



Justice Under International Administration: Kosovo, East Timor and Afghanistan

By Simon Chesterman

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TABLE OF CONTENTS

- Executive Summary 1
- About the Project on Transitional Administrations 2
- About the Author 2
- Acknowledgements. 2
- Introduction 3
- Kosovo: Justice in Limbo 3
 - The Security Vacuum 4
 - Applicable Law 5
 - Appointment of Judges. 5
 - Executive Detentions 5
- Kosovo in Limbo 6
- East Timor: Post-Colonial Justice. 6
 - Law and Order Under INTERFET 6
 - Appointment of Judges. 7
 - Infrastructure and Support 7
 - Serious Crimes 8
- East Timor in Transition. 8
- Afghanistan: Justice and the 'Light Footprint' . 9
 - Applicable Law 9
 - Human Rights and Transitional Justice . . 10
 - Justice Sector 11
 - Tiptoeing Through Afghanistan. 12
- Conclusion 12
- Further Reading 14

Executive Summary

- In the rare circumstances in which the United Nations administers a post-conflict territory, what law should be enforced? By whom? And, crucially, how should one resolve the potential dilemma between building capacity for sustainable local institutions and maintaining respect for international standards of justice? This report examines these questions through the experiences of United Nations administrations in Kosovo (1999–) and East Timor (1999-2002) and the assistance mission in Afghanistan (2002–). Practice in this area has, necessarily, been improvisational rather than principled. But it is possible to draw some broad lessons from these three experiments in judicial reconstruction.
- First, the administration of justice should rank among the higher priorities of a post-conflict peace operation – certainly far higher than it is currently ranked in Afghanistan. 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. Failure to do this undermined the credibility of the international presence in Kosovo, and led to missed opportunities in East Timor.
- Secondly, 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. 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.
- Thirdly, once the security environment allows the process of civil reconstruction to begin, sustainability should generally 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, where possible, through broad consultation with local actors.

About the Project on Transitional Administrations

This interdisciplinary project addresses how the on-going and ad hoc involvement of the United Nations in 'state-building' missions is contributing to the transformation of accepted norms of self-determination and state sovereignty. The starting point of the project is the concern – raised, though only in passing, by the Report of the Panel on UN Peace Operations (the 'Brahimi Report') – that the United Nations is becoming involved in state-building projects without any clear institutional guidelines or political consensus. This has given rise to uncertainty of mandate in ongoing UN operations, as well as the potential for establishing precedents that may confuse the normative framework within which future operations take place.

On this basis, the two goals of the project are:

- (a) to develop clear guidelines on how United Nations transitional administrations can and should be used to further the self-determination aspirations of a given group; and
- (b) to examine how UN actions have contributed to the normative and practical transformation of self-determination and state sovereignty through the 1990s (in turn, perhaps, giving rise to more calls for self-determination by groups).

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Introduction

One of the most important and difficult challenges confronting a post-conflict society is the re-establishment of faith in the institutions of 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 themselves have been used as a tool of oppression, building trust in the *idea* of the state requires a transformation in the way in which 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 members of a population emerging from conflict to seize the opportunity of peace to exact retribution for past injustices.

For most such post-conflict societies, the choices range from drawing an historical line and moving on, as Spain did after Franco, through lustration processes embraced in some Eastern European countries, truth and reconciliation processes along the lines of the Latin American or the 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 and Tokyo and the tribunals for the former Yugoslavia and Rwanda, or through special agreement, as in the case of Sierra Leone and the tribunal at one time contemplated for Cambodia. A further possibility, also outside the control of the state concerned, is trial before a third state exercising universal jurisdiction.

Where the United Nations assumes temporary control of territory, what law should it enforce?

These choices shift radically in the still rarer situation when the territory itself comes under international administration. Such circumstances, where the institutions of state are exercised on an interim basis by a benevolently despotic power, are uncommon; practice in this area has therefore been improvisational rather than principled. What law should be enforced? By whom? And, crucially, how should one resolve the potential dilemma between building capacity for sustainable local institutions and maintaining respect for international standards of justice?

