Rough Justice: Establishing the Rule of Law in Post-Conflict Territories

SIMON CHESTERMAN*

> "In hindsight, we should have put the establishment of the rule of law first, for everything else depends on it: a functioning economy, a free and fair political system, the development of civil society, public confidence in police and the courts."[1]

One of the most important and difficult challenges confronting a post-conflict society is the reestablishment of faith in the institutions of the state. Respect for the rule of law in particular, implying subjugation to consistent and transparent principles under state institutions exercising a monopoly on the legitimate use of force, may face special obstacles. In territories where state institutions existed as tools of oppression, building trust in the *idea* of the state requires a transformation in the way such institutions are seen. Informal mechanisms that emerge in times of conflict may also create economic and political incentives that militate against respect for the rule of law. These concerns are in addition to more immediate issues, such as the desire of some to seize the opportunity of peace to exact immediate retribution for past injustices.

For such societies, the choices range from drawing a historical line and moving on, as Spain and Mozambique have done, through lustration processes embraced by some Eastern European countries and truth and reconciliation processes along the lines of Latin American or South African models, to limited or more general criminal prosecutions before tribunals. In rare cases, international bodies may be established to try alleged offenders. This may be done without the cooperation of the state or states concerned, as in Nuremberg, Tokyo, and the tribunals for the former Yugoslavia and

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* B.A. (Hons) (University of Melbourne) 1995; LL.B. (Hons) (University of Melbourne) 1997; D.Phil. (University of Oxford) 2000; Executive Director, Institute for International Law & Justice, New York University School of Law. This text draws upon material elaborated at greater length in SIMON CHESTERMAN, YOU, THE PEOPLE: THE UNITED NATIONS, TRANSITIONAL ADMINISTRATION, AND STATE-BUILDING (2004). An earlier version of parts of the text was published as Simon Chesterman, *Justice Under International Administration: Kosovo, East Timor and Afghanistan*, 12 FINNISH Y.B. OF INT'L L. 143 (2001). Permission to reproduce the relevant sections is gratefully acknowledged. Many thanks to Chandra Lekha Sriram for her helpful comments on the text.

[1] Paddy Ashdown, *What I Learned in Bosnia*, N.Y. TIMES, Oct. 28, 2002, at A25.

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Rwanda,[2] or through special agreement such as in the case of Sierra Leone and later Cambodia. The International Criminal Court may provide a more regular basis for such prosecutions in the future. Another possibility outside the control of the state concerned is trial before a third state exercising universal jurisdiction.

In the rarer situation when the territory itself comes under international administration, these choices shift radically. Circumstances in which the institutions of the state are controlled on an interim basis by a benevolently autocratic power are uncommon; therefore, practice in this area is improvisational rather than principled. What law should be enforced, and by whom? Crucially, how should one resolve the potential dilemma between building capacity for sustainable local institutions and maintaining respect for international standards of justice?

This article sketches out the relationship between justice and reconciliation before examining these questions through the experiences of United Nations (U.N.) administrations in Kosovo (1999–present) and East Timor (1999–2002), and the assistance mission in Afghanistan (2002–present). Though the U.N. exercised varying measures of executive power in its previous missions—notably West New Guinea (1962–1963), Cambodia (1992–1993), and Eastern Slavonia (1996–1998)[3]—Kosovo and East Timor were the first occasions on which the U.N. exercised full judicial power within a territory.[4] These situations, therefore, merit some scrutiny and are considered in Parts II and III. The U.N. Assistance Mission in Afghanistan (UNAMA) represents a correction to the increasing aggregation of sovereign

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[2] Rwanda voted against the Security Council resolution establishing the International Criminal Tribunal for Rwanda in 1994. *See* S.C. Res. 955, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/955 (1994). Since then, its cooperation with the Tribunal has varied.

[3] Bodies other than the U.N. have also exercised quasi-judicial power. For example, in Somalia, as Australian peacekeepers entered areas, they attempted to re-establish local police forces and community courts. *See* Martin R. Ganzglass, *The Restoration of the Somali Justice System*, *in* LEARNING FROM SOMALIA: THE LESSONS OF ARMED HUMANITARIAN INTERVENTION 20, 27 (Walter Clarke & Jeffrey Herbst eds., 1997).

[4] *See* S.C. Res. 1244, U.N. SCOR, 54th Sess., at 3–4 , U.N. Doc. S/RES/1244 (1999); *see also* UNTAET, Reg. No. 1999/1, *On the Authority of the Transnational Administration in East Timor*, U.N. SCOR, § 1.1, U.N. Doc. UNTAET/REG/1999/1 (1999) (stating that "[a]ll legislative and executive authority with respect to East Timor, including the administration of the judiciary, is vested in UNTAET and is exercised by the Transitional Administrator."); UNMIK, Reg. No. 1999/1, *On the Authority of the Interim Administration in Kosovo*, U.N. SCOR, § 1.1, U.N. Doc. UNMIK/REG/1999/1 (1999) (stating that "[a]ll legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative of the Secretary-General").

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powers exercised in U.N. operations since the mid-1990s. Accordingly, Part IV considers this operation by way of counterpoint.

Transitional administration presents a hard case for many of the difficulties that run through the issue of externalized (or universalized) justice more generally.[5] Here, the issue is not so much *where* justice takes place, but *who* administers it and according to what law. Many critics of the exercise of universal jurisdiction point to the disjunction between these "ideal" proceedings and the cultural context within which the crimes actually took place, or to the unsustainability of international standards after the fleeting interest of international actors passes from a particular conflict situation. These concerns apply a fortiori to situations in which a primary purpose of engagement is to establish institutions that will outlast the international presence. The experience in the three states to be considered here has been, to say the least, mixed.

I. NO JUSTICE WITHOUT PEACE?

The question of how an emerging regime should deal with past abuses has become a leitmotif in the literature on democratization.[6] This section focuses on the role that international actors can and should play in "transitional justice." A central problem in this respect is that commentators with an international perspective often view such internal transitions through the lens of international criminal law: either the wrongdoers are held accountable, or they enjoy impunity.

In fact, the situation is more complex. First, a useful distinction may be made between *acknowledgment*—whether to remember or forget the abuses—and *accountability*—whether to impose sanctions on the individuals who were responsible for the abuses.[7] This helps to distinguish between four

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[5] *See* Chandra Lekha Sriram, *Universal Jurisdiction: Problems and Prospects of Externalizing Justice*, 12 FINNISH Y.B. OF INT'L L. 47, 52–53 (2001).

[6] *See generally* GARY JONATHAN BASS, STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS (2000) (concerning government support of international war crimes tribunals); PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITIES (2001) (concerning the establishment and aspects of truth commissions in transitional countries); GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE (1999) (surveying approaches to crimes against humanity); 1–3 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES (Neil J. Kritz ed., 1995) (containing general considerations, country studies, and laws, rulings, and reports concerning how new nations treat previous totalitarian governments).

[7] Luc Huyse, *Justice After Transition: On the Choices Successor Elites Make in Dealing with the Past*, 20 LAW & SOC. INQUIRY 51, 52–53 (1995) (discussing the policy

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types of responses to past abuses. At either extreme of the spectrum are criminal prosecutions and unconditional amnesty. Criminal prosecution was the official policy toward collaborators in all Western European states occupied by Germany during the Second World War, a history that continues to inform current attitudes to war crimes. One may contrast this with the general position of post-communist Eastern and Central Europe and the post-authoritarian regimes of Latin America, which tend to favor amnesties. Between these extremes lie policies such as lustration and conditional amnesties, typically in the form of truth commissions.

The word "lustration" derives from the Latin term for the purifying sacrifice that followed a quinquennial census in Rome. In the present context, it denotes the disqualification of a former elite, of the secret police and their informers, or of civil servants from holding political office under the new regime. Such disqualification of political and civil rights may accompany a criminal conviction, as it did in post-war Belgium, France, and the Netherlands. In situations such as post-communist Eastern and Central Europe, it has sometimes provided a way to sidestep prosecutions. The United States used it for similar purposes to exclude Iraqi Ba'ath Party officials in 2003, but its bluntness as a tool led to criticisms that it unfairly imposed a form of collective guilt on party members—of whom there were approximately 30,000—and that it excluded capable Iraqis from the reconstruction process.[8]

Conditional amnesties linked to truth commissions serve a different agenda, putting a high priority on investigating the abuses of the former regime. The goal of such a commission is not to prosecute or punish, but to disclose the facts of what took place. Truth commissions have been established with varying success across Latin America,[9] but the link between truth and amnesty is epitomized by the South African Truth and Reconciliation Commission, which ran from 1995–2002. The goals that it embodied were expressed in the 1993 Interim Constitution: "[T]here is a need for understanding but not for vengeance, a need for reparation but not retaliation, a need for *ubuntu* but not for victimization."[10] A person could

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choices of transitional countries in confronting the abuses of former oppressive regimes).

[8] INTERNATIONAL CRISIS GROUP, BAGHDAD: A RACE AGAINST THE CLOCK (June 11, 2003), *at* http://www.icg.org//library/documents/reports_archive/A401000_11062003.pdf (last visited Oct. 6, 2004).

