

JUSTICE UNDER TRANSITIONAL ADMINISTRATION: CONTOURS AND CRITIQUE OF A PARADIGM[†]

Carsten Stahn^{*}

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^{*} LL.M., NYU; LL.M., Köln-Paris. Associate Legal Advisor, International Criminal Court, carsten.stahn@icc-cpi.int. The views expressed here are those of the author alone and do not necessarily reflect the position of the International Criminal Court.

I. INTRODUCTION

In a standard textbook on international criminal law, justice is usually theorized in three different categories: domestic legal justice, international criminal justice, as evidenced by the naissance of institutions such as the international criminal tribunals for the former Yugoslavia and Rwanda or the International Criminal Court, and hybrid criminal justice, a term used to describe newly emerging forms of mixed national-international criminal adjudication as practiced in, for example, Sierra Leone or Cambodia.¹

This tripartite conceptualization of justice is, however, reductionist. Both the practice of the United Nations (U.N.) in international territorial administration² and international experiments in state-building, more generally, indicate that there is, in effect, a separate paradigm that has emerged within the practice of post-conflict reconstruction: justice under transitional administration.³

This phenomenon is distinct from the broader category of transitional justice⁴ that became popular in the wake of the

* LL.M., NYU; LL.M., Köln-Paris. Associate Legal Advisor, International Criminal Court, carsten.stahn@icc-cpi.int. Originally presented at the IFHV Conference "Post-Conflict Reconstruction, Nation or Statebuilding?", The Hague, May 22, 2004. The views expressed here are those of the author alone and do not necessarily reflect the position of the International Criminal Court.

1. See, e.g., ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 455-56 (2003).

2. See Ralph Wilde, *From Danzig to East Timor and Beyond: The Role of International Territorial Administration*, 95 AM. J. INT'L L. 583, 583 (2001); Ralph Wilde, *Representing International Territorial Administration*, 15 EUR. J. INT'L L. 71, 71 (2004).

3. See SIMON CHESTERMAN, YOU, THE PEOPLE: THE UNITED NATIONS, TRANSITIONAL ADMINISTRATION, AND STATE-BUILDING 155 (2004) [hereinafter CHESTERMAN, YOU THE PEOPLE]; SIMON CHESTERMAN, JUSTICE UNDER INTERNATIONAL ADMINISTRATION: KOSOVO, EAST TIMOR AND AFGHANISTAN 3 (2003), available at http://www.ipacademy.org/PDF_Reports/JUSTICE_UNDER_INTL.pdf; Hansjörg Strohmeier, *Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor*, 95 AM. J. INT'L L. 46, 46-48 (2001). For further discussion, see NEW APPROACHES IN INTERNATIONAL CRIMINAL JUSTICE: KOSOVO, EAST TIMOR, SIERRA LEONE AND CAMBODIA (Kai Ambos & Mohamed Othman eds., 2003).

4. See RUTI G. TEITEL, TRANSITIONAL JUSTICE (2000); Richard Lewis Siegel, *Transitional Justice: A Decade of Debate and Experience*, 20 HUM. RTS. Q. 431, 431-35 (1998).

transformations in Latin America and Eastern Europe in the 1980s and deals with the judicial treatment of regime transitions more generally.⁵ The concept of justice under transitional administration is more limited in its scope of application. It encompasses scenarios of transitions in which international authorities exercise normative powers in the context of a process of judicial reconstruction, either exclusively or in conjunction with domestic authorities.

This article seeks to focus on two aspects of this paradigm: on its contours and on some of its critiques.⁶ The analysis starts with a study of the anatomy of the administration of justice under a transitional administration. This contribution argues that justice under a transitional administration differs in a number of ways from purely domestic or international forms of justice and mixed models of adjudication, namely by its rationale, its features, and its challenges.

This analysis is followed by an assessment of how the challenge of the restoration of justice has been approached in different contexts of transition. The aim of this survey is to highlight the current flaws and deficiencies of contemporary practice and to add some brief suggestions to address some of the existing shortcomings.

II. JUSTICE UNDER TRANSITIONAL ADMINISTRATION: THE CONTOURS OF A PARADIGM

The systematic engagement of international actors in the reconstruction of a domestic justice system in territories under transition, as such, is a relatively contemporary paradigm. The need to develop a targeted strategy to restore the rule of law in post-conflict societies became painfully obvious in the beginning

5. See, e.g., Juan E. Mendez, *In Defense of Transitional Justice*, in TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES 1–2 (A. James McAdams ed., 1997); see also 2 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES, COUNTRY STUDIES (Neil Kritz ed., 1995).

6. See also Report of the Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies*, UN. Doc. S/2004/616 (2004). See, e.g., RAMA MANI, *BEYOND RETRIBUTION: SEEKING JUSTICE IN THE SHADOWS OF WAR* 4 (2002); Edward Newman, *'Transitional Justice': The Impact of Transnational Norms and the U.N.*, 9 INT'L PEACEKEEPING, 31, 31–32 (2002).

of the 1990s when U.N. peacekeepers failed to accomplish their civilian mandate in Somalia under UNOSOM II, due to both an ambiguous and half-hearted international mandate and a lack of support from local actors.⁷ Calls from the U.N. Secretariat for a more sustainable approach to peacemaking⁸ led to a shift in conception in the late 1990s that is, *inter alia*, reflected in the establishment of transitional administrations by the U.N. in Kosovo,⁹ East Timor,¹⁰ Afghanistan,¹¹ and to some extent also in the multilateralization of the U.S. led occupation of Iraq by the Security Council.¹²

One of the common features of these experiments is that international actors assumed active responsibilities in judicial reconstruction in order to fill domestic vacuums in the area of law enforcement and the rule of law. The model of engagement varied from case to case. The presence of the U.N. administrations in Kosovo and East Timor was based on a dirigiste model, vesting U.N. actors directly with the exercise of all of the classical powers of the state, including the administration of justice.¹³ The U.N. missions concerning Afghanistan (UNAMA) and Iraq (UNAMI), in contrast, followed

7. See *Report of the Commission of Inquiry Established Pursuant to Security Council Resolution 885 (1993) to Investigate Armed Attacks on UNOSOM II Personnel which Led to Casualties Among Them*, U.N. SCOR Inquiry Comm., ¶¶ 251–53, U.N. Doc. S/1994/653 (1994).

8. See *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping: Report of the Secretary-General*, U.N. SCOR, 47th Sess., ¶¶ 34–35, U.N. Doc. A/47/277 (1992).

9. See S.C. Res. 1244, U.N. SCOR, 54th Sess., 4011th mtg., ¶ 10, U.N. Doc S/RES/1244 (1999).

10. See S.C. Res. 1272, U.N. SCOR, 54th Sess., 4057th mtg., ¶ 1, U.N. Doc S/RES/1272 (1999).

11. See *Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions*, U.N. SCOR, 56th Sess., 4434th mtg., Annex 2, 3, U.N. Doc. S/2001/1154 (2001).

12. See S.C. Res. 1486, U.N. SCOR, 58th Sess., 4761st mtg., ¶¶ 4, 8, U.N. Doc. S/RES/1483 (2003); S.C. Res. 1511, U.N. SCOR, 58th Sess., 4844th mtg., ¶¶ 1, 8, U.N. Doc S/RES/1511 (2003).

13. UNMIK Reg. No. 1999/1, UNMIK, § 1, U.N. Doc UNMIK/REG/1999/1 (1999) amended by U.N. Doc. UNMIK/REG/2000/54 (2000), UNMIK/REG/1999/25 (1999); UNTEAT Reg. No. 1999/1, UNTEAT, § 1, U.N. Doc UNTEAT/REG/1999/1 (1999).

essentially a “light footprint” approach,¹⁴ leaving the direct management of public affairs primarily in the hands of interim domestic institutions and the Coalition Provisional Authority in Iraq (CPA).¹⁵ But all of these undertakings share one common characteristic—the direct involvement of international actors in the restoration of justice and the rule of law in post-conflict territories.

A. A Unique Rationale

To what extent does the rationale of justice under transitional administration differ from the objectives and goals of justice of established domestic or international justice systems? There are two main factors that make justice under transitional administration unique.

The first aspect is the close connection between the restoration of justice and security in post-conflict situations. Justice under transitional administration is less a means of safeguarding the interests of individual victims than an *instrument of restoring public order and safety* more generally. It is part and parcel of a post-intervention strategy, designed to prevent revenge killings or “reverse ethnic cleansing” and to address the root causes of conflict through the re-establishment of the rule of law. This particular objective links justice under transitional administration more directly to a communitarian, rather than an individual or victim-centered, interest.