This report will examine these questions through the experiences of United Nations administrations in Kosovo (1999–) and East Timor (1999–2002) and the assistance mission in Afghanistan (2002–). Though the United Nations had exercised varying measures of executive power in previous missions, notably West Papua (1962–1963), Cambodia (1992–1993), and Eastern Slavonia (1996–1998), Kosovo and East Timor were the first occasions on which the UN exercised full judicial power within a territory. These situations therefore merit some scrutiny and are considered in parts one and two. The UN Assistance Mission in Afghanistan (UNAMA) represents a substantial correction to the increasing aggregation of sovereign powers exercised in UN operations since the mid-1990s. This operation will therefore be considered by way of counterpoint in part three.

International administration presents a hard case for many of the issues that run through the issue of externalized (or universalized) justice more generally. Here, the issue is not so much *where* justice takes place as *who* administers it and according to whose 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 the international community passes from a particular conflict situation. These concerns apply *a fortiori* to situations in which a primary purpose of the international community’s engagement is to establish institutions that will outlast the international presence. Experience in the three post-conflict states to be considered here has been, to say the least, mixed.

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 exacerbated 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 (fostered, in part, by the failure

to address the status question) led the United Nations to adopt security measures that actively 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 UN. 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 inches its way towards Europe.

In Kosovo, there was considerable reluctance to hand over power to the Kosovar Albanians if this led to assertions of actual independence.

In the course of NATO's aerial campaign, a key element in resolving the dispute was the establishment of an interim administration authorized by the UN Security Council. The principles adopted by the G-8 Foreign Ministers on 6 May 1999 provided for a 'political process towards the establishment of an interim political framework agreement', which would in turn provide for 'substantial self-government for Kosovo', taking full account of the sovereignty and territorial integrity of the FRY. This was further 'elaborated' in the principles finally agreed by the FRY, which stated that the interim administration was to be established as a part of the international civil presence 'under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia'.

The central contradiction of the United Nations Interim Admission Mission in Kosovo's (UNMIK) mandate was that it lacked a political resolution for the problem of Kosovo. On the ground, it was swiftly 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. Four aspects of this problem as it manifested in Kosovo will be considered here: dealing with the immediate security vacuum; 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.

The Security Vacuum

The most immediate problem confronting the international presence in Kosovo in the area of rule of law was the vacuum caused by the withdrawal of Serb authorities. Most had fled before NATO troops arrived, frequently taking whatever they could carry and destroying that which remained. 'Court buildings looked like a plague of heavily armed locusts had swept through,' William O'Neill writes, 'scouring the grounds for anything valuable and leaving broken windows and ripped out electric sockets in their wake.'

Many international staff later attributed the ongoing difficulties in establishing UNMIK as a credible force for law and order to failures in the first weeks and months of the operation. Two days before KFOR entered Kosovo, one of the 'measures of merit' General Wesley Clark established for the ground intervention was to avoid anarchy: 'get all Serb forces out, stop any crimes of revenge or Serb ethnic cleansing'. Such orders, if made, were ineffective. Reporters came across Albanians, including members of the KLA, looting and driving Serbs and Roma from their homes. When one approached KFOR soldiers who were watching this take place he was informed that 'The orders are to let them plunder.'

Kosovo's bad start on law and order has continued to make its role difficult.

The slow deployment of civilian police (CIVPOL) has affected almost every UN peace operation in which CIVPOL have been involved, and there is an increasing view among commentators that — given its faster deployment capabilities and greater resources — the military will have to be used in some capacity to fill this void. The military is rightly reluctant to embrace law and order duties that are outside its expertise, but in many situations only it will be in a position to exercise comparable functions in the first weeks and months of an operation. It is unlikely that the United Nations will soon be able to deploy law and order 'packages' comprising CIVPOL and mobile courts with a skeleton staff of lawyers and judges. In the meantime, future situations like Kosovo will present a choice between increasing the initial role of the military and accepting a temporary law and order vacuum. As Kosovo showed, such a vacuum will quickly be filled by informal local

arrangements that may undermine the credibility of the international presence when eventually deployed. By contrast, where KFOR adopted an aggressive but measured posture, violence tended to diminish.