[9] *See* Priscilla B. Hayner, *Fifteen Truth Commissions—1974 to 1994: A Comparative Study*, 16 HUM. RTS. Q. 597, 613–15, 627–29 (1994); HAYNER, *supra* note 6, at 32–40, 45–49, 52–54.

[10] CONST. OF THE REPUBLIC OF SOUTH AFRICA (Act 200, 1993), § 251 (repealed 1996). *Ubuntu* may be translated as the essence of being human, linked to an inclusive

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apply to the Truth and Reconciliation Commission for amnesty for any act, omission, or offense that took place between March 1, 1960, and May 11, 1994. To be granted amnesty, the person had to satisfy the Committee on Amnesty that the act was associated with a political objective committed in the course of the conflicts of the past, and that full disclosure of all relevant facts had been made.[11] East Timor's Commission for Reception, Truth, and Reconciliation was an innovative variation on this theme, linking the need for reconciliation to the need for reconstruction. The Commission was empowered to establish non-prosecutorial "Community Reconciliation Processes" (usually some form of community service) that barred future prosecution for criminal acts not amounting to serious crimes.[12]

Various peace agreements concluded in the 1990s incorporated provisions demanding individual accountability. The Paris Agreements on Cambodia that were adopted in 1991 included a requirement that Cambodia recognize its obligations under relevant human rights instruments, which included obligations under the Genocide Convention to prosecute those responsible for genocide.[13] The 1992 El Salvador peace agreements provided for the creation of a truth commission, along with a watered-down pledge to end impunity, but were followed by a broad amnesty law.[14] A 1994 agreement on human rights in Guatemala committed the government to criminalizing disappearances and extra-judicial executions, though this was

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sense of community. *See* Desmond Tutu, *The World Can Learn from South Africa's Restitution; Northern Ireland Can also Be Healed, Not Through Retribution but by Confronting Its People's Pain*, The INDEPENDENT (London), Oct. 31, 1999, at 28, *available at* LEXIS, News Library, Indpnt File.

[11] Promotion of National Unity and Reconciliation Act 34, § 20 (1995). *See* ALEX BORAINE, A COUNTRY UNMASKED: INSIDE SOUTH AFRICA'S TRUTH AND RECONCILIATION COMMISSION 270 (2000); RICHARD J. GOLDSTONE, FOR HUMANITY: REFLECTIONS OF A WAR CRIMES INVESTIGATOR 68 (2000).

[12] UNTAET, Reg. No. 2001/10, *On the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor*, U.N. SCOR, § 23.1, U.N. Doc. UNTAET/REG/2001/10 (2001); *see* Frederick Rawski, *Truth-Seeking and Local Histories in East Timor*, 3 ASIA PAC. J. ON HUM. RTS. & L. 77, 83–84 (2002).

[13] Final Act of the Paris Conference on Cambodia, Oct. 30, 1991, Fr.-Indon., 31 I.L.M. 180, 186 (Agreements on a Comprehensive Political Settlement of the Cambodia Conflict), *available at* http://www.usip.org/library/pa/cambodia/agree_comppol_10231991_toc.html.

[14] Mexico Agreements, Commission on the Truth, *in* EL SALVADOR AGREEMENTS: THE PATH TO PEACE 16, U.N. Pub. No. DPI/1208-92614-July 1992-5M (1992), *quoted in* Steven R. Ratner, *New Democracies, Old Atrocities: An Inquiry in International Law*, 87 GEO. L.J. 707, 717 n.46 (1999). *But see* Law on General Amnesty for the Consolidation of Peace, Decree No. 486, Mar. 20, 1993 (El Sal. Legis. Assemb.), *reprinted in* 3 TRANSITIONAL JUSTICE, *supra* note 6, at 546–48.

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accompanied by an amnesty for past crimes.[15] The 1995 Dayton Peace Agreement included a pledge by the parties to the conflict in Bosnia and Herzegovina to cooperate with the International Criminal Tribunal for the Former Yugoslavia, as well as the exclusion of indicted fugitives from positions of authority in the new state.[16] Significantly, though each of these agreements obliged parties to establish particular regimes of accountability, none contained an explicit obligation to punish any offences.[17] In negotiations prior to the Paris Agreements, Hun Sen's Cambodian People's Party (CPP) was strongly dissuaded from insisting on punishment of Khmer Rouge officials on the grounds that this was more appropriately left to the new Cambodian government contemplated in the negotiations. This was political cover for the more practical reason for rejecting the demand—that any attempt to include such provisions, let alone to capture Khmer Rouge leaders, would have threatened the Agreements and provoked the resumption of war.[18]

A far more common feature of such peace agreements is a provision for amnesty. Amnesty laws of varying breadths covering governmental atrocities have been passed or honored throughout Latin America in the past decade in Chile, Brazil, Uruguay, Argentina, Nicaragua, Honduras, El Salvador, Haiti, Peru, and Guatemala. A similar practice now appears to be accompanying transitions to democracy in Africa, reflected in Côte d'Ivoire, South Africa, Algeria, Sierra Leone, and Liberia.[19] The international reaction to such amnesties has been ambiguous. With a few notable exceptions, the U.N. and

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[15] *The Situation in Central America: Procedures for the Establishment of a Firm and Lasting Peace and Progress in Fashioning a Region of Peace, Freedom, Democracy and Development*, U.N. SCOR, 48th Sess., art. III, Annex I, U.N. Doc. A/48/928-S/1994/448 (1994); *see* SUSANNE JONAS, OF CENTAURS AND DOVES: GUATEMALA'S PEACE PROCESS, 90–91 (2000). *But see* Ratner, *supra* note 14, at 722–23 n.72 (citing Ley de Reconciliación Nacional, Decreto No. 145-96, Dec. 18, 1996 (Guat.)).

[16] *The Situation in Bosnia and Herzegovina*, U.N. SCOR, 50th Sess., art. IX, Annex, U.N. Doc. S/1995/999 (1995).

[17] Ratner, *supra* note 14, at 717.

[18] INTERNATIONAL CRISIS GROUP, CAMBODIA: THE ELUSIVE PEACE DIVIDEND 27 (2000) *available at* http://www.icg.org//library/documents/report_archive/A400026_11082000pdf. Australian Foreign Minister Bill Hayden's 1984 proposals for U.N. intervention were undermined by his calls for an international tribunal to try Khmer Rouge leaders—at the very least, this ensured the alienation of China from any such proposal.

[19] *See* Simon Chesterman, *No Justice Without Peace? International Criminal Law and the Decision to Prosecute*, *in* CIVILIANS IN WAR 145, 154 (Simon Chesterman ed., 2001); Somini Sengupta, *Leader of Liberia Surrenders Power and Enters Exile*, N.Y. TIMES, Aug. 12, 2003, at A1.

HeinOnline -- 20 Ohio St. J. on Disp. Resol. 74 2005

its member states have been reluctant to condemn amnesties. Following the amnesty in Guatemala in 1996, for example, the General Assembly adopted a weak resolution in which it recognized "the commitment of the Government and civil society of Guatemala to advance in the fight against impunity and towards the consolidation of the rule of law."[20] In 1994, the United States actively encouraged the democratically elected government that it had helped to return to power in Haiti to grant amnesty to the prior junta.[21] Exceptions to this trend include the U.S. criticism of Peru in 1997, and the U.N. Secretary-General's criticism of El Salvador the same year.[22] More robust criticism has come from the U.N. Human Rights Committee established under the International Covenant on Civil and Political Rights. The Committee first condemned amnesties by referring to their negative effect on respect for the prohibition of torture, but later extended its concern to blanket amnesties generally.[23]

In Sierra Leone, international actors were heavily involved in the peace process, but backed away from criticizing an amnesty that granted impunity to participants in a conflict notorious for its viciousness. The Lomé Peace Agreement, signed on July 7, 1999, was brokered by the U.N., the Organization of African Unity (OAU) and the Economic Community of West African States (ECOWAS). It nevertheless provided for the pardon of Corporal Foday Sankoh and a complete amnesty for any crimes committed by members of the fighting forces during the conflict from March 1991 up until the date of the signing of the agreement.[24] At the last minute, the U.N. Special Representative of the Secretary-General (SRSG), Francis Okelo, appended a hand-written disclaimer to the agreement, stating that the U.N. would not recognize the amnesty provisions as applying to genocide, crimes

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[20] G.A. Res. 51/197, *The Situation in Central America: Procedures for the Establishment of a Firm and Lasting Peace and Progress in Fashioning a Region of Peace, Freedom, Democracy and Development*, U.N. GAOR, 51st Sess., at 5, U.N. Doc. A/RES/51/197 (1996).

[21] *See* Michael P. Scharf, *Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?*, 31 TEX. INT'L L.J. 1, 6–8 (1996).

[22] Ratner, *supra* note 14, at 724 n.79.

[23] *General Comment 20*, U.N. GAOR, Hum. Rts. Comm., Supp. No. 40, Annex VI, U.N. Doc. A/47/49 (Dec. 16, 1992) ("Amnesties are generally incompatible with the duty of States to investigate such acts."); *Preliminary Observations on Peru*, U.N. GAOR, Hum. Rts. Comm., 57th Sess., 1528th mtg. at 3, ¶ 9, U.N. Doc. CCPR/C/79/Add.67 (July 25, 1996).