Moreover, the establishment of justice in post-conflict societies is usually guided by *utilitarian considerations*. The ideas of reconstruction, justice, and reconciliation are often advertised as merits of sustainable peacemaking. But this is not entirely true. There is some hypocrisy in this argument. The establishment of justice and reconstruction is frequently a post hoc means of justifying liberal interventions (humanitarian interventions, democratic interventions, etc.).¹⁶ The point is

14. Simon Chesterman, *Walking Softly in Aghanistan: the Future of UN State-Building*, 44 SURVIVAL 37, 37 (2002) (citing *The situation in Afghanistan and its implications for international peace and security*, U.N. GAOR, 56th Sess. Agenda Item 43, U.N. Doc A/56/875-S/2002/278 (2002)).

15. See, e.g., *id.* at 37, 44.

16. See THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST

simple. If an intervening force justifies its operation with the objective of preventing further human rights violations or to restore democracy, but there is no functioning system to bring violators to justice, “then not only is the force’s mandate to that extent unachievable, but its whole operation is likely to have diminished credibility both locally and internationally.”¹⁷

B. Unique Features

The particularities of justice under a transitional administration do not end here. International efforts to restore justice in post-conflict situations bear unique features because they are immediately linked to the post-conflict environment and because they involve the exercise of public authority over foreign people. This creates additional complications in two regards: in relation to the scope of actors involved in the administration of justice and in relation to the applicable law.

1. The Multiplicity of Actors

In situations of conflict, a whole range of different actors are involved in the administration of justice. The military often plays a crucial role in the restoration of justice in the immediate aftermath of hostilities, because it is the only entity that has the de facto power to restore law and order. But military forces are ill-equipped to perform functions of justice. They may carry out executive functions such as detentions or tasks of law enforcement. Nevertheless, they lack the means to assume genuinely judicial functions or to conduct trials. This may lead to curious situations. In Somalia, for instance, Australian peacekeepers took it into their own hands to re-establish a local police force and community courts in areas they controlled, in order to restore basic mechanisms of justice.¹⁸ In Kosovo, the

THREATS AND ARMED ATTACKS 181–87 (2002) (analyzing the link between the conflict and the post-conflict phase in Kosovo); Carsten Stahn, *Enforcement of the Collective Will After Iraq*, 97 AM. J. INT’L L. 804, 814–18 (2003) (discussing Iraq).

17. See INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT 41 (2001).

18. See Martin R. Ganzglass, *The Restoration of the Somali Justice System*, in LEARNING FROM SOMALIA: THE LESSONS OF ARMED HUMANITARIAN INTERVENTION 27–28 (Walter Clarke & Jeffrey Herbst eds., 1997) (discussing the activities of Australian

Kosovo Force (KFOR) felt compelled to extend its detentions up to the time when the United Nations Mission in Kosovo (UNMIK) could take over civilian responsibilities.¹⁹

The strong focus on military control in the early post-conflict phase may produce a number of unsatisfactory legal gaps in the area of the administration of justice. Military forces are usually exempted from the jurisdiction of the host state, and sometimes even from international jurisdiction. Moreover, there is some ambiguity to what extent military forces operating within the framework of peacekeeping operations are subject to the rules of the Fourth Geneva Convention, a surrogate framework of law.²⁰ The U.N. has systematically refrained from regarding itself as a non-belligerent, occupying power.²¹ State practice is divided. While Australian peacekeepers considered themselves formally bound by the laws of the Convention in U.N. peace operations in Somalia²² and East Timor,²³ other states like the United States refused to officially acknowledge the applicability of the Convention.²⁴

peacekeepers). For an overview of the history of the conflict in Somalia, see JARAT CHOPRA, PEACE-MAINTENANCE: THE EVOLUTION OF INTERNATIONAL POLITICAL AUTHORITY 123–60 (1999).

19. See ALEXANDROS YANNIS, KOSOVO UNDER INTERNATIONAL ADMINISTRATION: AN UNFINISHED CONFLICT 35–40 (2001).

20. Adam Robert, *What is Military Occupation?*, 55 BRIT. Y.B. INT'L L. 249, 303–05 (1985)

21. The laws of occupation were not invoked by the U.N. in the cases of Somalia and Cambodia, nor in the later engagements in Kosovo or East Timor. See *id.* at 290–91; EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION, 189–90 (1993) (discussing the decline of the laws in occupation in international legal practice); Tobias Irmscher, *The Legal Framework for the Activities of the United Nations Interim Administration in Kosovo: The Charter, Human Rights and the Law of Occupation*, 44 GER. Y.B. INT'L L. 353, 387 (2001) (favoring an application of the laws of occupation to U.N. forces).

22. See MICHAEL J. KELLY, RESTORING AND MAINTAINING ORDER IN COMPLEX PEACE OPERATIONS 29, 37–38 (1999) [hereinafter KELLY, RESTORING AND MAINTAINING ORDER IN COMPLEX PEACE OPERATIONS].

23. See Michael J. Kelly et al., *Legal Aspects of Australia's Involvement in the International Force for East Timor*, 83 INT'L REV. RED CROSS 101, 104 (2001).

24. See MARTEN ZWANENBURG, ACCOUNTABILITY UNDER INTERNATIONAL HUMANITARIAN LAW FOR UNITED NATIONS AND NORTH ATLANTIC TREATY ORGANIZATION PEACE SUPPORT OPERATIONS 209 (2004) (Ph.D. dissertation, Leiden University) (on file with author) (referencing two factors: a 1997 decision of a Belgian Military Court that refused to recognize the applicability of the Fourth Geneva Convention to UNOSOM II,

2. *Ambiguities in the Law*

After the end of armed hostilities and a return to the path of peace, the situation does not necessarily improve fundamentally. Until the renaissance of international territorial administration in the mid- to late-1990s, the international community has generally been quite reluctant to complement military engagement by a sustainable civilian post-conflict presence. Furthermore, when international control takes over, it is often surrounded by the lack of an adequate framework for judicial reconstruction and doubts about the applicable law.²⁵

The Report of the Panel on United Nations Peace Operations (Brahimi Report) has tried to find a way out of this dilemma by suggesting the application of a standard criminal code in situations of emergency.²⁶ Similar “justice packages” have been proposed by the International Commission on Intervention and State Sovereignty as well as non-governmental organizations.²⁷ But this is only a partial solution. Quite apart from the fact that a standard solution is often ill-suited to address the problems of a specific society, one must observe that the core of the problem lies much deeper. The core problem is the lack of a coherent international legal framework for the *organization of justice* in post-conflict societies.

It is often difficult to simply rely on existing domestic law. Cases like Bosnia-Herzegovina, Kosovo, or East Timor show that the justice system and the laws of public administration of the previous regime are frequently inappropriate to serve as a legal framework for a process of post-conflict administration because they may be discriminatory in nature or fall short of meeting

and the fact that NATO troops did not consider the laws of occupation applicable to KFOR).

25. See, e.g., Michael Bohlander, *Kosovo: Legal Framework of the Prosecution and the Courts*, in *NEW APPROACHES IN INTERNATIONAL CRIMINAL JUSTICE*, *supra* note 3, at 21, 25–26 (discussing problems of retroactivity in Kosovo).

26. *Report of the Panel on United Nations Peace Operations*, U.N. GAOR, 55th Sess., Agenda Item 87, ¶¶ 80–83, U.N. Doc. A/55/305 (2000); see also Strohmeyer, *supra* note 3, at 62–63 (supporting a similar strategy).

27. INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, *THE RESPONSIBILITY TO PROTECT: REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY* 42 (2001).

universally recognized human rights standards. Transitional administrators have limited means at their disposal to correct these flaws. The laws of occupation may apply to multinational administrations such as in the case of post-war Iraq.²⁸ Furthermore, some authorities would even go a step further and argue that the classical framework of the laws of occupation apply (at least, by way of analogy) to processes of post-conflict reconstruction, even if conducted within the context of peacekeeping or peace enforcement operations.²⁹ Nevertheless, the added value of this suggestion is quite limited.³⁰ The laws of occupation provide a minimum legal framework for the restoration of law and order in war-torn societies, including provisions on penal procedure and the treatment of detainees.³¹ But they are quite conservative in their conception of authority and reform.