Applicable Law

This lack of credibility 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 24 March 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. 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 of Serb judges returning to office, this dispute greatly undermined the UN's credibility — especially when it finally reversed its earlier decision in December 1999 and passed a regulation declaring that the laws in effect on 22 March 1989 would be the applicable law in Kosovo.

Appointment of Judges

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, UN officials were reluctant to introduce international judges. A senior UN official reportedly responded to such a recommendation by stating: 'This is not the Congo, you know.' Instead, operating under the Joint Advisory Council on Provisional Judicial Appointments (JAC/PJA), 55 local judges and prosecutors were proposed in the first months of the mission. By February 2000, the rebellion of Albanian judges described above and a series of attacks against their few Serb counterparts led to a regulation allowing Special Representative of the Secretary-General

(SRS) 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.

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 28 May 2000, Afram Zeqiri, a Kosovo Albanian and former 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 him released 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 (1999).

Similar orders were made by Kouchner's successor, Hans Haekkerup. In February 2001, a bus carrying Serbs from Nis into Kosovo was bombed, killing 11. British KFOR troops arrested Florim Ejupi, Avdi Behluli, Çelë Gashi and Jusuf Velju in mid-March on suspicion of being involved, but on 27 March a panel of international judges of the District Court of Pristina ordered that Behluli, Gashi and Velju be released. The following day, Haekkerup issued an executive order extending their detention for 30 days, later extended by six more such orders. (Ejupi was later reported to have 'escaped' from the high-security detention facility at Camp Bondsteel.)

Two years into the mission, UNMIK officials argued that Kosovo still ranked as an 'internationally-recognized emergency'; in such circumstances, it was said, 'international human rights standards accept the need for special measures that, in the wider interests of security, and under prescribed legal conditions, allow authorities to respond to the findings of intelligence that are not able to be presented to the court system.' Following criticism by the OSCE Ombudsperson, as well as international human rights organizations such as Amnesty International and Human Rights Watch, a Detention Review Commission of international experts was established by UNMIK in August 2001 to make final decisions on the legality of administrative detentions. The commission approved extension of the detentions of

the alleged Nis bombers until 19 December 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’. 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. The last person held under an Executive Order, Afrim Zeqiri, was released by a judge on bail in early February 2002 after approximately 20 months in detention.

Kosovo in Limbo

Kosovo faced an especially challenging security and political environment. On occasion, this led to contradictory policies being embraced by the UN Interim Administration.

Kosovo demonstrates some of 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 the NATO’s intervention and the subsequent role of the United Nations. Together, these factors gave rise to 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 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 have been appropriate also for the UN to impose a generic penal code and code of criminal procedure for an interim period, along the lines recommended by the Report of the Panel on Peace Operations (the Brahimi Report).

East Timor Post-Colonial Justice

In East Timor, the United Nations faced the task of building a judicial system literally from the ground up. As the UN 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’. This apocalyptic view of the situation appeared borne out by early estimates that the number of lawyers remaining in the territory was fewer than ten.

Unlike Kosovo, East Timor’s main problem was developing institutions and training individuals. Neither was done satisfactorily.

Unlike Kosovo, then, East Timor’s experiences reflect a distinct set of concerns with internationally administered justice. Although there was an initial assumption that East Timor required swift 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 institutions that would be sustainable. 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 the qualifications of staff. 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 – led to the establishment of special panels for Serious Crimes. Plagued by various concerns irrelevant to the situation of the Timorese (such as internal UN management difficulties), this panel has enjoyed less legitimacy than the Timorese-driven Commission for Reception, Truth and Reconciliation (CRTR). Meanwhile, frustration with the pursuit of serious offenders and the dubious efforts by Indonesia to prosecute its own nationals has led to Timorese calls for a full international criminal tribunal to be convened. This may be based on unrealistic expectations of what such a tribunal might achieve; in any case, any such proposal appears unlikely to draw the support of the international community.