[24] *Letter Dated 12 July 1999 from the Chargé D'Affairs Ad Interim of the Permanent Mission of Togo to the United Nations Addressed to the President of the Security Council*, U.N. SCOR, at 14–15, U.N. Doc. S/1999/777 (1999).

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against humanity, war crimes, and other serious violations of international humanitarian law. Secretary-General Kofi Annan acknowledged at the time that the sweeping amnesty had caused some discomfort:

> As in other peace accords, many compromises were necessary in the Lomé Peace Agreement. As a result, some of the terms under which this peace has been obtained, in particular the provisions on amnesty, are difficult to reconcile with the goal of ending the culture of impunity, which inspired the creation of the United Nations Tribunals for Rwanda and the Former Yugoslavia, and the future International Criminal Court. Hence the instruction to my Special Representative to enter a reservation when he signed the peace agreement, explicitly stating that, for the United Nations, the amnesty cannot cover international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law. At the same time, the Government and people of Sierra Leone should be allowed this opportunity to realize their best and only hope of ending their long and brutal conflict.[25]

The Lomé Peace Agreement encapsulated the central policy dispute over whether to pursue prosecutions as opposed to amnesties, and their relative potential to end cycles of state violence and to consolidate democratic transitions.[26] The terms of this debate are usually limited to the question of criminal accountability for past abuses—there is general agreement that ongoing or future violations should not be the subject of amnesties—and opinions fall broadly into two camps. On the one hand, officials in states undergoing transitions frequently claim that criminal accountability undermines the transition to democracy and must therefore be limited in whole or in part. On the other, human rights non-governmental organizations (NGOs), victims groups, certain international bodies, and most commentators on the subject argue that criminal punishment is the most effective insurance against future repression.

The first view has been voiced by heads of state, legislatures, and courts, though different rationales have been advanced in support of it. In a minority of cases it has been justified in terms of simple *realpolitik*: a regime promulgates a self-amnesty, or refuses to surrender power unless it is granted such an amnesty. More commonly, it is linked to the question of reconciliation and the argument that criminal prosecutions may be an obstacle to this goal. This may be due to fears about the power of the former

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[25] *Seventh Report of the Secretary-General on the United Nations Observer Mission in Sierra Leone*, U.N. SCOR, ¶ 54, U.N. Doc. S/1999/836 (1999).

[26] Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2541–42 (1991).

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regime and the prospect of instability if trials are carried out (for example, Chile, Argentina, and Uruguay) or due to a political decision that persons who committed abuses should nevertheless remain part of the polity (for example, South Africa, Mozambique, and East Timor). A related concern may be the practical impossibility of prosecuting large numbers of people.[27]

The view that accountability supports democracy also has its variants. The U.N. Human Rights Committee has declared that impunity is "a very serious impediment to efforts undertaken to consolidate democracy."[28] Human rights NGOs often stress a link between accountability, reconciliation, peace, and democracy.[29] Others have argued the more modest point that trials serve to advance liberal government or the rule of law.[30] The specific concern that trials may also foster instability—in the form of entrenching divisions between communities and retaliatory violence—is frequently ignored, however, with the result that the debate often resolves to a simple opposition of idealists and realists.[31]

It seems clear that claims for a causal relationship between accountability and democracy are overstated. Carlos Nino, a human rights adviser to post-junta Argentine President Raúl Alfonsín, notes that trials can be destabilizing, but concludes that the link ultimately depends on what makes democracy self-sustainable: "If one believes that self-interested motivations are enough, then the balance works heavily against retroactive justice. On the other hand, if one believes that impartial value judgments contribute to the consolidation of democracy, there is a compelling political case for retroactive justice."[32]

Arguably, a distinction should be drawn between internal and international conflicts. The second Additional Protocol to the Geneva Conventions, which concerns the law applicable to non-international armed conflicts, calls on states after the conclusion of civil wars to "grant the

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[27] Ratner, *supra* note 14, at 734.

[28] *Report of the Human Rights Committee*, U.N. GAOR, 51st Sess., Supp. No. 40, vol. 1, ¶ 347, U.N. Doc. A/51/40 (1997).

[29] *See, e.g.*, Kenneth Roth, *Letter to Secretary of Defense Donald Rumsfeld*, Human Rights Watch (Aug. 8, 2003), *available at* http://www.hrw.org/press/2003/08/us080803.htm; Somini Sengupta, *Besieged Liberian: Should Taylor Face War Crimes Trial? The Question 'Has Divided Everybody'*, N.Y. TIMES, July 11, 2003, at A7.

[30] Ratner, *supra* note 14, at 735.

[31] *Cf.* Mark J. Osiel, *Why Prosecute? Critics of Punishment for Mass Atrocity*, 22 HUM. RTS. Q. 118 (2000) (surveying doubts arising from the prosecution of perpetrators of atrocities).

[32] CARLOS SANTIAGO NINO, RADICAL EVIL ON TRIAL 134 (1996).

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broadest possible amnesty to persons who have participated in the armed conflict."[33] It has been argued that this was not intended to include amnesties for those having violated international humanitarian law,[34] but in practice such amnesties have tended to be blanket ones. This provision may be contrasted with the Geneva Conventions themselves, which require that states parties undertake to enact legislation necessary to provide effective penal sanctions for persons committing grave breaches, such as willful killing, torture, and inhuman treatment.[35] In a case examining the constitutional legitimacy of the Truth and Reconciliation Commission, the South African Constitutional Court explained the distinction as follows:

> It is one thing to allow the officers of a hostile power which has invaded a foreign state to remain unpunished for gross violations of human rights perpetrated against others during the course of such conflict. It is another thing to compel such punishment in circumstances where such violations have substantially occurred in consequence of conflict between different formations within the same state in respect of the permissible political direction which that state should take with regard to the structures of the state and the parameters of its political policies and where it becomes necessary after the cessation of such conflict for the society traumatized by such a conflict to reconstruct itself. The erstwhile adversaries of such a conflict inhabit the same sovereign territory. They have to live with each other and work with each other and the state concerned is best equipped to determine what measures may be most conducive for the facilitation of such reconciliation and reconstruction.[36]

These qualifications on the appropriateness of legal and political approaches to dealing with a post-conflict situation do not provide answers to simple questions, such as whether international actors should push for international tribunals as part of a peace deal. As the response to Indonesia's half-hearted trials of military officials accused of abuses in East Timor shows, it may sometimes come down to a more subtle question of pressuring a state to make its legal investigations credible.[37] At the same time, it is clear

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[33] Protection of Victims of Non-International Armed Conflicts, art. 6, June 8, 1977, 1125 U.N.T.S. 609.

[34] Naomi Roht-Arriaza, *Combating Impunity: Some Thoughts on the Way Forward*, LAW & CONTEMP. PROBS., Autumn 1996, at 97.

[35] *See, e.g.*, Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287.

[36] Azanian Peoples Organization (AZAPO) v. President of the Republic of South Africa 1996 (4) SALR 671, 690 (CC).

[37] HUMAN RIGHTS WATCH, JUSTICE DENIED FOR EAST TIMOR: INDONESIA'S SHAM

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that criminal prosecutions are no longer regarded as a categorical good—there seems to be a general acceptance of South Africa's decision to grant amnesties rather than prosecute, for example.

Nor does the Rome Statute of the International Criminal Court provide solutions. In the course of the drafting negotiations, the question of how the Court should deal with amnesties or pardons was dropped when it appeared unlikely that a compromise could be reached.[38] This presents two points of uncertainty in the Statute. In the case of amnesties, the Statute requires that a case is or has been the subject of a *criminal* investigation in order to be inadmissible before the Court.[39] A blanket amnesty would clearly not fall within this provision. Nor, however, would a truth commission of the nature of South Africa's Truth and Reconciliation Commission, where immunity from prosecution is drawn from the simple telling of truth to a non-judicial body. Unless the Security Council intervened, the decision of whether or not it would be appropriate to commence a prosecution before the Court after such proceedings would fall to the discretion of the Prosecutor. This discretion is considerable; the Statute permits the Prosecutor to decline to initiate an investigation or to continue with a prosecution where there are "substantial reasons to believe that an investigation would not serve the interests of justice."[40] The reconciliation process in South Africa might fall within this provision; the amnesty granted in the Lomé Peace Agreement might not. The position is still less clear concerning pardons that follow a criminal prosecution. If it could be established that those proceedings were undertaken for the purpose of shielding the person from criminal responsibility, or if the proceedings were not otherwise conducted independently or impartially, the Court would not be precluded from hearing the case.[41] This might be difficult, however, particularly if the prosecution

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PROSECUTIONS, THE NEED TO STRENGTHEN THE TRIAL PROCESS IN EAST TIMOR, AND THE IMPERATIVE OF U.N. ACTION (Dec. 2002), *at* http://www.hrw.org/backgrounder/asia/timor/etimor1202bg.htm.

[38] John T. Holmes, *The Principle of Complementarity*, *in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 41, 60 (Roy S. Lee ed., 1999).