Occupying powers have very little leeway to undertake institutional reforms creating adequate conditions for post-conflict justice. Article 47 of the Fourth Geneva Convention restricts the power of the occupant to introduce changes in the institutions or government of the occupied territory.³² Furthermore, Article 64 requires that the penal law of the domestic courts be maintained for the “effective administration

28. See S.C. Res. 1483, U.N. SCOR, 58th Sess., 4761st mtg., ¶ 5, U.N. Doc. S/RES/1483 (2003). For an assessment, see David J. Scheffer, *Beyond Occupation Law*, 97 AM. J. INT'L L. 842, 842 (2003).

29. UNITED NATIONS, DEPARTMENT OF PEACEKEEPING OPERATIONS, LESSONS LEARNED UNIT, THE COMPREHENSIVE REPORT ON LESSONS LEARNED FROM THE UNITED NATIONS OPERATION IN SOMALIA (UNOSOM): APRIL 1992– MARCH 1995 ¶ 57 (1995), available at <http://pbpu.unlb.org/pbpu/library/UNOSOM.pdf>. This report suggests that that Fourth Geneva Convention “could supply adequate guidelines for regulating relations between peacekeeping troops and the local population”. *Id.*; see also KELLY, RESTORING AND MAINTAINING ORDER IN COMPLEX PEACE OPERATIONS, *supra* note 22, at 181. For an extension to the United Nations Mission in Kosovo (UNMIK), see Irmscher, *supra* note 21, at 388–94.

30. See Frédéric Mégret & Florian Hoffmann, *The U.N. as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities*, 25 HUM. RTS. Q. 314, 332 (2003).

31. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, arts. 71–78, 6 U.S.T. 3516, 75 U.N.T.S. 287, 332–38 [hereinafter Geneva Convention IV].

32. *Id.* at art. 47, 75 U.N.T.S. at 318.

of justice,”³³ though Article 66 leaves some room for the occupying power to prosecute some accused people in its “properly constituted, non-political military courts.”³⁴ But none of these options is exceedingly attractive. Domestic courts will often lack the neutrality and distance necessary to judge atrocities objectively.³⁵ Moreover, military courts of the intervening powers will hardly enjoy greater trust. They face a conflict of interests. A military occupant cannot, by its very nature, be considered a neutral entity acting only in the interest of the occupied territory and its inhabitants, and it will certainly not be perceived as such by the society of the post-conflict territory.

This places a great burden of responsibility on the Security Council. The Council has both the authority and the necessary representativeness to design legal frameworks governing processes of post-conflict reconstruction.³⁶ But its resolutions are often too vague or too ambiguous to provide secure guidance for post-conflict justice. A good example is Resolution 1483 (2003) that left experts divided over the question whether the Council used its Chapter VII powers actually to conform the laws of occupation to the process of reconstruction of Iraq,³⁷ or whether

33. *Id.* at art. 64, 75 U.N.T.S. at 328.

34. *Id.* at art. 66, 75 U.N.T.S. at 328–29.

35. *E.g.*, Strohmeyer, *supra* note 3, at 49–50. In Kosovo, Albanians were largely excluded from the judiciary before the conflict. Furthermore, the work of the judiciary was hampered by ethnic intimidation. *Id.*

36. U.N. CHARTER arts. 39–42. For a historical survey of Security Council authority and powers, see André J.J. de Hoogh, *Attribution or Delegation of (Legislative) Power by the Security Council ? The Case of the United Nations Transitional Administration in East Timor (UNTAET)*, in 7 INTERNATIONAL PEACEKEEPING: THE YEARBOOK OF INTERNATIONAL PEACE OPERATIONS 1, 5–9 (Michael Bothe & Boris Kondoch eds., 2002).

37. *See* Scheffer, *supra* note 28, at 849–50.

The primacy of the UN Charter under which the Security Council acts would have enabled that body to modify the occupation regime that otherwise would be required under occupation law. Resolution 1483 falls far short of that opportunity because it rests upon occupation law as the fulcrum of the Authority’s work, rather than a mandate of civilian and military responsibilities and UN oversight that would eclipse much of occupation law with a larger body of modern international law that could help guide transformational objectives.

Id. at 850.

it created a partial exception from the regime of occupation,³⁸ authorizing the CPA to engage in far-reaching law reform.

The practice of the U.N. in transitional administrations does not provide much clearer guidance. U.N. mandates are often ambiguous or lacunary. In the cases of Kosovo and East Timor, the Council left it essentially within the hands of the U.N. administrations to give meaning to their mandate by bestowing them with wide legislative, executive, and judicial powers to carry out their functions.³⁹ This wide delegation of authority raised doubts as to the legal limits of the action of U.N. administrations.

The U.N. Interim Administration UNMIK argued, for example, that it was not bound to respect human rights standards on detention, on the grounds that “[t]he situation in Kosovo [was] analogous to emergency situations envisioned in the human rights conventions” and that its mandate was adopted under Chapter VII, thus overriding international standards by virtue of Article 103 of the Charter.⁴⁰ This position

38. Thomas D. Grant, *Iraq: How to reconcile conflicting obligations of occupation and reform*, AM. SOC’Y INT’L L. INSIGHTS, No. 107A (June 2003), available at <http://www.asil.org/insights/insigh107a1.htm>.

The better view may be that Res. 1483 has created a “carve out” from the Hague Regulations and Fourth Geneva Convention, leaving other provisions of the treaties in force, but suspending with respect to the Authority those provisions that otherwise would curb its license to change the laws, institutions, and personnel of the occupied state.

Id.

39. See, e.g., de Hoogh, *supra* note 36, at 1–2.

40. Press Briefing, Susan Manuel, UNMIK Police, (July 2, 2001) available at <http://www.unmikonline.org/press/2001/trans/tr020701.html>). UNMIK officials used this explanation to justify executive detentions in Kosovo for security reasons. They noted:

Our position is that the authority for law and order and public safety is vested in the SRSB acting on behalf of the Secretary-General and the Security Council, according to Resolution 1244. Article 13 of the European Convention on Human Rights recognizes that there may be exceptions to the conventions principles in certain emergency situations. This is acceptable in European courts. The situation in Kosovo is analogous to emergency situations envisioned in the human rights conventions. We emphasize that UNMIK’s mandate was adopted under Chapter 7, which means that the situation calls for extraordinary means and force can be used to carry out the mandate. Any deprivation of liberty by an Executive Order is temporary and extraordinary, and its objective is the effective and impartial administration of justice.

was rightly disputed by the Kosovo Ombudsperson⁴¹ and untenable in the light of the formal derogation requirements under human rights treaty law and the U.N.'s own mandate under Article 55 of the Charter.⁴²

Furthermore, when defining the applicable law in Kosovo and East Timor, both UNMIK and its East Timorese counterpart, the United Nations Transitional Administration in East Timor (UNTAET), adopted the principle that the laws of the respective territories should remain in force, in so far as they did not contravene internationally recognized human rights standards.⁴³ This solution was, however, too simplistic in the sense that it charged national and international lawyers with the difficult burden of interpreting penal and public laws in light of the most recent and sophisticated standards as well as interpreting human rights without providing them with sufficient background and knowledge about the respective legal systems.⁴⁴ In addition, there was some ambiguity as the extent to which domestic courts could directly apply principles of international criminal law, such as the concept of crimes against humanity, in the domestic sphere to fill regulatory gaps in the legislation of the U.N. administrations.⁴⁵ These shortcomings created significant uncertainties about the applicable law in Kosovo and East Timor.

It is therefore rather clear that justice under a transitional administration suffers from a very particular burden, namely being exposed to the criticism of being governed by an imperfect

Id.

41. OMBUDSPERSON INSTITUTION, SPECIAL REPORT NO. 3: ON THE CONFORMITY OF DEPRIVATIONS OF LIBERTY UNDER 'EXECUTIVE ORDERS' WITH RECOGNIZED INTERNATIONAL STANDARDS (2001), available at http://www.ombudspersonkosovo.org/doc/spec_reps/pdf/sr3.pdf [hereinafter SPECIAL REPORT NO. 3].

42. See John Cerone, *Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo*, 12 EUR. J. INT'L L. 469, 487-88 (2001).

43. See UNMIK Reg. No. 1999/1, *supra* note 13, § 3; *On the Law Applicable in Kosovo*, UNMIK Reg. No. 1999/24, UNMIK, § 1, U.N. Doc. UNMIK/REG/1999/24 (1999), amended by U.N. Doc. UNMIK/REG/2000/59 (2000); *On the Authority of the Transitional Administration in East Timor*, UNTAET Reg. No. 1999/1, UNTAET, § 3, U.N. Doc. UNTAET/REG/1999/1 (1999).

44. Strohmeyer, *supra* note 3, at 59.

45. See Bohlander, *supra* note 25, at 31-32.

framework, and sometimes even underdeveloped framework of law.

