of preservation of Afghan sovereignty. It is therefore necessary to consider whether or not increased UN involvement in Afghanistan would have garnered better results.

To speak to the extreme end of the spectrum, it is unlikely that complete UN control over the Afghan government, by way of a transitional administration, would have been successful. This view was recognized throughout the process and from the earliest days of UN involvement. As reported by Mr. Brahimi, all interested parties believed that the Afghans needed to control the process of reconstruction.[376] Past efforts to control Afghanistan were dismal failures. As reported by Ebrahim Afsah and Alexandra Hilal Guhr in their work on the subject: "a too intrusive international effort would have been perceived as foreign domination, and could thus have triggered the kind of violent resistance that Afghans have shown throughout their history towards internal interference."[377] Given this history, I also agree that a UN transitional administration, as was implemented in Kovoso and East Timor, would not have worked for Afghanistan.

However, it is also clear that the UN should have taken on a greater role for the provision of security throughout Afghanistan. Limiting security forces to Kabul prevented peacebuilding initiatives from succeeding in the regions and allowed warlords and the Taliban to maintain their control. This tactic may have been a result of the perceived need to adopt a light footprint approach but, as stated by Professor Jonathan Goodhand of the School of Oriental and African Studies at the University of London: "in practice there has been an extremely heavy

[376] See the discussions at the Security Council on 13 November 2001, *supra* note 300.

[377] Afsah & Guhr, *supra* note 317 at 381.

footprint in Kabul and an extremely light – to the extent of being barely visible – footprint outside the capital." [378]

The limited UN security involvement also allowed Operation Enduring Freedom to continue to operate, unabated. While the respective goals of Operation Enduring Freedom and UNAMA may have been technically unrelated, the "short-term tactical considerations" of the security operations were inconsistent with the overall peacebuilding goals of the UN.[379] Allowing Operation Enduring Freedom to continue operations without a corresponding strong UN presence throughout the country undermined the UN's efforts to restore security, build strong state-run institutions, and eliminate power brokers who continued to operate a dual system of justice that thrived because of their criminal activities.

i. Brahimi's 2007 Appraisal

Ideally, the UN should have adopted a greater role during the first few years following the fall of the Taliban. However, recognizing this, one must ask whether the failure in Afghanistan is a failure of the light footprint approach or, in the alternative, an incorrect application of this approach. In 2007, Mr. Brahimi presented a paper at the seventh Global Forum on Reinventing Government[380] revealing his personal views regarding the peacebuilding mission's failure in Afghanistan. Although he is the architect of the light footprint approach, according to this paper, he did not intend it to mean that international donor support should be

[378] Jonathan Goodhand, "From war economy to peace economy?" a paper delivered at the "State reconstruction and international engagement in Afghanistan" conference, 30 May - 1 June 2003, at 14, online: http://eprints.lse.ac.uk/28364/.

[379] Afsah & Guhr, *supra* note 317 at 455.

[380] Brahimi, State Building in Crisis, *supra* note 13.

limited. In his paper, Mr. Brahimi is candid regarding the realities of the mission in Afghanistan. Although the mission in Afghanistan was said to have ended in success, he notes that it is "rather embarrassing for the international community in general, and for those individuals like myself who were directly involved … that … [it] fell back into conflict within five years."[381]

While the initial phases of the Bonn process were a relative success as evidenced by the new constitution and corresponding elections, according to Mr. Brahimi, much more was required to build and sustain peace. Afghanistan needed more help recruiting and training personnel, and required increased funding and equipment. In his 2007 appraisal, Mr. Brahimi asserts that the light footprint approach is intended to "avoid the creation of parallel institutions and dual systems which undermine local authority, hinder coordination and precipitate competition."[382] However, rather than providing adequate resources, international donors and the UN "continued to operate … through parallel structures that did provide some services to the population but undermined rather than helped the state establish and sustain its credibility."[383]

Overall, Mr. Brahimi's paper makes clear that he was not satisfied with the way the light footprint approach was implemented in Afghanistan. His approach was intended to provide support for the emerging institutions of government. However, according to his review of this situation, this is not what occurred. As he explains:

> Let me insist that [the light footprint] never meant that international missions had to limit themselves to a reduced staff, irrelevant of what their real needs were. It did mean, however, that we should do our best to ensure that nationals perform jobs that they are capable of performing, with qualified and appropriate international staff only carrying out those tasks for which they can provide a genuine value added.

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[381] *Ibid* at 2.

[382] *Ibid* at 4.

[383] *Ibid* at 6.

[…]

> …a 'light footprint' never meant for us a 'rushed footprint.' The international community must understand that statebuilding efforts require long-term commitments of human and financial resources. Experience has proven this point again and again. In Afghanistan in 2001-2002, hope for the future was very high, but the lack of sustained attention to the statebuilding effort … allowed security and economic conditions to deteriorate.[384]

Although the light footprint approach was a failure in Afghanistan, as evidenced by the resurgence of violence in 2006 and the corresponding need for the international community to significantly increase its involvement, this failure is not a reason to reject the approach. The failures that occurred in Afghanistan, coupled with the lessons to be learned, inform what future post-conflict peacebuilding efforts should look like. A light footprint "*plus*" approach may in fact be the preferred legal framework for peacebuilding efforts. It is my view that a framework that allows the local population to lead the process with support and mentorship from the international community must be considered for future efforts.