[39] *Rome Statute of the International Criminal Court*, U.N. GAOR, at 16, U.N. Doc. A/Conf.183/9 (1998). Article 17 refers to "investigation," which might in isolation be interpreted as including the work of a truth commission. *Id.* Nevertheless, the standard for determining that an investigation is not genuine is that the proceedings are "inconsistent with an intent to bring the person concerned to justice," suggesting a criminal proceeding. *Id.* art. 17(2)(b).

[40] *Rome Statute of the International Criminal Court*, *supra* note 41, art. 53(1)(c).

[41] *Id.* at art. 20(3)(b).

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and the pardon are undertaken by different political organs.[42]

Though commonly discussed in the abstract, these questions are far from hypothetical. The following three sections will examine how they have been resolved in Kosovo, East Timor, and Afghanistan.

II. KOSOVO: JUSTICE IN LIMBO

Kosovo's experience of justice reflects the intentional ambiguity of the resolution to the 1999 conflict between NATO and the Federal Republic of Yugoslavia (FRY) over Kosovo. Though the chances of it ever returning to direct control under Belgrade are negligible, Kosovo's final status remains indeterminate. This uncertainty has increased the challenges of post-conflict reconstruction as it is unclear what form of institutions should be built by the "interim administration." In particular, there was considerable reluctance to hand over power to the Kosovar Albanians in the form of quasi-independent institutions that might quickly assert actual independence; at the same time, the hostile environment led the U.N. to adopt security measures that in themselves arguably undermined respect for the rule of law. There was, therefore, no "ownership" on the part of the local community and frequently little leadership on the part of the U.N. Though hardly the largest of the many problems confronting Kosovo, these factors have not helped the prospects for the rule of law as the province slouches its way towards Europe.

The central contradiction of the U.N. Interim Admission Mission in Kosovo's (UNMIK) mandate was that it lacked a political resolution for the sovereignty question posed by the Serbian province. On the ground, it was soon recognized that returning Kosovo to direct control under Belgrade was inconceivable. Nevertheless, the authorizing resolutions and official statements emphasized continuing respect for the territorial integrity and political independence of the FRY. In itself, this contradiction presented a serious barrier to the re-establishment of the rule of law in Kosovo—a problem exacerbated still further by the security vacuum that was left after the departure of the Serb institutions of state. Three aspects of this problem as it manifested in Kosovo are considered here: the choice of law to be applied in Kosovo, the appointment of local and later international judges, and the question of executive detention by UNMIK.

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[42] *Id.* at art. 53. *See also* John Dugard, *Dealing with Crimes of a Past Regime: Is Amnesty Still an Option?*, 12 LEIDEN J. OF INT'L L. 1001, 1004 (2000) (finding that both national courts and the International Criminal Court have jurisdiction over war crimes, crimes against humanity, and genocide under the complementary principle of the Rome Statute).

HeinOnline -- 20 Ohio St. J. on Disp. Resol. 80 2005

A. *Applicable Law*

The failure to establish political credibility from the outset of the mission compounded the internal contradictions of UNMIK's mandate. At Russian insistence, and consistent with the terms of Resolution 1244 (1999), the first UNMIK regulation established that the law in force prior to March 24, 1999 (the day on which NATO's air campaign commenced) would apply, provided that this law was consistent with internationally recognized human rights standards and Security Council Resolution 1244.[43] The largely Albanian judiciary that was put in place by UNMIK rejected this, however, with some judges reportedly stating that they would not apply "Serbian" law in Kosovo. Though they accepted some federal laws, such as the federal code of criminal procedure, the judges insisted on applying the Kosovo Criminal Code and other provincial laws that had been in effect in March 1989, asserting that these had been illegally revoked by Belgrade. The judges nevertheless "borrowed" from the 1999 law to deal with cases involving crimes not covered in the 1989 Code, such as drug-trafficking and war crimes. In addition to lowering hopes that Serb judges would return to office, this dispute further undermined local respect for UNMIK—especially when it finally reversed its earlier decision in December 1999 and passed a regulation declaring that the laws in effect on March 22, 1989, would be the applicable law in Kosovo.[44]

UNMIK also had to reverse itself on the question of appointing international judges to oversee the legal system. Despite the resignation of Serb judges and concerns about ethnic bias and intimidation within the Albanian judiciary, U.N. officials were reluctant to introduce international judges.[45] A senior U.N. official reportedly responded to such a recommendation by stating: "This is not the Congo, you know." Instead, 55 local judges and prosecutors, operating under the Joint Advisory Council on Provisional Judicial Appointments, were proposed in the first months of the mission.[46] By February 2000, the rebellion of Albanian judges and a series of

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[43] UNMIK Reg. No. 1999/1, *supra* note 4, §§ 2, 3.

[44] UNMIK, Reg. No. 1999/24, *On the Law Applicable in Kosovo*, U.N. SCOR, § 1.1, U.N. Doc. UNMIK/REG/1999/24 (1999).

[45] *See, e.g.*, *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, U.N.SCOR, § IV.A.366, U.N. Doc. S/1999/779 (1999) ("There is an urgent need to build genuine rule of law in Kosovo, including through the immediate re-establishment of an independent, impartial[,] and multi-ethnic judiciary.").

[46] UNMIK Reg. No. 1999/1, *supra* note 4; UNMIK Reg. No. 1999/2, *On the Prevention of Access by Individuals and Their Removal to Secure Public Peace and*

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attacks against their few Serb counterparts led to a regulation allowing SRSG Bernard Kouchner to appoint international judges to the district court in Mitrovica as an emergency measure. Within three months, this had been extended to every district court in Kosovo.[47]

B. *Executive Detentions*

One of the consequences of the diminished credibility of UNMIK and its own lack of faith in the local judiciary was recourse to detention on executive orders. On May 28, 2000, Afram Zeqiri, a Kosovar Albanian and former Kosovo Liberation Army (KLA) fighter, was arrested on suspicion of murdering three Serbs in the village of Cernica, including the shooting of a four-year-old boy. An Albanian prosecutor ordered his release for lack of evidence, raising suspicions of judicial bias. The decision was upheld by an international judge, but Kouchner nevertheless ordered that Zeqiri continue to be detained under an "executive hold," claiming that the authority to issue such orders derived from "security reasons" and Security Council Resolution 1244.[48]

Similar orders were made by Kouchner's successor, Hans Haekkerup. In February 2001, a bus carrying Serbs from Nis into Kosovo was bombed, killing eleven. British Kosovo Force (KFOR) troops arrested Florim Ejupi, Avdi Behluli, Çelë Gashi, and Jusuf Veliu in mid-March on suspicion of involvement, but on March 27, 2001, a panel of international judges of the District Court of Pristina ordered release of Behluli, Gashi, and Veliu. The following day, Haekkerup issued an executive order extending their detention for thirty days, and later issued six more such orders. Ejupi was reported to have "escaped" from the high-security detention facility at Camp Bondsteel.[49]

Order, U.N. SCOR, U.N. Doc. UNMIK/REG/1999/2 (1999) (creating the legal basis for Joint Advisory Council and appointing its members (three internationals, and four locals—two Albanians, one Serb, and one Bosniak)). This was later succeeded by the Advisory Judicial Commission. UNMIK, Reg. No. 1999/7, *On the Appointment and Removal from Office of Judges and Prosecutors*, U.N. SCOR, U.N. Doc. UNMIK/REG/1999/7 (1999).

[47] UNMIK, Reg. No. 2000/6, *On the Appointment and Removal from Office of International Judges and International Prosecutors*, U.N. SCOR, U.N. Doc. UNMIK/REG/2000/6 (2000); UNMIK, Reg. No. 2000/34, *Amending UNMIK Regulation No. 2000/6 On the Appointment and Removal from Office of International Judges and International Prosecutors*, U.N. SCOR, U.N. Doc. UNMIK/REG/2000/34 (2000).

[48] WILLIAM G. O'NEILL, KOSOVO: AN UNFINISHED PEACE 86 (2002).

[49] *See* Arben Qirezi, *Kosovo: Court Overturns Haekkerup Detention Orders*, IWPR BALKAN CRISIS REPORT NO. 308, Jan. 11, 2002, *available at*

HeinOnline -- 20 Ohio St. J. on Disp. Resol. 82 2005

Following criticism by the Organization for Security and Co-operation in Europe (OSCE) Ombudsperson, as well as international human rights organizations such as Human Rights Watch and Amnesty International, a Detention Review Commission of international experts was established by UNMIK in August 2001 to make final decisions on the legality of administrative detentions.[50] The Commission approved an extension of the detention of the alleged Nis bombers until December 19, 2001—a few weeks after Kosovo's first provincial elections—ruling that "there [are] 'reasonable grounds to suspect that each of the detained persons has committed a criminal act . . . .'"[51] At the end of that period, the three-month mandate of the Commission had not been renewed; in its absence, the Kosovo Supreme Court ordered the release of the three detainees.[52] The last person held under an Executive Order, Zeqiri, was released on bail in early February 2002, after approximately twenty months in detention.[53]

C. *Kosovo in Limbo*

Kosovo demonstrates the most difficult aspects of administering justice under international administration. Some of these difficulties arose from the security environment on the ground; others from the high politics surrounding every aspect of NATO's intervention and the subsequent role of the U.N. Together, these factors encouraged inconsistent policies on the part of the international administration, in turn giving rise to its own contradictions as the body charged with instilling the values of human rights and the rule of law detained persons in apparent contempt of international

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http://www.iwpr.net/index.pl?archive/bcr2/bcr2_20020111_2_eng.txt.