3. *Unique Challenges*

The problems do not end here. The mission of justice under transitional administration is further complicated by a number of conceptual challenges arising from the status of transitional administrators as foreign public authorities. There are at least three substantial challenges that impair the authority of international transitional authorities: a neutrality challenge, a democratic challenge, and a functional challenge.⁴⁶

a. *The Neutrality Challenge*

The first challenge of justice under transitional administration is the requirement of impartiality. Impartiality is the very essence of U.N. peacekeeping in general and transitional administration in particular. International authorities are bestowed with governing powers in situations of transition because they are supposedly more neutral and detached from the morass of local conflict and politics and therefore better equipped to exercise functions of public authority in situations of transition. This justification is, however, difficult to maintain in situations when the international institutions effectively become “the state organs” of the administered territory, such as in Kosovo and East Timor recently, or in some earlier cases of transitional administration. Is it still possible to attribute the labels of neutrality or impartiality to international entities, which have the mandate to run the internal affairs of a territory? The requirement of neutrality appears to collide in these cases with the responsibilities of the administration as an internal organ of the territory under administration.

This accumulation of responsibilities creates, in particular, conflicts in the context of establishment of an independent

46. For a general critique of peacemaking in this light, see Roland Paris, *Peacebuilding and the Limits of Liberal Internationalism*, 22 INT'L SECURITY 54, 56–59 (1997) and Roland Paris, *International peacebuilding and the 'mission civilisatrice'*, 28 REV. INT'L STUD. 637, 637–39 (2002).

judiciary. International administrators, on the one hand, are charged with the de-politicization and reform of the local judiciary, which requires strong involvement in and supervision of judicial reconstruction.⁴⁷ But they are, at the same time, required by human rights law to respect basic notions of the rule of law in the exercise of their mandate, which includes the obligation to respect the independence of the judiciary.⁴⁸ The guarantee of an independent judiciary raises difficult questions of public administrations. To what extent can international administrations appoint judges on a short-term contract, subject to periodical renewal by the administration? How far can U.N. administrations control the appointment and removal from office of individual judges? Or, to what extent are transitional administrations allowed to give advice on the interpretation of the law declared applicable by them?

b. The Democratic Challenge

The problem of impartiality coincides with another problem—the lack of democratic legitimacy of transitional administrations. International administering institutions are usually neither elected nor appointed by local representatives, nor formally accountable to the authorities of the administered territories. This deficit raises an “authority problem” in the process of judicial reconstruction. It appears in at least two forms: the question of deference to local ownership and the issue of the temporal scope of application of acts of transitional authorities.

i. Local Ownership

The first aspect is probably the most difficult one. The fundamental question of all undertakings in international territorial administration is to what extent international actors are entitled to make decisions on behalf of local actors in the period of administration. One may easily agree that international actors may legitimately counter governmental vacuums by addressing technical and security aspects of

47. Strohmeyer, *supra* note 3, at 51.

48. *Id.* at 58.

reconstruction, such as law enforcement, border control, monetary questions and institution-building. But what about the grand strategic decisions of a post-conflict society, including decisions over the prosecution of past atrocities and property restitution? Should these choices be ultimately made by international administrations, such as in Kosovo and East Timor, where U.N. transitional administrators determined the essential features of criminal adjudication,⁴⁹ restitution,⁵⁰ and reconciliation⁵¹ by way of legislation?

ii. Ad Hocism v. Sustainability

The second problem is directly related to the issue of local ownership. The transitional character of international authority triggers a conflict between the objectives of progressive self-rule and sustainable reconstruction. The idea of transitional administration in the area of state-building is to achieve sustainable peace through long-term reconstruction. This ambition contrasts, however, with the temporal limitation of international authority. International administrations have approached this problem in a very formal manner, by limiting the scope of application of U.N. regulations until their repeal by domestic institutions after the end of the period of administration.⁵²

49. See *On Assignment of International Judges/Prosecutors and/or change of venue*, UNMIK Reg. No. 2000/64, UNMIK, U.N. Doc. UNMIK/REG/2000/64 (2000); *On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences*, UNTAET Reg. No. 2000/15, UNTAET, U.N. Doc. UNTAET/REG/2000/15 (2000); *On the Organization of the Public Prosecution Service in East Timor*, UNTAET Reg. No. 2000/16, UNTAET, U.N. Doc. UNTAET/REG/2000/16 (2000).

50. See *On the Establishment of the Housing and Property Directorate and the Housing and Property Claims Commission*, UNMIK Reg. No. 1999/23, UNMIK, § 2.7, U.N. Doc. UNMIK/REG/1999/23 (1999); *On Residential Property Claims and the Rules of Procedure and Evidence of the Housing and Property Directorate and the Housing and Property Claims Commission*, UNMIK Reg. No. 2000/60, UNMIK, § 3.1, U.N. Doc. UNMIK/REG/2000/60 (2000).

51. *On the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor*, UNTAET Reg. No. 2001/10, UNTAET, U.N. Doc. UNTAET/REG/2001/10 (2001). For a survey, see Carsten Stahn, *Accommodating Individual Criminal Responsibility and National Reconciliation: The U.N. Truth Commission for East Timor*, 95 AM. J. INT'L L. 952 (2001).

52. See, e.g., *On the Authority of the Interim Administration in Kosovo*, UNMIK

Reality is, however, far more subtle. International legislation usually gains recognition and acceptance through institutional routine and practice under transitional administration. If one is to take local ownership seriously, the hard question is whether transitional administration should at all be entitled to adopt legal acts with a long-term and possibly irreversible impact on the domestic population, such as the introduction of a liberal market economy in territories under transition, or changes in criminal law and criminal procedure that lead to final convictions.

c. The Functional Challenge

Some have even gone a step further and questioned whether the U.N. should be “in the business” of transitional administration at all.⁵³ The case for international territorial administration is easy to make in cases of state collapse and in post-conflict situations, where international authorities enjoy special functional legitimacy due to their formal impartiality, their expertise in special areas of reconstruction (election monitoring, policing, refugee return), and their contribution to a sharing of the financial burdens of war. Nevertheless, an ultra-liberal critique of transitional administration would hold that international administrators should not intervene in core areas of state-building, such as democratization and judicial reconstruction, because domestic actors have the right to make their own mistakes and to learn from them.⁵⁴

III. JUSTICE UNDER TRANSITIONAL ADMINISTRATION: A STOCKTAKING

International practice does not quite yet seem to have found a unified answer to these fundamental choices. It is therefore too early to provide definitive answers about the feasibility and

Reg. No. 1999/1, UNMIK, § 4, U.N. Doc. UNMIK/REG/1999/1 (1999); *On the Authority of the Transitional Administration in East Timor*, UNTAET Reg. No. 1999/1, UNTAET, §4, U.N. Doc. UNTAET/REG/1999/1 (1999).

53. *Report of the Panel on United Nations Peace Operations*, U.N. GAOR, 55th Sess., Agenda Item 87, ¶ 78, U.N. Doc. A/55/305-S/2000/809 (2000).

54. See Anne-Marie Slaughter, *Not the Court of First Resort*, WASH. POST, Dec. 21, 2003, at B7.

prospect of justice under transitional administration as a policy device. Nevertheless, it is high time to look in a more detailed fashion at the lessons that may be drawn from the practice and methodology applied by previous administrations.

A. *Evaluation and Critique of Some Approaches*

Previous and current efforts in judicial reconstruction present, in sum, a rather mixed picture. It is certainly a welcome development that international conflict engagement passes from the stage of temporary symptom relief to a more general commitment to root cause prevention. The current efforts of the international community in judicial reconstruction are far from perfect. They suffer, generally, from two fundamental shortcomings: the reproach that international engagement has been improvisational rather than principled in nature; and the fact that international practice jumps from one model to another, without showing coherence or consistency in institutional design. This is evidenced by the practice in the cases of Kosovo, East Timor, Afghanistan, and Iraq.⁵⁵

1. *Kosovo—A Learning Experience*

The international engagement in Kosovo may be described best as a learning experience in the true sense of the term. It receives some benefit from the fact that it is marked one of the “maiden experiments” in comprehensive judicial reconstruction. But it suffered from some flaws.

a. *Lack of Preparedness*

The first critique that may be voiced in relation to the conception of post-conflict justice in the case of Kosovo is a lack of preparedness. Both the Congo crisis in the 1960s and the U.N. engagement in Somalia had very clearly sent the message that the restoration of law and order in a crisis environment requires a structured approach to the restoration of justice. The U.N. failed, however, to develop a coherent approach to justice in the first phase of its engagement in mission.