[384] *Ibid* at 17.

CONCLUSIONS

The challenge of post-conflict peacebuilding is to build a peaceful, politically stable, independent and sovereign nation that is governed by the rule of law and in which human rights standards are upheld and honoured. In most countries where drastic interventions occur, the state lacks all of these things. By the time the international community arrives to help, the country is war-torn, its infrastructure destroyed, and its citizens living in fear of violence at the hands of regional powerbrokers. Successfully rebuilding a state from this level of dysfunction hinges, in large part, on the legal framework chosen through which to engage in peacebuilding initiatives.

The objective of this thesis was to provide an assessment of three different peacebuilding frameworks: occupation, interim administrations and the light footprint approach. None of these frameworks provide an easy solution; however, their use in recent peacebuilding initiatives provide lessons learned that can be applicable to future undertakings. I have ultimately concluded in favour of the third framework, with modifications, for future efforts.

In Part I, I examined, the law of occupation, with Chapter VII augmentation, as it was employed in Iraq by the coalition partners in 2003-2004. This model of post-conflict reconstruction is not ideal. The law of occupation is a codified framework and must therefore be executed within the confines of the Hague IV Regulations of 1907 and the Fourth Geneva Convention. These codified requirements are in place to ensure that the sovereignty of the occupied state is ultimately restored without any significant changes having been made to the state or its institutions. The occupation framework is not intended for the types of drastic changes that are necessary in modern peacebuilding contexts. Although occupation was used in

conjunction with Chapter VII authority to permit changes in Iraq, this was a unique situation. The example of Iraq serves to illustrate the power of the UN Security Council to authorize transformative objectives in a post-conflict state. However, the framework employed in Iraq does not expand upon the existing law of occupation. It is therefore my conclusion that there are other more appropriate models that are better suited to post-conflict peacebuilding initiatives.

In Part II of the thesis, I provided an assessment of the UN interim administrations in both Kosovo and East Timor. The legal authority for the UN to act as an interim administrator derives from a purposive interpretation of the UN Charter. Because of the broad source of authority, absolute power over the state and its institutions is vested in the UN. This situation enables the UN to make any number of changes and rebuild government institutions without restriction. Unfortunately, this broad authority is the greatest weakness of this framework as evidenced by the many unilateral decisions imposed in both Kosovo and East Timor that undermined public support. Ultimately, a mission that fails to consider the needs or desires of the local population will face tremendous challenge. Unilateral decisions regarding the choice of law to apply in Kosovo, for example, led to strain amongst members of the judiciary and a refusal to implement the laws that were chosen by UN authorities.

In both Kosovo and East Timor, as in Afghanistan, there were significant problems associated with finding qualified members of the judiciary. Years of conflict had eroded the pool from which trained people could be chosen and ethnic tensions further complicated those choices. The discussion of the efforts to rebuild the judiciaries in these countries serves to illustrate that problems that are endemic to post-conflict reconstruction regardless of the framework chosen. Even the installation of international judges and executive changes to the legislation to try and bolster fairness failed to produce a judiciary that was accountable and independent.

One concern of note with respect to the interim administration framework was the UN's failure to comply with human rights standards, with the UN administration in Kosovo providing a vivid example. The military component of the mission engaged in executive detentions which were in violation of local laws. These unlawful detentions garnered severe criticism and undermined the mission as a whole. Further, the UN and states operating under its authority were not accountable for these violations, which eroded public confidence in the mission. One of the most significant lessons learned from the interim administration in Kosovo is the need for the party that is assisting to comply with internationally accepted human rights standards, particularly due process or fair trial standards. To do otherwise erodes public confidence in the mission and undermines the overall intent to create a state that respects human rights. While the interim administration framework is broad and capable of creating the necessary institutions for success, it is not necessarily the best framework to encourage public acceptance.

I then examined the light footprint approach in Part III, as an approach that was developed in response to the shortcomings identified in the earlier missions. The light footprint approach was developed as a result of the need to ensure that the local population is involved in the entire peacebuilding process. In the case of Afghanistan, the international community engaged in peacebuilding initiatives at the request of the Afghan government. However, rather than taking over every aspect of the peacebuilding process, the light footprint approach was intended to support the local population in doing it themselves. Although the light footprint approach failed in Afghanistan, it is my conclusion that this framework should not be abandoned and in fact should be preferred. It is clear that many of the difficulties occurred because there was inadequate and uncoordinated international efforts. Further, the emphasis should be on local ownership and initiative with heavy international support and mentorship. The legal authority for international involvement via this framework can come from either the UN or through requests from the local government. Where there is no existing local government, the UN Security

Council has the power to initiate post-conflict peacebuilding efforts, as demonstrated in Iraq, Kosovo and East Timor. There are no limitations on what kinds of changes can be made through the framework of the light footprint approach in the emerging state and because the local population remains engaged in the process, there is a greater likelihood of making changes that will be accepted. The light footprint approach "plus," with greater international mentorship and support, should be considered as the best possible framework for future international peacebuilding initiatives.

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