Law and Order Under INTERFET

In the wake of the post-referendum violence in East Timor in September 1999, the Australian-led intervention force (INTERFET) had to decide how to respond to denunciations of alleged former militia. Such matters formally remained in the hands of the Indonesian police and judiciary, though this was on paper only. It was clear that this area would soon become the responsibility of the United Nations Transitional Administration in East Timor (UNTAET) and an East Timorese judiciary, but

these had yet to be established on the ground. INTERFET's Security Council mandate was silent on its responsibility or authority to carry out arrests.

INTERFET showed the important role that the military can play in the early stages of an operation.

The Council resolution did, however, stress the responsibility of individuals committing violations of international humanitarian law and demand that they be brought to justice. INTERFET ultimately decided that its broad mandate to restore peace and security could encompass arrests of individuals accused of committing serious offences – failure to do so might encourage Timorese people to take the law into their own hands. INTERFET's commander therefore issued a Detainee Ordinance, creating various categories of detainees. INTERFET troops were authorized to detain persons suspected of committing a serious offence prior to 20 September, and were required to deliver them to the Force Detention Centre in Dili within 24 hours. If a detainee was held for more than 96 hours, he or she was provided the grounds for being held, together with material considered by the commander of INTERFET as the basis for continuing detention. Defending Officers were available to assist the detainee to show why he or she should not be so held, and a number of detainees were released because of insufficiency of evidence. The INTERFET Detention Centre handed over 25 detainees to UNTAET Civilian Police and the East Timorese judiciary on 14 January 2000.

Appointment of Judges

Though East Timor presented fewer security and political problems than Kosovo (choice of law, for example, was uncontroversial), the lack of local capacity presented immense challenges. Under Indonesian rule, no East Timorese lawyers had been appointed to judicial or prosecutorial office. A Transitional Judicial Service Commission was established, comprising three East Timorese and two international experts, but the absence of a communications network meant that the search for qualified lawyers had to be conducted through leaflet drops by 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 7 January 2000.

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 swift 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.

As in Kosovo, the decision to rely on inexperienced local jurists in East Timor was a mix of politics and pragmatism.

Interestingly, UNTAET was more aggressive in 'Timorizing' the management of judicial systems than the areas of political and civil affairs. 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; others as paralegals with Timorese human rights organizations and resistance groups. None had ever served as a judge or prosecutor. UNTAET developed a three-tier training approach. First, judges, prosecutors and public defenders were given a one-week compulsory 'quick impact' training course prior to appointment to office. Secondly, they were required to participate in mandatory ongoing training while in office. Thirdly, a 'mentoring scheme' was established, bringing a pool of experienced international legal practitioners to serve as 'shadow' judges, prosecutors and public defenders without actually exercising judicial power. Limited resources and difficulties in recruiting experienced mentors with a background in civil law posed serious obstacles to the training programme, however, which UNTAET officials later acknowledged was grossly insufficient.

Infrastructure and Support

Even more so than Kosovo, the destruction wrought in East Timor presented substantial practical difficulties to the administration of justice. The first judges to be sworn in worked out of chambers and courtrooms that were still blackened by smoke. They lacked not merely 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.

A non-obvious priority in the first months of the operation was to construct correctional facilities. Virtually all detention facilities had been destroyed prior to the arrival of INTERFET, creating substantial practical constraints on the capacity to detain alleged criminals. This problem was inherited by UNTAET, with the result that CIVPOL were forced to release suspects arrested on suspicion of serious criminal offences in order to detain returning militia implicated in the commission of grave violations of international humanitarian law during the post-referendum violence. 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. An obvious alternative would be for such emergency constructions to be included in the mission's budget funded by assessed (rather than voluntary) contributions from the UN member states.