55. See also CHESTERMAN, *YOU, THE PEOPLE*, *supra* note 3, at 165–82.

The withdrawal of the Federal Republic of Yugoslavia forces in accordance with the Security Council Resolution 1244⁵⁶ left Kosovo in limbo. UNMIK targeted the institutional gap in the area of justice in an ad hoc fashion, namely by way of experimentation. Since the U.N. was not able to deploy an adequate number of international lawyers with sufficient knowledge about the domestic legal system on short notice,⁵⁷ it first appointed nine local judges and prosecutors as a mobile response unit, exercising judicial authority all over Kosovo.⁵⁸ Then, it went on to appoint a core of fifty-four, mostly Albanian judges and prosecutors,⁵⁹ who were familiar with local traditions but hostile to the application of former Yugoslavian law. Fears about ethnic bias in the judiciary led UNMIK finally to assign international judges and prosecutors to domestic courts⁶⁰—an option that is now gaining wider recognition in other contexts.⁶¹

Additional complications arose from shortcomings in the

56. S.C. Res. 1244, U.N. SCOR, 54th Sess., 4011th mtg., U.N. Doc. S/RES/1244 (1999).

57. *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, 54th Sess., at 2, 13–14, U.N. Doc. S/1999/779 (1999).

58. Press Release, UNMIK, UNMIK Appoints First Judges and Prosecutors for Interim Kosovo Judiciary System (June 30, 1999), <http://www.unmikonline.org/press/press/pr5.html>.

59. *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, U.N. SCOR, 54th Sess., 4086th mtg., ¶ 54, U.N. Doc. S/1999/1250 (1999).

60. The general framework for the assignment of international judges and prosecutors to cases is laid down in UNMIK Regulation Nos. 2000/6 and 2000/64. *On the Appointment and Removal from Office of International Judges and International Prosecutors*, UNMIK Reg. No. 2000/6, UNMIK, §§ 1–2, U.N. Doc. UNMIK/REG/2000/6 (2000), amended by UNMIK Reg. No. 2000/34, UNMIK, U.N. Doc. UNMIK/REG/2000/34 (2000) and UNMIK Reg. No. 2001/2, UNMIK, UNMIK/REG/2001/2 (2001); *On Assignment of International Judges/Prosecutors and/or Change of Venue*, UNMIK Reg. No. 2000/64, UNMIK, §§ 1–2, U.N. Doc. UNMIK/REG/2000/64 (2000). Section 1.2 of Regulation 2000/6 provides that “[i]nternational judges shall have the authority . . . to select and take responsibility for new and pending criminal cases within the jurisdiction of the court to which [they are] appointed.” UNMIK Reg. No. 2000/6, § 1.2. Similarly, Section 1.3 of the Regulation vests international prosecutors with the authority to conduct criminal investigations and to select and take responsibility for new and pending criminal investigations. *Id.* § 1.3.

61. See Subhash C. Kashyap, *The Framework of Prosecutions in Cambodia*, in *NEW APPROACHES IN INTERNATIONAL CRIMINAL JUSTICE: KOSOVO, EAST TIMOR, SIERRA LEONE AND CAMBODIA*, *supra* note 3, at 189 (discussing the Cambodian model).

area of law enforcement. The cooperation between UNMIK police and the judiciary was hampered by two factors: the fact that many police officers were unfamiliar with the active role of the investigative judge in criminal investigation under the Kosovo legal tradition, and the unavailability of Serbian or Albanian translations of the law in force in Kosovo that were written in English.⁶² Even more importantly, UNMIK fell short of prioritizing the need to establish an adequate prison infrastructure. The limited number of detention facilities forced UNMIK police to release perpetrators of crimes only for reasons of lack of correctional capacity⁶³—a practice that is detrimental to the perception of justice in a post-conflict environment.

Many of these shortcomings could have been avoided had the international community devoted more time and resources to the planning of the international post-conflict presence.

b. The U.N. as 'A Human Rights Violator'

The organizational deficits of the U.N. in the preparation of judicial reconstruction by UNMIK were followed by a number of substantial flaws in the conception of U.N. authority. UNMIK has applied a number of questionable practices in the context of judicial reconstruction that actually exposed it to the criticism of being “a Human Rights Violator.”⁶⁴ The most famous example is the practice of “executive detentions.”⁶⁵ The U.N. Special Representative in Kosovo has issued a number of executive orders extending detention periods without providing the detainees or their legal counsel with information about the grounds for the continued detention or giving the detainee the opportunity to challenge the lawfulness of the detention.⁶⁶ This

62. See Elizabeth Abraham, Comment, *The Sins of the Savior: Holding the United Nations Accountable to International Human Rights Standards for Executive Order Detentions in its Mission in Kosovo*, 52 AM. UNIV. L. REV. 1291, 1325–26 (2003).

63. Cf. ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE MISSION IN KOSOVO REPORTS, REVIEW OF THE CRIMINAL JUSTICE SYSTEM (APRIL 2003–OCTOBER 2004): CRIME, DETENTION, AND PUNISHMENT 35–36 (2004), available at http://www.osce.org/documents/mik/2004/12/3984_en.pdf.

64. See Mégret & Hoffmann, *supra* note 30, at 314.

65. See Abraham, *supra* note 62, at 1327–96.

66. For UNMIK's position, see UNMIK News, *UNMIK Refutes Allegations of*

practice is in clear breach of habeas corpus guarantees under Article 5 of the European Council's Convention for the Protection of Human Rights and Fundamental Freedoms as well as Article 9 of the International Covenant on Civil and Political Rights, which require that anyone who has been arrested or detained be brought promptly before a judge in order to determine the lawfulness of the arrest or the detention.⁶⁷ UNMIK's detention practice triggered such open public criticism by institutions such as the OSCE⁶⁸ and the Kosovo Ombudsperson,⁶⁹ that it led to the establishment of an international Detention Review Commission.⁷⁰ Nevertheless, the lack of judicial control over the executive in the area of detentions has remained a problem until the most recent past.⁷¹

This human rights critique goes hand in hand with a broader institutional critique of UNMIK as a governing body. Although UNMIK assumed all the powers of a state in Kosovo, including executive, legislative, and judicial authority, it absolved itself from any form of judicial control. It declared itself "immune from any legal process"⁷² in violation of the right of

Judicial Bias and Lack of Strategy (June 25, 2001) at <http://www.unmikonline.org/pub/news/nl98.html>.

67. Convention for the Protection of Human Rights and Fundamental Freedoms, Apr. 11, 1950, Council of Europe, art. 5, Council Europe T.S. No. 005; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 175-76.

68. See ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE, REPORT NO. 6: EXTENSION OF CUSTODY TIME LIMITS AND THE RIGHTS OF DETAINEES: THE UNLAWFULNESS OF REGULATION 1999/26 (2000), available at http://www.osce.org/documents/mik/2000/04/959_en.pdf [hereinafter OSCE REPORT NO. 6]; see also AMNESTY INTERNATIONAL, FEDERAL REPUBLIC OF YUGOSLAVIA (KOSOVO): AMNESTY INTERNATIONAL'S RECOMMENDATIONS TO UNMIK ON THE JUDICIAL SYSTEM (2000), available at http://www.amnestyusa.org/countries/serbia_montenegro/document.do?id=DFB015FB06DD2BF28025687A005C29DF.

69. See SPECIAL REPORT NO. 3, *supra* note 41.

70. *On the Establishment of a Detention Review Commission for Extra-Judicial Detentions Based on Executive Orders*, UNMIK Reg. No. 2001/18, UNMIK, U.N. Doc. UNMIK/REG/2001/18 (2001).

71. ORGANIZATION OF SECURITY AND CO-OPERATION IN EUROPE, KOSOVO: REVIEW OF THE CRIMINAL JUSTICE SYSTEM (MARCH 2002 - APRIL 2003) 31-33 (2003), available at http://www.osce.org/documents/mik/2003/05/859_en.pdf [hereinafter OSCE, REPORT MARCH 2002].