[50] *See* UNMIK, Reg. No. 2001/18, *On the Establishment of a Detention Review Commission for Extra-Judicial Detentions Based on Executive Orders*, U.N. SCOR, § 1, U.N. Doc. UNMIK/REG/2000/18 (2001); Ombudsperson Institution in Kosovo, Special Report No. 3 On the Conformity of Deprivations of Liberty Under "Executive Orders" with Recognised International Standards, to Mr. Hans Haekkerup Special Representative of the Secretary General of the United Nations (June 29, 2001), *available at* http://www.ombudspersonkosovo.org/doc/spec%20reps/pdf/sr3.pdf; HUMAN RIGHTS WATCH, WORLD REPORT 2002: EVENTS OF 2001, at 386 (2002) *available at* http://www.hrw.org/wr2k2/; Amnesty INTERNATIONAL, ANNUAL REPORT 2002 (2002), *available at* http://web.amnesty.org/web/ar2002.nsf/home/home?OpenDocument.

[51] Press Release, UNMIK, Supreme Court Releases Nis Bomb Suspects (Dec. 19, 2001), *available at* www.unmikonline.org/press/2001/press-r/pr671.htm.

[52] *Id.*; *see also* Qirezi, *supra* note 49, at 1.

[53] Zeqiri was finally released due to lack of evidence. *See* UNMIK Division of Media Monitoring, June 15, 2002, *available at* http://www.unmikonline.org/press/2002/mon/june/lmm150602.htm#5.

HeinOnline -- 20 Ohio St. J. on Disp. Resol. 83 2005

judges. A clearer distinction between an initial period of martial law and subsequent judicial reconstruction might have ameliorated some, though not all, of these problems. Given the particular controversy concerning the choice of law in Kosovo, it might also have been appropriate for the U.N. to impose a generic penal code and code of criminal procedure for an interim period, along the lines recommended by the Brahimi Report on U.N. Peace Operations.[54] A deeper problem underlying UNMIK's difficulties is the lack of any serious interest in reconciliation on the part of the local actors. Virtually all parties remain ethnically "pure," and until the final status question is resolved the prospects of dealing with the past locally remain slim.

III. EAST TIMOR: POST-COLONIAL JUSTICE

In East Timor, the U.N. faced the task of building a judicial system literally from the ground up. As the U.N. prepared to establish a transitional administration, the Secretary-General observed that "local institutions, including the court system, have for all practical purposes ceased to function, with . . . judges, prosecutors, and other members of the legal profession having left the territory."[55] This apocalyptic view of the situation was borne out by early estimates that the number of lawyers remaining in the territory was fewer than ten.[56]

Unlike Kosovo, then, East Timor's experiences reflected a distinct set of concerns with internationally administered justice. Although there was an initial assumption that East Timor required quick law and order measures to maintain peace and security (learning, in part, from the experiences of Kosovo), it soon became clear that the main focus should be on developing

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[54] *Report of the Panel on United Nations Peace Operations*, U.N. GAOR, 55th Sess., Provisional Agenda Item 87, at 14, U.N. Doc. A/55/305–S/2000/809 (2000), [hereinafter *Brahimi Report*] (calling for the Secretary-General to invite a panel of international legal experts to evaluate the feasibility and utility of developing an interim criminal code, including possible regional adaptations, for use in transitional administration operations pending the re-establishment of local rule of law and local law enforcement capacity).

[55] *Report of the Secretary-General on the Situation in East Timor*, U.N.SCOR, § IV.A.33, U.N. Doc. S/1999/1024 (1999).

[56] *See* Hansjoerg Strohmeyer, *Building a New Judiciary for East Timor: Challenges of a Fledgling Nation*, 11 CRIM. L.F. 259, 262–63 (2000). The World Bank estimated that over seventy percent of all administrative buildings were partially or completely destroyed, and almost all office equipment and consumable materials were totally destroyed. WORLD BANK, REPORT OF THE JOINT ASSESSMENT MISSION TO EAST TIMOR, Annex 1, at 15 (1999).

HeinOnline -- 20 Ohio St. J. on Disp. Resol. 84 2005

sustainable institutions. Greater efforts were made to "Timorize" the judiciary than most other civil and political institutions, but this led to substantial trade-offs in terms of qualifications. Balancing the need to respect international human rights standards against the need for sustainability—and the reluctance of Indonesia to cooperate with any form of international tribunal[57]—led to the establishment of special panels for serious crimes. Plagued by various concerns irrelevant to the situation of the Timorese (such as internal U.N. management difficulties), this panel enjoyed less legitimacy than the Timorese-driven Commission for Reception, Truth, and Reconciliation.[58] Meanwhile, frustration with the pursuit of serious offenders and the questionable efforts by Indonesia to prosecute its own nationals led to renewed Timorese calls to convene a full international criminal tribunal.

A. *"Timorizing" the Judiciary*

Though East Timor presented fewer security and political problems than Kosovo (choice of law, for example, was uncontroversial),[59] the lack of local capacity presented immense challenges. Under Indonesian rule, no East Timorese lawyers had been appointed as judges or prosecutors. A Transitional Judicial Service Commission was established, comprised of three East Timorese and two international experts,[60] but the absence of a communications network meant that the search for qualified lawyers had to be conducted through leaflet drops by International Force in East Timor (INTERFET) planes. Within two months, sixty qualified East Timorese with law degrees had applied for positions and the first eight judges and two prosecutors were sworn in on January 7, 2000.[61]

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[57] Such a tribunal had been called for by, among others, the International Commission of Inquiry on East Timor. *See Report of the International Commission of Inquiry on East Timor to the Secretary-General*, U.N.SCOR, § IV.A.6.152, U.N. Doc. A/54/726–S/2000/59 (2000).

[58] *See supra* Part I.

[59] UNTAET, Reg. No. 1999/1, *supra* note 4, § 3.1 (defining the applicable law as "the laws applied in East Timor prior to 25 October 1999."). This language (referring to "the laws applied," rather than "the applicable laws") was chosen in order to avoid the retroactive legitimation of the Indonesian occupation of East Timor. *See* Strohmeyer, *supra* note 56, at 267 n.18.

[60] UNTAET, Reg. No. 1999/3, *On the Establishment of a Transitional Judicial Service Commission*, U.N. SCOR, § 2, U.N. Doc. UNTAET/REG/1999/3 (1999), *available at* http://www.un.org/peace/etimor/untaetR/etrey3.htm.

[61] Hansjoerg Strohmeyer, *Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor*, 95 AM. J. INT'L L. 46, 54 n.39 (2001).

HeinOnline -- 20 Ohio St. J. on Disp. Resol. 85 2005

As in Kosovo, the decision to rely on inexperienced local jurists came from a mix of politics and pragmatism. Politically, the appointment of the first Timorese legal officers was of enormous symbolic importance. At the same time, the emergency detentions under INTERFET required the early appointment of judges who understood the local civil law system and who would not require the same amount of translation services demanded by international judges. In addition, appointment of international judges would necessarily be an unsustainable temporary measure that would cause further dislocation when funds began to diminish.

The U.N. Transitional Administration in East Timor (UNTAET) was more aggressive in "Timorizing" the management of judicial systems than the institutions working in political and civil affairs.[62] The trade-off, of course, was in formal qualifications and practical experience. Some of the appointees had worked in law firms and legal aid organizations in Indonesia, while others worked as paralegals with Timorese human rights organizations and resistance groups.[63] None had ever served as a judge or prosecutor. "Timorization" thus referred more to the identity of a particular official, rather than the establishment of support structures to ensure that individuals could fulfill their responsibilities. UNTAET developed a three-tier training approach, comprising a one week "quick impact" course prior to appointment, ongoing training, and a mentoring scheme. However, limited resources and difficulties in recruiting experienced mentors with a background in civil law posed serious obstacles to the training program, and UNTAET officials later acknowledged that the program was grossly insufficient.

B. *Infrastructure and Support*

Even more so than Kosovo, the destruction wrought in East Timor presented substantial practical difficulties in the administration of justice. The first judges to be sworn in worked out of chambers and courtrooms that were still blackened by smoke. The judges lacked not only furniture and computers, but virtually any legal texts. Some books were retrieved from the destroyed buildings, but most had to be sought in the form of donations from private law firms and law schools in Indonesia and Australia.[64]

A non-obvious priority in the first months of the operation was to

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[62] *See, e.g.*, Joel C. Beauvais, *Benevolent Despotism: A Critique of U.N. State-Building in East Timor*, 33 N.Y.U. J. INT'L L. & POL. 1101, 1149 (2001).

[63] Strohmeyer, *supra* note 61, at 54.

[64] Strohmeyer, *supra* note 56, at 268–69.