Over half the Timorese prison population escaped in August 2002.

Many of the gaps in the legal system, in particular the provision of legal assistance, were filled by enterprising non-governmental organizations (NGOs) such as the civil rights organization Yayasan Hak. Such initiatives deserve the support of the international community, particularly where bureaucratic or political obstacles delay UN initiatives in the same area. Nevertheless, by November 2000, the Security Council Mission to East Timor found that 'the judicial sector remains seriously underresourced. Consequently, the current system cannot process those suspects already in detention, some of whom have been held for almost a year.' Such delays, combined with the lack of access to qualified defence lawyers, were blamed when over half the Timorese prison population escaped in August 2002.

Serious Crimes

In Kosovo, the judicial system exists parallel to the ongoing jurisdiction of the International Criminal Tribunal for the former Yugoslavia. In the course of NATO's bombing campaign, the Prosecutor issued an indictment for Yugoslav President Slobodan Milosevic and other Serbian leaders for alleged offences committed in Kosovo. Though no Kosovar Albanians have been

publicly indicted by the Tribunal, there are said to be at least four sealed indictments of KLA leaders accused of war crimes. Given the politicization of the Kosovo judiciary described earlier, conducting such trials within Kosovo would pose a substantial challenge to the judicial system.

In East Timor, no such international tribunal exists. 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 Appeal in Dili in relation to serious crimes. These were defined as including genocide, war crimes, and crimes against humanity, as well as murder, sexual offences and torture committed between 1 January 1999 and 25 October 1999. These cases would 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 May 2000.

In addition to the constraints on resources, management problems contributed to the extremely slow functioning of the Serious Crimes panels. By early 2001 there were over 700 unprocessed cases in the serious crimes category alone and detention facilities were filled to capacity with pre-trial detainees, with the result that some alleged perpetrators had to be released. These problems continued through 2001 with a number of resignations from the Serious Crimes Unit. Dissatisfaction with the progress in serious crimes was one factor that encouraged the East Timorese to look for alternative means of accountability for the abuses of September 1999. More importantly, however, the inadequacy of Indonesia's efforts to deal with alleged perpetrators in its territory have led many to believe that an international tribunal is the only way in which high-level perpetrators will ever face justice.

East Timor in Transition

In the panoply of UN peace operations, East Timor will almost certainly be regarded as a success. Its independence on 20 May 2002 was the culmination of over twenty-five 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 law and order area were laudable, but the slow pace of the embryonic legal system undermined faith in the rule of law as such.

A major test of this system will be 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 will include claims arising from Indonesian and Portuguese colonial rule, and perhaps claims under customary norms pre-dating Portuguese colonization. How East Timor deals with this issue, and the incentives for corruption that go with it, will undoubtedly challenge this newest of countries' political and legal systems. Although the outcome is clearly up to the East 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.

Afghanistan: Justice and the 'Light Footprint'

During the initial stages of the military action in Afghanistan, it was unclear what role the United Nations would play in post-conflict Afghanistan. Some feared that the UN would be left to pick up the pieces left after the United States had completed its military objectives; others eagerly looked forward to the 'next big mission' and a major role for the UN in rebuilding Afghanistan. Due in part to security concerns – notably the decision to limit the UN-mandated International Security Assistance Force (ISAF) to Kabul and its immediate vicinity – and in part to a desire to encourage Afghan capacity-building, the mission as deployed sought to rely on as limited an international presence and on as many Afghan staff as possible. This has come to be referred to as the 'light footprint' approach.

The relatively small UN presence in Afghanistan stems partly from a desire to encourage Afghan capacity and partly from the constraints of the security environment.