72. See *On the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo*, UNMIK Reg. No. 2000/47, UNMIK, § 3.1, U.N. Doc.

access to the Courts⁷³ and admitted only reluctantly that it is bound to abide by human rights standards.⁷⁴ This policy raised the impression that UNMIK conceived itself as being above the law, and it proved to be counterproductive in the sense that it diminished its credibility as a governing institution in the eyes of the governed, in particular in the area of judicial reconstruction.

c. *(In)dependence of the Judiciary*

Moreover, in its governing practice, UNMIK displayed a curious understanding of the independence of the judiciary. It inserted a clause in its Regulation No. 1999/24, on the Law Applicable in Kosovo, which encouraged courts in Kosovo to “request clarification from the Special Representative of the Secretary-General in connection with the implementation of the present regulation.”⁷⁵ This provision has a very ambiguous undertone. It appears to suggest that the courts may seek advice on the interpretation of the law applicable in Kosovo “in the exercise of their functions.” This incentive runs directly counter to the separation of powers and the independence of the judiciary and is somewhat reminiscent of the political practice of former socialist countries, where the executive controlled the interpretation of the law.⁷⁶

UNMIK/REG/2000/47 (2000).

73. See OMBUDSPERSON INSTITUTION IN KOSOVO, SPECIAL 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 AND ON THE IMPLEMENTATION OF THE ABOVE REGULATION 14–16 (2000), available at http://www.ombudspersonkosovo.org/doc/spec_reps/pdf/sr1.pdf.

74. For an early critique, see Carsten Stahn, *International Territorial Administration in the Former Yugoslavia: Origins, Developments and Challenges Ahead*, 61 HEIDELBERG J. INT'L L. 107, 156

75. *On the Law Applicable in Kosovo*, UNMIK Reg. No. 1999/24, UNMIK, § 2, U.N. Doc. UNMIK/REG/1999/24 (1999), amended by U.N. Doc. UNMIK/REG/2000/59 (2000) (stating “[c]ourts in Kosovo may request clarification from the Special Representative of the Secretary-General in connection with the implementation of the present regulation. The Special Representative of the Secretary-General shall provide such clarification for the consideration of the courts in the exercise of their functions”).

76. For a critique, see Jochen Abr. Frowein, *Die Notstandsverwaltung von Gebieten durch die Vereinten Nationen*, in VÖLKERRECHT UND DEUTSCHES RECHT, Festschrift für Walter Rudolf 43 (H.W. Arndt et al. eds., 2001).

This scepticism about UNMIK's conception of an independent judiciary is reinforced by UNMIK's regulatory practice in relation to the appointment and the removal from office of judges and prosecutors. International judges enjoy formally the status of UNMIK civil employees.⁷⁷ This creates an appearance of an undue executive inference because the executive holds the ultimate control over the extension of contracts.⁷⁸ Non-extension may, in particular, be a means of holding judges accountable for specific conduct undertaken within the term of their offices,⁷⁹ which is manifestly incompatible with the independence of the judiciary.

Similar flaws may be detected in the procedure for the removal from office of members of the judiciary. The removal from office of national and international judges as well as prosecutors may be justified by such indeterminate grounds as serious misconduct or failure in the due execution of office.⁸⁰ The persons concerned must not even be heard by the Special Representative to the Secretary General (SRSG) before their removal from office.⁸¹ Finally, under the provisions of UNMIK Regulation 2000/64, international judges are not assigned to a case by a random system, but designated with the approval of the SRSG.⁸² These practices are difficult to reconcile with the principle of judicial independence, which seeks to protect independence against any doubts of extraneous influence.

d. Lack of Delegation of Authority to Domestic Actors

Last but not least, UNMIK has shown extraordinary reluctance in transferring powers to domestic institutions. In

77. OSCE, REPORT MARCH 2002, *supra* note 71, at 28 n.71.

78. *Id.*

79. *Id.*; see also ORGANIZATION OF SECURITY AND CO-OPERATION IN EUROPE, KOSOVO: REVIEW OF THE CRIMINAL JUSTICE SYSTEM (SEPTEMBER 2001 – FEBRUARY 2002) 31 (2002) [hereinafter OSCE, REPORT SEPTEMBER 2001], available at http://www.osce.org/documents/mik/2002/04/965_en.pdf.

80. See OSCE, REPORT MARCH 2002, *supra* note 71, at 30 n.78; OSCE, REPORT SEPTEMBER 2001, *supra* note 79, at 33.

81. See *id.* at 33.

82. See UNMIK Reg. No. 2000/64, *supra* note 49, § 2; OSCE, REPORT MARCH 2002, *supra* note 71, at 28 n.71.

particular, it has reserved its final decision-making authority over all aspects of public authority. This is not only explicitly stated in the preamble of the Constitutional Framework for Provisional Self-Government in Kosovo, but also reiterated in Chapter 12 of that document.⁸³ According to Chapter 12, the SRSG is empowered to oversee “the Provisional Institutions of Self-Government, its officials and its agencies” and to take “appropriate measures whenever their actions are inconsistent with UNSCR 1244(1999) or [the] Constitutional Framework.”⁸⁴ This strict top-down conception of authority has raised frustrations among domestic actors, particularly among Albanian leaders.

2. *East Timor—Some Lessons Learned*

A slightly different approach has been taken in East Timor. It may be summarized best under the heading of “some lessons learned.”

The United Nations Transitional Administration in East Timor (UNTAET) was established four months after UNMIK.⁸⁵ This placed the U.N. in a position to build on the precedent of Kosovo and to draw upon some initial lessons. The overall framework of governance was largely copied after the model of UNMIK. Nevertheless, there are some fine nuances.

a. *A Broader Focus on Local Ownership*

UNTAET placed a greater focus on the furtherance of East Timorese participation in the judiciary.⁸⁶ This decision was

83. See UNMIK Reg. No. 2001/9, UNMIK, at 31, at ch. 12, U.N. Doc. UNMIK/REG/2001/9 (2001). For a discussion see Carsten Stahn, *Constitution Without a State? Kosovo Under the United Nations Constitutional Framework for Self-Government*, 14 LEIDEN J. INT'L L. 531 (2001).

84. UNMIK Reg. No. 2001/9, *supra* note 83, at 31.

85. S.C. Res. 1244, U.N. SCOR, 54th Sess., 4011th mtg., § 10, U.N. Doc. S/RES/1244 (1999); S.C. Res. 1272, U.N. SCOR, 54th Sess., 4057th mtg., § 1, U.N. Doc. S/RES/1272 (1999).

86. For a discussion of the reconstruction of the justice system, see Suzannah Linton, *Rising from the Ashes: The Creation of a Viable Criminal Justice System in East Timor*, 25 MELBOURNE U. L.R. 122, 124 (2001). See also Simon Chesterman, *East Timor in Transition: Self-Determination, State-Building and the United Nations*, 9 INT'L PEACEKEEPING 45, 65 (2002).

guided by two factors. During Indonesian occupation, East Timorese lawyers had been largely excluded from service in the judiciary.⁸⁷ This placed UNTAET under a special responsibility to further local ownership in the East Timorese judiciary. Furthermore, the situation on the ground was less shaped by ethnic rivalries than in the case of Kosovo. This prerequisite facilitated the early integration of domestic actors in the newly established judicial system. But, at the same time, it required, greater qualificational concessions in the staffing policy.

b. A Wider Commitment To the Observance of the Rule of Law

Another merit of UNTAET is that it paid greater tribute to the observance of the principle of the rule of law than UNMIK. UNTAET displayed greater respect for the strict observance of human rights standards in the area of detentions by introducing a special habeas corpus procedure to challenge unlawful arrest or detention.⁸⁸ Moreover, UNTAET made less effort to exempt itself from the constraints of international law. The U.N. administration refrained from adopting a general regulation on the status, privileges, and immunities of UNTAET following the controversial example of UNMIK. Instead, the U.N. administrator, in several regulations, allowed specific executive decisions of the organs of the administration to be challenged before the courts.⁸⁹ UNTAET Regulation 2000/10 even provided expressly for a review of decisions of the UNTAET Policy

87. Linton, *supra* note 86, at 133.

88. *On Transitional Rules of Criminal Procedure*, UNTAET Reg. No. 2000/30, UNTAET, § 47.1, U.N. Doc. UNTAET/REG/2000/30 (2000).

89. *See On the Prohibition of Logging Operations and the Export of Wood from East Timor*, UNTAET Reg. No. 2000/17, UNTAET, §§ 6.4–6.5, U.N. Doc. UNTAET/REG/2000/17 (2000); *On Protected Places*, UNTAET Reg. No. 2000/19, UNTAET, §§ 8.4–8.5, U.N. Doc. UNTAET/REG/2000/19 (2000) (stating “[p]ending the establishment of adequate judicial procedures for administrative matters, a person or legal entity may challenge a decision of the Deputy Transitional Administrator to uphold the original decision adverse to their interests with the competent judicial authorities in East Timor” and “[i]n any court proceeding arising out of or in connection with the present regulation against UNTAET or a servant of UNTAET, the court shall apply the same substantive norms as would be applicable under the procedures for administrative matters”).