HeinOnline -- 20 Ohio St. J. on Disp. Resol. 86 2005

construct correctional facilities. The destruction of virtually all detention facilities prior to the arrival of INTERFET limited the capacity to detain alleged criminals. UNTAET inherited this problem with the result that U.N. civilian police were forced to release alleged criminals in order to detain returning militia implicated in the commission of grave violations of international humanitarian law. One of the barriers to dealing with the shortage of space was the reluctance of donors to fund, either directly or indirectly, the building of prisons.[65]

Many gaps in the legal system, in particular the provision of legal assistance, were filled by enterprising NGOs, such as the civil rights organization Yayasan HAK.[66] Such initiatives deserve the support of international actors, particularly where bureaucratic or political obstacles delay U.N. initiatives in the same area. Nevertheless, by November 2000, the Security Council Mission to East Timor found that "the judicial sector remains seriously under-resourced. Consequently, the current system cannot process those suspects already in detention, some of whom have been held for almost a year."[67] These delays, combined with the lack of access to qualified defense lawyers, were blamed when over half of the Timorese prison population escaped in August 2002.[68]

C. *Serious Crimes*

In Kosovo, the judicial system existed parallel to the ongoing jurisdiction of the International Criminal Tribunal for the Former Yugoslavia. During the course of NATO's 1999 bombing campaign, the Prosecutor issued an indictment for Yugoslav President Slobodan Milošević and other Serbian leaders for alleged offences committed in Kosovo. Milošević was transported to The Hague in unusual circumstances in June 2001. The first indictments of Kosovar Albanians were issued in February 2003, concerning KLA leaders accused of war crimes. Given the politicization of the Kosovo judiciary described earlier, conducting any of these trials within Kosovo would have

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[65] HUMAN RIGHTS WATCH, UNFINISHED BUSINESS: JUSTICE FOR EAST TIMOR (2000), *available at* http://www.hrw.org/backgrounder/asia/timor/etimor-back0829.htm; Strohmeyer, *supra* note 61, at 58.

[66] Yayasan HAK (Foundation for Law, Human Rights, and Justice) was established in 1997 by a group of young East Timorese intellectuals and NGO activists. *See* Yayasan HAK, Timor Lorosae, *at* http://www.yayasanhak.minihub.org/about_us.html.

[67] *Report of the Security Council Mission to East Timor and Indonesia*, U.N.SCOR, § III.A.8, U.N. Doc. S/2000/1105 (2000).

[68] *See* Jill Jolliffe, *Jail Breakout over Delays*, THE AGE (Melbourne), Aug. 17, 2002, at 20.

HeinOnline -- 20 Ohio St. J. on Disp. Resol. 87 2005

posed a substantial challenge to the judicial system.[69]

In East Timor, no such international tribunal existed. Prosecution of those accused of the most serious crimes was therefore handled as part of the East Timorese domestic process. In March 2000, UNTAET passed a regulation establishing the exclusive jurisdiction of the Dili District Court and the Court of Appeals in Dili in relation to serious crimes.[70] These were defined as including genocide, crimes against humanity, war crimes, and torture, as well as murder and sexual offenses committed between January 1, 1999, and October 25, 1999.[71] The cases were to be heard by mixed panels of both international and East Timorese judges, and prosecuted by a new Serious Crimes Unit. The first hearings took place in January 2001.[72]

In addition to the constraints on resources, management problems contributed to the slow functioning of the panels on serious crimes. By early 2001, there were over 700 unprocessed cases in the serious crimes category alone and detention facilities were filled to capacity with pretrial detainees. As a result, some alleged perpetrators had to be released.[73] These problems continued through 2001 with a number of resignations from the Serious Crimes Unit. Dissatisfaction with the progress in deterring serious crimes was one factor that encouraged the East Timorese to look for alternative accountability mechanisms for the abuses of September 1999. More importantly, however, the inadequacy of Indonesia's efforts to deal with alleged criminals in its territory led many to believe that an international tribunal was the only way in which high-level perpetrators would ever face justice.[74] This might have been based on unrealistic expectations of what such a tribunal could achieve; in any case, such a proposal appeared unlikely to draw much support from governments.

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[69] Gary Jonathan Bass, *Milosevic in the Hague*, 82 FOREIGN AFF. 82 (2003), *available at* http://www.foreignaffairs.org/20030501faessay11221/gary-j-bass/milosevic-in-the-hague.html; Alissa J. Rubin, *Three Albanians to Face Kosovo War Crimes Charges; a Fourth Indictee Is in Custody*, L.A. TIMES, Feb. 19, 2003, at A3.

[70] UNTAET, Reg. No. 2000/11, *On the Organization of Courts in East Timor*, U.N. SCOR, § 10.1, U.N. Doc. UNTAET/REG/2000/11 (2000).

[71] *Id.* § 10.2; UNTAET, Reg. No. 2000/15, *On the Establishment of Panels with Exclusive Jurisdiction Over Serious Criminal Offences*, U.N. SCOR, § 2.3, U.N. Doc. UNTAET/REG/2000/15 (2000).

[72] *Report of the Secretary-General on the United Nations Transitional Administration in East Timor*, U.N. SCOR, § V.42, U.N. Doc. S/2000/738 (2000).

[73] Beauvais, *supra* note 62, at 1155.

[74] Ian Martin, *No Justice in Jakarta*, WASH. POST, Aug. 27, 2002, at A19.

HeinOnline -- 20 Ohio St. J. on Disp. Resol. 88 2005

D. *East Timor in Transition*

In the panoply of U.N. peace operations, East Timor will almost certainly be regarded as a success. Its independence on May 20, 2002, was the culmination of over 25 years of struggle by the Timorese and billions of dollars in international assistance. And yet, upon independence, it became the poorest country in Asia. Unemployment remains high, literacy remains low, and the foundations for a stable and democratic society are untested. The aggressive policies in promoting Timorese leadership in the area of law and order were laudable, but the slow pace of the legal system that was created undermined faith in the rule of law as such.

A major test of the established system will hinge on the question of land title. For essentially political reasons, UNTAET deferred consideration of the land title issue until after independence—and therefore beyond its mandate. This enormously complex problem includes claims arising from Indonesian and Portuguese colonial rule, and perhaps claims under customary norms predating Portuguese colonization.[75] How Timor-Leste deals with this issue, and the incentives for corruption that go with it, will undoubtedly challenge the country's political and legal systems. Although the outcome is clearly up to the Timorese themselves, how the new regime responds to that challenge will be a measure of the success of the rule of law policies put in place by UNTAET.

IV. AFGHANISTAN: JUSTICE AND THE "LIGHT FOOTPRINT"

In Afghanistan, the combination of restricting the international security presence to Kabul and the desire to encourage Afghan capacity building—the "light footprint" approach—led to a minimal international presence. In addition, Afghanistan's undisputed sovereignty substantially limited the role that the international presence played in the area of the rule of law. Nevertheless, key areas of the judicial system were still potentially "externalized" and provide an interesting contrast with the approach adopted in the earlier missions. These areas included establishing the applicable law under the imprimatur of the U.N., granting the U.N. the right to investigate human rights violations, and establishing a Judicial Commission to rebuild

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[75] *See* Dennis Schulz, *East Timor's Land Rights Mess*, THE AGE (Melb.), Dec. 23, 2000, *available at* http://www.etan.org/et2000c/december/17-23/23etland.htm. *Cf.* Strohmeyer, *supra* note 56, at 280–81 (arguing that it was "indispensable to establish . . . a land and property commission").

HeinOnline -- 20 Ohio St. J. on Disp. Resol. 89 2005

the domestic justice system.[76]

A. *Applicable Law*

The Bonn Agreement provided for the legal framework that applied in Afghanistan until the adoption of a new constitution by a Constitutional Loya Jirga, which was to be convened within eighteen months of the establishment of the Transitional Authority.[77] The interim legal framework was based on the 1964 Constitution, "with the exception of those provisions relating to the monarchy and to the executive and legislative bodies provided in the Constitution."[78] Existing laws and regulations would continue to apply, "to the extent that they are not inconsistent with this agreement or with international legal obligations to which Afghanistan is a party."[79]

As in Kosovo, the legal order established by previous regimes was itself controversial in Afghanistan. Therefore, the Bonn Agreement attempted to mediate these concerns by reverting to an earlier period.[80] Falling back on the 1964 Constitution in particular reflected an attempt to connect the peace process with memories of a more stable Afghanistan—though exclusion of provisions concerning the monarchy and the purely symbolic role for "His Majesty Mohammed Zaher, the former King of Afghanistan"[81] suggested ambivalence about the historical analogy. At the same time, reference to "existing laws and regulations" sought to provide for necessary amendments following 37 years of legal development.[82]

Precisely how such updating might occur was an open question. Similarly, although the Bonn Agreement explicitly incorporated only the international legal instruments to which Afghanistan was a party—rather than the entire corpus of "internationally recognized human rights

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[76] *Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions*, U.N. SCOR, art. II(2), U.N. Doc. S/2001/1154 (2001) [hereinafter *Bonn Agreement*].

[77] *Id.* at art. I(6).