Such a departure from the expansive mandates in Kosovo and East Timor substantially reduced the formal political role of the United Nations Assistance Mission in

Afghanistan (UNAMA). However dysfunctional, Afghanistan had been and remained a state with undisputed sovereignty. This was quite different from the ambiguous status of Kosovo and the embryonic sovereignty of East Timor. Nevertheless, key areas of the judicial system were still potentially 'externalized' and contrast interestingly with the approach adopted in the earlier missions. These areas included establishing the applicable law under the imprimatur of the United Nations, granting the UN the right to investigate human rights violations, and establishing a Judicial Commission to rebuild the domestic justice system 'with the assistance of the United Nations'.

Applicable Law

The Bonn Agreement provides for the legal framework that applies in Afghanistan until the adoption of a new constitution by a Constitutional Loya Jirga, which is to be convened within eighteen months of the establishment of the Transitional Authority. The interim legal framework is described as follows:

- (i) The Constitution of 1964, a/ to the extent that its provisions are not inconsistent with those contained in this agreement, and b/ with the exception of those provisions relating to the monarchy and to the executive and legislative bodies provided in the Constitution; and
- (ii) existing laws and regulations, to the extent that they are not inconsistent with this agreement or with international legal obligations to which Afghanistan is a party, or with those applicable provisions contained in the Constitution of 1964, provided that the Interim Authority shall have the power to repeal or amend those laws and regulations.

As in Kosovo, the legal order established by previous regimes was itself controversial in Afghanistan. The Bonn Agreement therefore attempted to mediate these concerns by reverting to an earlier period. Reversion to 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' suggested some ambivalence about the historical analogy. At the same time, reference to 'existing laws and regulation' sought to provide for some

necessary amendments following 37 years of legal development.

Reference to various human rights treaties in the legal framework of all three territories has led to confusion – exacerbated by the lack of training of local actors.

Precisely how such updating might occur is an open question. Similarly, although the Bonn Agreement specifically incorporates only international legal obligations to which Afghanistan is a party – rather than the entire corpus of ‘internationally recognized human rights standards’, as in Kosovo and East Timor – this still gives considerable latitude to the nascent Supreme Court of Afghanistan. (The major difference is that Afghanistan has signed but not ratified the Convention on the Elimination of All Forms of Discrimination Against Women.) In the two previous 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 pre-trial detention. Nevertheless, the paralysis of the Afghan legal system in the first six months since Bonn has left these questions unanswered.

Human Rights and Transitional Justice

The Bonn Agreement provides that the Interim Administration shall, ‘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.’ At the same time, the United Nations is separately granted ‘the right to investigate human rights violations and, where necessary, recommend corrective action’, as well as developing and implementing a human rights education programme.

In keeping with the ‘light footprint’ philosophy, senior UN staff were circumspect about asserting a lead role in human rights. The first National Workshop on Human Rights was convened in Kabul on 9 March 2002, chaired by Interim Administration Vice-Chair Sema Samar. Although UN High Commissioner for Human Rights Mary Robinson and SRSG Lakhdar Brahimi addressed the meeting, the participants were drawn from members of the Interim Administration, Afghan specialists and

representatives of national NGOs. The workshop established four national working groups to carry the process forward in accordance with 20 guiding principles adopted at the workshop. These concerned the role of the proposed Human Rights Commission, but also addressed the question of transitional justice. In respect of past violations, the principles included the following provisions:

Decisions on appropriate mechanisms of transitional justice must be made by the Afghan people themselves. ...

Transitional justice in Afghanistan should be based on international human rights standards, Afghan cultural traditions and Islam. ...

The UN, including OHCHR, and the international community should provide high profile political, technical and financial support to transitional justice activities in Afghanistan.

In his opening address to the workshop, Interim Administration Chairman Hamid Karzai had earlier 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 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.

This desire to confront transitional justice questions directly was repeated in the working groups established

out of the initial workshop. In addition to all-Afghan working groups on the establishment of an independent Human Rights Commission, human rights education and the rights of women, the working group on 'approaches to human rights monitoring, investigation and remedial action' recast its mandate to include transitional justice issues. At a meeting on 9 May 2002, the working group recommended a process of national consultation that may lead to calls for an international tribunal.