Committee before a court of competent jurisdiction.⁹⁰ These examples establish that UNTAET was indeed inclined to conceive itself as a domestic ruler subject to the rule of law.

c. An Authoritarian Type of Administration, Nevertheless

Nevertheless, the model of judicial reconstruction as such did not substantially differ from the precedent in Kosovo. It followed essentially a top-down methodology governed by the authority of a widely omnipotent U.N. administrator.⁹¹

This approach is open to two types of criticisms: the reproach of tutelage, and the threat of overregulation. Both elements are particularly evident in the area of the reconstruction of the East Timorese criminal justice system. Two examples may serve to illustrate these dangers.

First, the East Timorese Reception, Truth and Reconciliation Commission was not established on the basis of a parliamentary law, but by a legal act of the U.N. completed by UNTEAT's Human Rights Unit.⁹² This way of creation raises some concerns. Both the importance and the long-term impact of such decision on society appear to suggest that such an act should be taken by domestic actors and not by an international organ like UNTAET.

Second, one may observe that both the mechanisms of the Truth Commission and the U.N. established panels with exclusive jurisdiction over serious crimes are based on ultra-modern and highly sophisticated legal frameworks. The level of judicial inquiry and engagement that these two instruments require is, however, at odds with the administrative reality on the ground, where both technical equipment and professionally trained staff are still a scarce resource. This discrepancy is unhealthy. The tendency to overload a young society in

90. See *On Public Procurement for Civil Administration in East Timor*, UNTAET Reg. No. 2000/10, UNTAET, § 42, U.N. Doc. UNTAET/REG/2000/10 (2000).

91. For a critique, see 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, 1109–10, 1115, 1117 (2001).

92. See *On the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor*, UNTAET Reg. No. 2001/10, UNTAET, U.N. Doc. UNTAET/REG/2001/10 (2001).

transition with modern standards may easily turn into resentment and disbelief in the virtues of liberalism.⁹³

3. *Afghanistan—Faire et Laissez-faire*

The international engagement in Afghanistan stands in stark contrast to the experiences of Kosovo and East Timor. The United Nations Assistance Mission in Afghanistan (UNAMA), was based on a fundamentally different concept than UNMIK or UNTAET—a “light international footprint.” This change in technique has had direct implications in the area of judicial reconstruction.

a. *Internalized Justice*

Justice was internalized in Afghanistan. The guiding principle of judicial reconstruction is local ownership. This implies that the basic choices concerning transitional justice are to be made by the Afghani people themselves. The lead role in the process of judicial reconstruction was therefore assumed by the Afghanistan Interim Administration,⁹⁴ while the U.N. exercised only a function of government assistance.

The Afghani interim administration itself set up many of the institutions necessary for the functioning of the state that were established by UNMIK and UNTAET in Kosovo and East Timor. The administration established a Judicial Commission that was charged with the reconstruction of the domestic justice system in accordance with Islamic principles, international standards, the rule of law, and Afghani legal institutions.⁹⁵ Similarly, the

93. See also David Chandler, *Imposing the 'Rule of Law': The Lessons of BiH for Peacebuilding in Iraq*, 11 INT'L PEACEKEEPING 1, 3–4, 18–19 (2004). Chandler states:

First, while the new laws may appear to be very impressive on paper, they do not necessarily reflect or encourage an improvement in practice. Second, and more importantly, the development of the 'rule of law' through the external imposition of legislation undermines the process of consensus-building, necessary to give post-conflict populations a stake in the peacebuilding process.

Id.

94. *Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions*, U.N. SCOR, 56th Sess., 4434th mtg., § II.2, U.N. Doc. S/2001/1155.

95. *Id.* (stating Article 2, § 2 of the Bonn Agreement established the Judicial

Administration used its powers under the Bonn Agreement to create a Civil Service Commission,⁹⁶ a Human Rights Commission,⁹⁷ a Constitutional Commission,⁹⁸ and a national police force.⁹⁹

The dominance of local ownership has a number of other advantages. The lead role exercised by the interim administration in the different sectors of government helped to foster both its authority and its legitimacy in the country's fragile process of transition to peace.¹⁰⁰ Furthermore, local ownership ensured moderation in the designation of the law applicable in Afghanistan, and it maintained domestic influence over the choice of the members of the judiciary.

b. Neglected Justice?

Nevertheless, a light international footprint also has its downsides. Due to international deference and disengagement, the cause of justice reform has not received the same degree of attention as in Kosovo and East Timor. Initiatives to build up a new justice system in Afghanistan have only kicked off slowly, due to the limited powers of the U.N. in this field. Also contributing to this effect is the need for mutual consultation between the different authorities involved.¹⁰¹

This choice affects the peace process as a whole. The case of Afghanistan illustrates in this sense the inherent danger of a light footprint approach, namely the risk that it may privilege collective rights over individual rights. Local ownership safeguards the right of the people to remain free from external interference, but this protection may come at the price of the reduction in the level of individual rights protection if domestic

Commission).

96. *Id.* § III.C.5.

97. *Id.* § III.C.6.

98. *Id.* § I.6. See also *The Situation in Afghanistan and Its Implications for International Peace and Security: Report of the Secretary-General*, U.N. GAOR, 57th Sess., Agenda Item 37, ¶ 11, U.N. Doc. A/57/850-S/2003/754 (2003) (stating “[t]he Constitutional Commission was inaugurated on 26 April 2003”).

99. *Id.* ¶ 30.

100. *Id.* ¶¶ 2–32, 39–42.

101. See also CHESTERMAN, *YOU THE PEOPLE*, *supra* note 3, at 4.

leaders are either unwilling or unable to institutionalize mechanisms of human rights protection or criminal prosecution or both.

4. *Iraq—One Step Forward, Three Steps Back*

Transitional justice in Iraq follows the Afghani precedent in the sense that the international community placed great emphasis on local ownership since the takeover of responsibilities by the CPA. The U.N. Security Council charged the CPA expressly with a quasi-mandate to foster domestic reconstruction and to transfer authority to the Iraqi Governing Council.¹⁰² The practice of the CPA, however, repeated some of the shortcomings of the U.N. engagement in Kosovo.

a. *Lack of preparedness*

The framework of the administration was hastily drawn up after little attention had been paid to the post-conflict phase before the intervention. The most visible proof of this negligence was the apparent lack of a coherent concept for law enforcement and civil reconstruction in the immediate aftermath of the intervention.¹⁰³ The failure of the CPA to restore basic order facilitated widespread looting and civil unrest and caused damage to the Iraqi public institutions and Iraq's cultural heritage.¹⁰⁴

b. *Centralization of Authority*

Furthermore, by adopting an authoritarian model of governance, the Authority placed itself in contradiction to its mandate to promote the values of human rights and the rule of law. Its first regulation, CPA Regulation No. 1, adopted on May 16, 2003, reads like a reprise of UNMIK's or UNTAET'S autocratic conception of governance. It states :

The CPA is vested with all executive, legislative and judicial authority necessary to achieve its

102. See S.C. Res. 1483, U.N. SCOR, 58th Sess., 4716th mtg., ¶¶ 4, 8, U.N. Doc. S/RES/1483 (2003).

103. See Scheffer, *supra* note 28, at 843.

104. See *id.* at 849.

objectives, to be exercised under relevant U.N. Security Council resolutions, including Resolution 1483 (2003), and the laws and usages of war. This authority shall be exercised by the CPA Administrator.¹⁰⁵

This sweeping accumulation of authority is critical because it deviates from the Fourth Geneva Convention and the Hague Rules, which do not provide an occupying power with full legislative and judicial power to promote economic, social, and institutional change for the purpose of state-building. It bears more resemblance with the (outdated) administering framework of the post-surrender occupation of Germany and Japan¹⁰⁶ or exclusive U.N. governance missions than with a modern regime of occupation.

The regulatory practice of the CPA sent the implicit message that it was reluctant, if not unwilling, to submit itself to traditional standards of human rights protection and governmental accountability. The interpretation of the applicable law in Iraq left it open whether the CPA would be obligated to comply with international human rights standards. There is at least an argument that this obligation could be founded upon the extraterritorial application of the International Covenant on Civil and Political Rights.¹⁰⁷

Furthermore, the CPA avoided any significant degree of accountability by removing CPA personnel from the jurisdiction

105. See Coalition Provisional Authority, Reg. No. 1, § 2 (May 16, 2003) available at http://www.iraqcoalition.org/regulations/20030516_CPAREG_1_The_Coalition_Provisional_Authority_.pdf.