[78] *Id.* at art. II(1)(i).

[79] *Id.* at art. II(1)(ii).

[80] Afghanistan saw a series of constitutions adopted following successive coups in 1973 (leading to the constitution of February 1977), 1978, and 1979, the Soviet occupation from 1979–1989 (with a new constitution in 1987, replaced by a constitution in 1990), the coup by *mujahideen* forces in 1992, and the disputed Taliban rule from 1996.

[81] *Bonn Agreement*, *supra* note 76, at arts. I(4), III(A)(2).

[82] *Id.* at art. II(1)(ii).

HeinOnline -- 20 Ohio St. J. on Disp. Resol. 90 2005

standards," as in Kosovo[83] and East Timor[84]—the nascent Supreme Court of Afghanistan still enjoyed considerable latitude.[85] In the two earlier missions, the vagueness of the qualifying clauses and the lack of any attempt at training caused uncertainty as to the validity of certain laws, such as the maximum length of pretrial detention.[86] In the case of Afghanistan, it was paralysis of the legal system after the Bonn Agreement which left these questions unanswered.

B. *Human Rights and Transitional Justice*

Justice in Afghanistan under the Taliban was notoriously capricious and brutal; their overthrow was brutal in its own way. In addition to allegations that anti-Taliban forces summarily executed prisoners of war during the fighting, there were several reports that Rashid Dostum's troops killed hundreds of Taliban detainees while transporting them in sealed freight containers. There was little willingness to investigate these and other allegations against members of Hamid Karzai's new government.[87]

The Bonn Agreement provided that the Interim and later Transitional Authority should, "with the assistance of the United Nations, establish an independent Human Rights Commission, whose responsibilities will include human rights monitoring, investigation of violations of human rights, and development of domestic human rights institutions."[88] At the same time, the U.N. was separately granted "the right to investigate human rights violations and, where necessary, recommend corrective action," as well as to develop

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[83] UNMIK, Reg. No. 1999/1, *supra* note 4, §§ 2–3.

[84] UNTAET, Reg. No. 1999/1, *supra* note 4, § 3.1. These standards were requested in East Timor by the National Council of Timorese Resistance ("CNRT"), which had endorsed them in its "Magna Carta" in 1998, adopted at the East Timorese National Convention in the Diaspora, Peniche, Portugal on April 25, 1998.

[85] The major difference was that Afghanistan had not ratified the Convention on the Elimination of All Forms of Discrimination Against Women. Afghanistan acceded to the convention on March 5, 2003. *See* Division for the Advancement of Women, Department of Economic and Social Affairs, *State Parties*, *at* http://www.un.org/womenwatch/daw/cedaw/states.htm.

[86] *See, e.g.*, Strohmeyer, *supra* note 56, at 276.

[87] HUMAN RIGHTS WATCH, WORLD REPORT 2003: EVENTS OF 2002, at 198 (2003), *available at* http://www.hrw.org/wr2k3/. The detention of Afghan and alleged al Qaeda forces on U.S. military bases also raised serious questions of international humanitarian law.

[88] *Bonn Agreement*, *supra* note 76, at art. III(C)(6).

HeinOnline -- 20 Ohio St. J. on Disp. Resol. 91 2005

and implement a human rights education program.[89]

In keeping with the "light footprint" philosophy, senior U.N. staff was circumspect about taking the lead in human rights.[90] The first National Workshop on Human Rights was convened in Kabul on March 9, 2002, chaired by Interim Authority Vice-Chair Sema Samar. Although U.N. High Commissioner for Human Rights Mary Robinson and SRSG Lakhdar Brahimi addressed the meeting, the participants were drawn from members of the Interim Authority, Afghan specialists, and representatives of national NGOs. The workshop established four national working groups to carry the process forward in accordance with twenty guiding principles. These principles concerned the role of the proposed Human Rights Commission, as well as the question of transitional justice. With respect to past violations, the principles called for decisions on appropriate mechanisms of transitional justice to be made by the Afghan people themselves, based on "international human rights standards, Afghan cultural traditions, and Islam."[91]

In his opening address to the workshop, Interim Authority Chairman Hamid Karzai raised the possibility of an Afghan Truth Commission in a speech that departed from his prepared text:

> Yet another important matter to consider is the question of the violations of the past. I cannot say whether the current Interim Administration has full authority to address this. But it is my hope that the Loya Jirga government will have the authority to establish a truth commission and ensure that the people will have justice. The people of Afghanistan must know that there will be a body to hear their complaints.
>
> Indeed, we must hear what the people have to say. Mass graves have been found in which hundreds were buried, houses and shops burnt, so

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[89] *Id.* at Annex II, ¶ 6.

[90] Interesting human rights issues more general than those discussed here are raised by the United Nations Mission in Afghanistan ("UNAMA") mission structure. Rather than concentrating human rights in a single component, UNAMA has a human rights coordinator in the Office of the SRSG with two full-time human rights staff and works with relevant staff located in the mission's two operational pillars (Pillar I: "political" and Pillar II: "relief, recovery and reconstruction"). *See* OFFICE OF THE SRSG FOR AFGHANISTAN, HUMAN RIGHTS IN THE UNITED NATIONS ASSISTANCE MISSION FOR AFGHANISTAN (2002).

[91] OFFICE OF THE SRSG FOR AFGHANISTAN, HUMAN RIGHTS ADVISORY NOTE NO. 3: IMPLEMENTING THE ACCOUNTABILITY PROVISIONS OF THE BONN AGREEMENT: TOWARD AN AFGHAN NATIONAL STRATEGY FOR HUMAN RIGHTS MONITORING, INVESTIGATIONS AND TRANSITIONAL JUSTICE (2002). *See also The Situation in Afghanistan and Its Implications for International Peace and Security: Report of the Secretary-General*, U.N. SCOR, § II.F.42, U.N. Doc. A/56/875–S/2002/278 (2002) [hereinafter *Report of the SG of Mar. 18, 2002*].

HeinOnline -- 20 Ohio St. J. on Disp. Resol. 92 2005

> many cruel acts, and about which nothing had been heard or known before. So many of our people have been murdered, mothers killed as they embraced their children, people burnt, so much oppression, so many abuses. This is why a truth commission is needed here: to protect our human rights, and to heal the wounds of our people.[92]

This desire to confront transitional justice questions directly was repeated in the working groups established out of the initial workshop. An all-Afghan working group on "approaches to human rights monitoring, investigation and remedial action" recast its mandate to include transitional justice issues.[93]

The process of national reconciliation that this may herald is necessarily slow. Nevertheless, mission staff was keen to avoid scenes common in the past, with foreign consultants parachuting into a country like Afghanistan, lecturing the local population, and quickly departing. Generally, the consultations that took place were regarded as fruitful, though perhaps open to the criticism that the main interlocutors came from a very narrow cross-section of Afghan civil society. Still, less can be said about achievements in the justice sector.

C. *Justice Sector*

Under the Bonn Agreement, the Interim Authority was to establish, "with the assistance of the United Nations, a Judicial Commission to rebuild the domestic justice system in accordance with Islamic principles, international standards, the rule of law[,] and Afghan legal traditions."[94]

The Secretary-General's March 18, 2002, report made brief reference to the Judicial Commission, noting that it would "touch on issues central to the values and traditions of different segments of Afghan society. It is imperative, therefore, that the Afghan men and women chosen to serve on the Commission be highly respected, apolitical[,] and suitably qualified to discharge their duties."[95] The lead role was attributed to the Interim

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[92] Hamid Karzai, A Vision of Human Rights in the New Afghanistan 3 (Mar. 9, 2002), *quoted in* Situation of Human Rights in Afghanistan (Note by the Secretary-General), U.N. Doc. A/57/309 (Aug. 13, 2002), *available at* http://www.unhchr.ch/huridocda/huridoca.nsf/0/E1A5CA1D109B9D01C1256C5500364012/$File/N0252599.pdf?OpenElement (unofficial translation from the original Dari on file with author).

[93] *Report of the SG of Mar. 18, 2002*, *supra* note 91, § II.F.42.

[94] *Bonn Agreement*, *supra* note 76, at art. II(2).

[95] *Report of the SG of Mar. 18, 2002*, *supra* note 91, § II.F.44.

HeinOnline -- 20 Ohio St. J. on Disp. Resol. 93 2005

Authority, which was to "cooperate closely with lawyers and judges, other interested parties and individuals and the United Nations to identify potential candidates for the Commission, with a view to establishing it as soon as possible."[96] On March 26, 2002, the Office of the SRSG announced that it had "prepared a paper on the Judicial Commission, outlining its proposed mission, composition, powers and operating procedures."[97] Nevertheless, a judicial adviser was not appointed until the first week of May 2002.[98]

A document from the Office of the SRSG from the same month stated that:

> [A]ll agree that global experience in justice reform and development has shown that non-strategic, piecemeal and "interventionist" approaches can have dire consequences for the effective development of [the justice] sector. A strategic, comprehensive, Afghan led, integrated programme of justice sector reform and development can only begin with a comprehensive sectoral review and assessment of domestic needs, priorities, initiatives and capacities for reconstruction and development of this crucial sector. To date, none has been undertaken.[99]

Given the experiences of Kosovo and East Timor, these assumptions are highly debatable. UNMIK in particular found that failure to engage *immediately* with rule of law questions can eliminate the opportunity to maximize the impact of international engagement. It is true that a strategic, comprehensive approach is desirable, but not if it means indefinite delays until the security environment allows for a thorough review. If necessary, skeletal legal reforms might be made on an emergency basis until a more strategic approach can be formulated.[100]

In Afghanistan, UNAMA's mandate was interpreted as requiring the U.N. to facilitate rather than lead. In areas such as the choice of laws, the structure of the legal system, and appointment of judges, this was entirely appropriate. But such an interpretation was less persuasive in relation to

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[96] *Id.*

[97] Press Release, U.N. SCOR, Security Council Expresses Overwhelming Support for Proposed United Nations Assistance Mission in Afghanistan (Mar. 26, 2002), *available at* http://www.un.org/News/Press/docs/2002/SC7338.