Afghans have been more enthusiastic about transitional justice than their international partners.

The process of national reconciliation that this may herald is necessarily slow. Nevertheless, mission staff have been keen to avoid scenes common in the past, with foreign consultants flying in to a country like Afghanistan, lecturing the local population, and then departing. The consultations to date have been fruitful, but are open to the criticism that the main interlocutors have been human rights activists and lawyers within the Afghan community. Still less can be said about achievements in the justice sector.

Justice Sector

Under the Bonn Agreement, the Interim Administration 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.'

The Secretary-General's 18 March 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.' The lead role was attributed to the Interim Administration, 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.' On 26 March 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'. Nevertheless, a Judicial Adviser was appointed only in the first week of May 2002.

A document from the Office of the SRSG from the same month states that

all 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.

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 lead to missing the opportunity for the maximum impact of international engagement. Certainly 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.

Rule of law has, unfortunately, not been a priority in Afghanistan.

In Afghanistan, UNAMA's mandate has been interpreted as requiring the United Nations to facilitate rather than lead. In areas such as the choice of laws, the structure of the legal system and appointment of judges, this is entirely appropriate. Such arguments are less persuasive in relation to basic questions of rebuilding courthouses, procuring legal texts and office equipment, and training of judges. Instead, it appears that rule of law has simply not been a priority. Although the Afghan Interim Administration has appointed some new judges (including a number of female judges), by mid-2002 those courts that functioned at all did so erratically. In the 48-page National Development Framework drafted by the Afghan Assistance Coordination Authority (AACA), the justice system warranted only a single substantive sentence. 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 by mid-2002.

Tiptoeing Through Afghanistan

As indicated earlier, UNAMA served in some ways as a correction to the expanding mandates asserted by the United Nations through the 1990s, culminating in UNMIK and UNTAET. 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 UN in these areas under the Bonn Agreement, and the need to consult closely with the Afghan Interim Administration and other actors on the appropriate nature of the assistance that might be offered. But it seems also fair to say that rule of law was not seen as a priority by either the Interim Administration, UNAMA or the donor community.

Afghanistan, of course, posed challenges distinct from those of Kosovo and East Timor. Rather than being in a position of government, the UN's function was to provide assistance to the political structures set in place in Bonn. Also, despite the suffering of the previous 23 years, Afghanistan was not as riven with ethnic tension as Kosovo, nor was it establishing the first independent political institutions as in East Timor. Nevertheless, as the Afghan state is being rebuilt, respect for the consistency and transparency of that 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.

Conclusion

In 1944, Judge Learned Hand spoke at a ceremony in Central Park, New York, to swear in 150,000 naturalized citizens. 'Liberty lies in the hearts of men and women,' he observed '[W]hen 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.'

Building or rebuilding faith in the idea of the rule of law requires a similar transformation in mentality as much as it does in politics. A crucial test of the success of such a transformation is whom people turn to for solutions to problems that would normally be considered 'legal'. In each of the three territories considered here, the results of that test would be 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 United Nations or another international body has effective legal control over a territory. (The UN experience in Afghanistan suggests that any expectations that this might happen soon should be dampened.) The principles fall into three broad themes.

First, the administration of justice should rank among the higher priorities of a post-conflict peace operation. 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 play a role in laying the foundation for subsequent reconciliation processes. Failure 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, it has simply not featured on the agenda.

Secondly, 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.

Thirdly, once the security environment allows the process of civil reconstruction to begin, sustainability should generally 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 where 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

minds of the general population; any foreign involvement must therefore be sensitive to particularities of that population. This is not to say that 'ownership' requires that locals must drive this process in all circumstances. On the contrary, international engagement will sometimes abrogate the most basic rights to self-governance on a temporary basis. But although the levels of foreign intervention may vary from the light footprint in Afghanistan, through the ambiguous sovereignty in Kosovo to benevolent despotism 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 longer-term institution-building that will last beyond the life of the mission and the transient interest of the international community.

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