106. For a critique, see EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 94, (1993).

107. See *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, Hum. Rts. Comm., 80th Sess., 2187th mtg., ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004) It states:

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 with the power or effective control of that State Party, even if not situated within the territory of the State Party.

Id.

of the Iraqi Courts for both civil and criminal matters.¹⁰⁸ This measure reduced mechanisms of redress to military internal investigation, while excluding impartial and independent review of human rights violations by civilian personnel or an ombudsperson.

c. Shortcomings in Judicial Reconstruction

These conceptual flaws coincided with shortcomings in legal practice. The CPA faced visible difficulties in the area of detention. It applied double standards in its detention policy.¹⁰⁹ Moreover, it made the implementation of court orders for the release of detainees dependent on the approval of the military¹¹⁰—a requirement that is in conflict with Article 9(3) of the International Covenant on Civil and Political Rights.¹¹¹

A second reproach that one may address to the CPA is that it displayed activism in institution building without, however, possessing firm authority for such activity. The CPA created a Central Criminal Court of Iraq by CPA Order No. 13.¹¹² But the legal status of this Court remained ambiguous because of the limitation under article 64 of the Fourth Geneva Convention that states that the tribunals of the occupied territory shall continue to function.¹¹³ Similarly, the CPA failed to articulate a clear legal basis for the creation of the Iraqi Special Tribunal under international humanitarian law. Instead, it relied on a

108. See Coalition Provisional Authority, Order No. 17 (revised), § 2, ¶ 1 (June 17, 2004) available at http://www.iraqcoalition.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf (stating the CPA, “their Personnel, property, funds and assets . . . shall be immune from Iraqi Legal process”).

109. For the legal consequences, see NOELLE QUÉNIVET, PROSECUTING PRIVATE CONTRACTORS UNDER US LAW FOR THE MISTREATMENT OF DETAINEES IN ABU GHRAIB (2004), <http://www.ruhr-uni-bochum.de/ifhv/publications/bofaxe>.

110. See AMNESTY INTERNATIONAL, IRAQ: MEMORANDUM ON CONCERNS RELATING TO LAW AND ORDER, § 8 (July 2003), available at <http://web.amnesty.org/library/index/ENGMDE141572003?open&of=ENG-IRQ>.

111. *Id.*

112. See Coalition Provisional Authority, Order No. 13 (Revised) (Amended) (April 22, 2004), available at http://www.iraqcoalition.org/regulations/20040422_CPAORD_13_Revised_Amended.pdf.

113. Geneva Convention IV, *supra* note 31, art. 64, 6 U.S.T. at 3558, 75 U.N.T.S. at 328.

legal fiction to justify the establishment of the tribunal. The CPA delegated parts of its authority to the Governing Council, in order to authorize the latter to establish the tribunal as a domestic entity.¹¹⁴ This practice of delegation fails, however, to eliminate doubts about the legal foundation of the tribunal because the court was formally established on the basis of authority under occupation law,¹¹⁵ which is hostile to the creation of criminal tribunals by the occupant.

Finally, the practice of the CPA revealed shortcomings in relation to the observance of the independence of the judiciary. CPA Order No. 13 failed to uphold judicial independence by tying the appointment of judges of the Central Criminal Court of Iraq to one year contracts approved by the CPA.¹¹⁶ The Order also granted the CPA an undue possibility of influence over the judiciary by providing the Chief CPA Administrator with a possibility to refer cases to the court.¹¹⁷

Similar criticisms may be voiced in relation to the Iraqi Special Tribunals. One may have some doubts whether the terms of the statute guarantee the tribunal a sufficient degree of independence from the Iraqi Governing Council.¹¹⁸ Moreover, the statute grants non-Iraqi nationals a rather obscure right to act “as observers to the Trial Chambers and to the Appeals Chamber,” including the possibility “to monitor the protection by

114. See Coalition Provisional Authority, Order No. 48, § 1 (Dec. 9, 2003), *available at* http://www.iraqcoalition.org/regulations/20031210_CPAORD_48_IST_and_Appendix_A.pdf (stating “[t]he Governing Council is hereby authorized to establish an Iraqi Special Tribunal . . . to try Iraqi nationals or residents of Iraq accused of genocide, crimes against humanity, war crimes or violations of certain Iraqi laws, by promulgating a statute, the proposed provisions of which have been discussed extensively between the Governing Council and the CPA”).

115. *Id.* at pmb. (stating “[p]ursuant to my authority as Administrator of the Coalition Provisional Authority . . . and under the laws and usages of war, and consistent with relevant U.N. Security Council resolutions, including Resolution 1483 (2003), Resolution 1500 (2003) and Resolution 1511 (2003), . . . I hereby promulgate the following”) (second emphasis added).

116. See AMNESTY INTERNATIONAL, *supra* note 110, at 15.

117. See Coalition Provisional Authority, Order No. 13, *supra* note 112, § 19.

118. See Coalition of Provisional Authority, Order No. 48, *supra* note 114, app. A, art. 5.

the Tribunal of general due process of law standards.”¹¹⁹ This provision is certainly guided by the noblest intentions. But it is at odds with the principle of the independence of judges from non-judicial oversight in the exercise of their judicial functions.

B. Some Modest Proposals

The experiences in Kosovo, East Timor, Afghanistan, and Iraq establish very clearly that justice under transitional administration is still a rather fragile and inexperienced paradigm that suffers from flaws and misconceptions. Mistakes are often repeated, be it by the same or different legal entities.¹²⁰ In particular, problems occur most frequently due to shortcomings in preparation; misconceptions about the necessary degree of authority for transitional administrators; and shortcomings in the field of detention, in the independence of the judiciary, and in the choice of the applicable law.

Due to the differences of each situation, it is difficult to draw very clear-cut lessons for future undertakings in transitional administration. Nevertheless, one may identify some minimum guidelines that may serve as a common ground.

1. Justice—An Indispensable Feature in a Reconstruction Agenda

Previous experiences such as Kosovo, East Timor, and Iraq have, first of all, shown that the establishment of basic judicial functions, including all parts of the justice sector must count among the highest priorities of international engagement from the early stages of deployment.¹²¹

[T]he absence of a functioning judicial system can adversely affect both the short and the long-term objectives of the peace-building, including the restoration of political stability necessary for return of refugees, . . . [the possibility] to provide

119. *See id.*, app. A, art. 6.

120. Some of the lessons learned by UN practice have been drawn in the Report of the Secretary-General, *supra* note 6, paras.14-37.

121. *See* CHESTERMAN, *YOU THE PEOPLE*, *supra* note 3, at 181; *see also* Report of the Secretary-General, *supra* note 6, para. 21 (“Justice and peace are not contradictory forces. Rather, properly pursued, they promote and sustain one another”).

humanitarian assistance, the implementation of democratic institutions, and the [need to create] an environment friendly to foreign investment and economic development.¹²²

Failure to foster justice may diminish both the authority of transitional authorities and the willingness of the domestic population to respect the law.

2. *Less May Be More*

Second, justice under transition can only succeed if it is sensitive to domestic particularities.¹²³ This applies both in relation to the degree of authority exercised by international actors and the law created by them. The lesson here is that less may sometimes be more. A focus on strong local ownership from the beginning may, for example, enhance sustainability in the long-term. Moreover, moderation in the imposition of international legal standards may increase the chances of internalization.

3. *If You Do It, Do It Right*

Third, if international actors undertake efforts in judicial reconstruction, they must do so in keeping with habeas corpus guarantees and the requirements of judicial independence. To apply double standards in a process of transitional administration is not only incompatible with the role and function of international administrators¹²⁴, but damaging to the process of state-building because it sets the domestic judiciary on the wrong track from its very start.

4. *Neutralize the Neutralizers*

Finally, international practice, including the most recent events in Iraq, suggests that the action of international transitional authorities must itself be subject to some form of scrutiny in order to avoid abuse. This may be achieved in two ways: through inter-institutional checks and balances, resulting from the involvement of a multiplicity of actors in the process of

122. Strohmeier, *supra* note 3, at 60.

123. See also the Report of the Secretary-General, *supra* note 6, paras. 15-17.

124. See also the Report of the Secretary-General, *supra* note 6, para. 33 ("Indeed, if the rule of law means anything at all, it means that no one, including peacekeepers, is above the law").

judicial reconstruction, and through the creation of independent monitoring institutions, such as Human Rights Ombudspersons or special quasi-judicial commissions, following the example of the practice in Kosovo and East Timor.