[98] In part this was due to difficulties recruiting the right person. The current Judicial Adviser, Amin M. Medani, was previously in the Office of the High Commissioner for Human Rights Representative for the Arab Region.

[99] OFFICE OF THE SRSG FOR AFGHANISTAN, PROPOSAL FOR A MULTI-AGENCY REVIEW OF JUSTICE SECTOR DEVELOPMENT IN AFGHANISTAN 2 (2002).

[100] *See, e.g.*, INTERNATIONAL POLICY INSTITUTE, A REVIEW OF PEACE OPERATIONS: A CASE FOR CHANGE 263 (2003), *available at* http://ipi.sspp.kcl.ac.uk/rep007/toc.html.

HeinOnline -- 20 Ohio St. J. on Disp. Resol. 94 2005

basic questions of rebuilding courthouses, procuring legal texts and office equipment, and training of judges. Instead, it appeared that the rule of law was simply not a priority. In the 48-page National Development Framework drafted by the Afghan Assistance Coordination Authority (AACA) in April 2002, the justice system warranted only a single substantive sentence.[101] Similarly, although Italy agreed to serve as "lead donor" on the justice sector at the Tokyo pledging conference in January 2002, there was little evidence of activity in this area. The Afghan Interim Authority did appoint some new judges, including a number of women, but those courts that functioned at all did so erratically. This was not helped by Karzai's appointment of a septuagenarian Chief Justice who had never studied secular law.[102]

D. *Tiptoeing Through Afghanistan*

As indicated earlier, UNAMA served in some ways as a correction to the expanding mandates asserted by the U.N. through the 1990s, culminating in the missions in Kosovo and East Timor.[103] At the same time, the light footprint approach adopted in Afghanistan led to little being achieved in the justice sector in the six-month Interim Authority period. This was, in part, due to the limited role given to the U.N. in these areas under the Bonn Agreement, and the need to consult closely with the Afghan Interim Authority and other actors on the appropriate nature of the assistance that might be offered.[104] But it seems also fair to say that the rule of law was not seen as a priority by either the Interim Authority, UNAMA, or the donor community.

Afghanistan, of course, poses challenges distinct from those of Kosovo and East Timor. Rather than being in a position of government, the function

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[101] AFGHAN ASSISTANCE COORDINATION AUTHORITY, NATIONAL DEVELOPMENT FRAMEWORK: DRAFT FOR CONSULTATION 47 (2002), *available at* http://www.adb.org/afghanistan/ndf.pdf. "The judicial system will be revived through a sub-program that provides training, makes laws and precedents available, and rehabilitates the physical infrastructure of the judicial sector." *Id.*

[102] Hafizullah Gardish, *Chief Justice Under Scrutiny*, INSTITUTE FOR WAR AND PEACE REPORTING AFGHAN RECOVERY REPORT NO. 54, Apr. 1, 2003, *available at* http://www.iwpr.net/index.pl?archive/arr/arr_200303_54_1_eng.txt.

[103] *See supra* text accompaning note 4.

[104] In his report of March 18, 2002, the Secretary-General stated that the U.N.'s approach to human rights "will be guided by Afghan human rights organizations and activists, who are best placed to advise on how international human rights law and standards can be implemented in Afghanistan's particular social, political[,] and cultural context." *Report of the SG* of Mar. 18, 2002, *supra* note 91, § II.F.43.

HeinOnline -- 20 Ohio St. J. on Disp. Resol. 95 2005

of the U.N. is to provide assistance to the political structures created in the Bonn Agreement. Also, despite the suffering of the previous 23 years, Afghanistan is not as riven with ethnic tension as Kosovo, nor is it establishing its first independent political institutions as in East Timor. Nevertheless, as the Afghan state is being rebuilt, respect for the consistency and transparency of the state's laws will become as important as respect for the leaders that emerge from the ongoing political process laid down by the Bonn Agreement.

V. CONCLUSION

In 1944, Judge Learned Hand spoke at a ceremony in Central Park, New York, to swear in 150,000 naturalized citizens.[105] He observed, "[l]iberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it."[106]

Building or rebuilding faith in the idea of the rule of law requires a mental transformation as much as a political one. An important test of the success of such a transformation is to whom people turn for solutions to problems that would normally be considered "legal." In each of the three territories considered in this article, the results of that test are uncertain. It is possible, however, to draw some broad principles from these experiments in judicial reconstruction, principles that may be relevant the next time the U.N. or another international body has effective legal control over a territory. The principles fall into three broad themes.

First, the administration of justice should rank among the high priorities of a post-conflict peace operation.[107] There is a tendency on the part of international actors to conflate armed conflict and criminal activity more generally. Drawing a clearer distinction and being firm on violations of the law increases both the credibility of the international presence and the chances of a peace agreement holding. This encompasses both the lawlessness that flourishes in conflict and post-conflict environments and vigilantism to settle scores. Swift efforts to re-establish respect for law may also help to lay a foundation for subsequent reconciliation processes. Failure

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[105] LEARNED HAND, THE SPIRIT OF LIBERTY 190 (Alfred A. Knopf, 3d ed. 1952) (1944).

[106] *Id.*

[107] *See, e.g.*, *Brahimi Report*, *supra* note 54, at 8. "The Panel recommends a doctrinal shift in the use of civilian police, other rule of law elements and human rights experts in complex peace operations to reflect an increased focus on strengthening rule of law institutions and improving respect for human rights in post-conflict environments." *Id.*

HeinOnline -- 20 Ohio St. J. on Disp. Resol. 96 2005

to prioritize law enforcement and justice issues undermined the credibility of the international presence in Kosovo and led to missed opportunities in East Timor. In Afghanistan, rule of law simply did not feature on the agenda.

Second, in an immediate post-conflict environment lacking a functioning law enforcement and judicial system, rule of law functions may have to be entrusted to military personnel on a temporary basis. Recourse to the military for such functions is a last resort, but may be the only alternative to a legal vacuum. Measures to create a standby network of international jurists who could be deployed at short notice to post-conflict areas would facilitate the establishment of a judicial system (primarily as trainers and mentors), but are unlikely to be able to deploy in sufficient time and numbers to establish even an ad hoc system on their own. This role for the military may also include the emergency construction of detention facilities. The law imposed in such circumstances should be simple and consistent. If it is not feasible to enforce the law of the land, martial law should be declared as a temporary measure, with military lawyers (especially if they come from different national contingents) agreeing upon a basic legal framework. Persons detained under such an ad hoc system should be transferred to civilian authorities as quickly as possible.[108]

Third, once the security environment allows the process of civil reconstruction to begin, sustainability generally should take precedence over temporary standards in the administration of basic law and order. Whether internationalized processes are appropriate for the most serious crimes should be determined through broad consultation with local actors. In some situations, such as those in which conflict is ongoing, this consultation will not be possible. In circumstances where there are concerns about bias undermining the impartiality of the judicial process, some form of mentoring or oversight may be required. In all cases, justice sector development must be undertaken with an eye to its coordination with policing and the penal system.

These themes are necessarily general. Indeed, the idea that one could construct a rigid template for reconstructing the judicial system in a post-conflict environment is wrongheaded. As Judge Hand recognized, the major transformation required is in the hearts of the general population; any foreign involvement must therefore be sensitive to the particularities of the local population.[109] This is not to say that "ownership" requires that locals drive this process in all circumstances. On the contrary, international engagement

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[108] *See* ASPEN INSTITUTE, HONORING HUMAN RIGHTS UNDER INTERNATIONAL MANDATES: LESSONS FROM BOSNIA, KOSOVO, AND EAST TIMOR 18–19 (2003).

[109] HAND, *supra* note 105, at 190.

HeinOnline -- 20 Ohio St. J. on Disp. Resol. 97 2005

will sometimes abrogate the most basic rights to self-governance on a temporary basis. But while the levels of foreign intervention may vary from the light footprint in Afghanistan, the ambiguous sovereignty in Kosovo, and the benevolent autocracy in East Timor, the guiding principle must be an appropriate balance of short-term measures to assert the re-establishment of the rule of law, and long-term institution building that will last beyond the life of the mission and the fickle interest of international actors.

HeinOnline -- 20 Ohio St. J. on Disp. Resol. 98 2005