

Building the Rule of Law and Establishing Accountability for Atrocities in the Aftermath of Conflict

by Louis Aucoin

As places like Iraq and Afghanistan dominate the news, perhaps never before has post-conflict reconstruction assumed greater importance. As the resources of countries around the globe are invested in these and other conflict and post-conflict situations, it has become increasingly clear that the establishment of the rule of law is essential to the success of these efforts. In fact, the authorities have begun to recognize that the failure to prioritize the rule of law has been one of the chief failings of recent post-conflict missions.¹

In the Secretary-General of the United Nations' August 2004 report entitled "The rule of law and transitional justice in post-conflict societies," Kofi Annan has defined the rule of law as:

a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedure and legal transparency.²

In the past few decades, international and local actors have been working separately and together to foster all of these aspects of the rule of law in countries where it has been destroyed by conflict. There are now a number of activities that have emerged as standard strategies for the promotion of rule of law and transitional justice in post-conflict societies. New lessons are learned from each international mission or intervention in post-conflict societies, and practitioners are beginning to identify important methodological approaches building on those lessons. So-called "top-down" approaches, in which international elites attempt to impose foreign models, are frowned upon, and "bottom-up" strategies designed to foster local ownership and legitimacy are favored. In addition, practitioners of rule of law

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promotion now call for a holistic approach to this field in which multidisciplinary teams coordinate all of their activities pursuant to a strategic plan, which itself is the result of a careful pre-deployment assessment.

The principal activities now intimately associated with this new field include: constitution-making, judicial reform, law development, democratic policing, establishing accountability/fighting impunity, fighting corruption, and the use of local customary practices in promoting the rule of law. This study analyzes the state of the art of rule of law promotion in the context of each one of these rule of law activities, briefly identifying the lessons learned, flagging questions unanswered, and, where possible, identifying the way forward.

CONSTITUTION-MAKING

One area of rule of law promotion that has received a great deal of attention in recent years is constitutional development. The world has watched as a constitution was created for Bosnia as part of the Dayton agreement; in East Timor, as the mandate of United Nations Mission in East Timor drew to a close; and in other post-conflict countries such as Rwanda, Afghanistan, and, most recently, Iraq. It has become obvious that the period immediately following the cessation of hostilities by warring parties is a “constitutional moment,” when there is hope that opponents can find a common ground in devising a charter. In this unique moment, hostile parties can set forth principles, and the higher law of the constitution, to guide the nation and keep it off the course of conflict and instability. As a result, a great deal of effort has been devoted to constitution-making by local actors, who have the greatest stake in the process, as well as by international actors, who have often provided material and technical support.³

Although it may be too early and too difficult to evaluate the success of recent constitution-making processes that have unfolded in these post-conflict situations, some modest lessons can be derived from analyzing them anecdotally. Some analysts have taken note of a “new constitutionalism” that has evolved in recent years. Professor Vivien Hart has defined this new brand of constitution-making as consisting of:

prior agreement on broad principles as a first phase of constitution making; an interim constitution to create space for longer term democratic deliberation; civic education and media campaigns, the creation and guarantee of channels of communication, right down to local discussion forums; election for constitution making assemblies [which may be interim parliaments or bodies elected specifically for the purpose of agreeing on a constitution depending on the resources of the country involved]; open drafting committees aspiring to transparency of decision making; and approval by various combinations of representative legislatures, courts, and referendums.⁴

In addition, this new constitutionalism is characterized by the view that the process is as important, if not more important, than the ultimate content of the final charter. The theory underlying this view is that an open and inclusive process will contribute to healing and reconciliation. Furthermore, it will serve to create a sense

of ownership by giving minorities and the previously disenfranchised (including, racial, ethnic, and religious minorities, as well as women) a voice.⁵ The goal is for the process to enhance the legitimacy of the constitution and ensure the stability of the political regime established under it. Hart has gone so far as to suggest that the emphasis placed on the process, and the avenues of communication created by it, is so great that perhaps the moment has come when we can now view constitutions through the metaphor of a continuing conversation between the elites of a given society and the population. This, therefore, suggests the establishment of a sea change from the older view of constitutions as static and monolithic.⁶

In recent decades, several new constitutions have been adopted through such a process. The establishment of South Africa's Constitution in 1996 is perhaps the paradigm of this new approach, though many other countries, including Eritrea, Nicaragua, Brazil, and Kenya, have adopted new constitutions through processes that utilized the active engagement of their populations. While it is obviously too early to determine whether these new charters will survive the test of time, some anecdotal evidence suggests that they have succeeded in fostering legitimacy.⁷

In addition, apart from the inclusiveness and participation that characterize this new constitutionalism, international actors have also been assigned a new role. Whereas, in the past, international actors have dominated and driven constitution-making, particularly in post colonial countries, most international actors working in this context today have come to play a more neutral role, bringing expertise and resources to processes that are locally driven.⁸

JUDICIAL REFORM

Revitalizing and repairing damaged court systems in the aftermath of conflict is obviously an essential feature of rule of law promotion. Here, as elsewhere, assessment is critical.⁹ Experience has shown that the needs with respect to judicial reform have differed enormously from one case to another. In some cases, such as Cambodia and East Timor, the creation of a judicial system suffered from an almost total lack of human resources on which to draw. In other cases, such as Bosnia and Kosovo, while there were enough individuals with judicial experience, many were nonetheless compromised in their ability to dispose impartial justice due to factors relating to the conflict. In other circumstances, like that of Rwanda, the problem was more one of competence than of impartiality.

Consequently, all reform in this area must begin with a comprehensive assessment of the current state of the judiciary, which includes: cultural factors, the effect of the conflict on the judiciary and on its infrastructure, and the history of the judiciary in the country. Appropriate action plans will depend greatly on the results of such an assessment. Nevertheless, while solutions to problems will thus need to be tailored to the particular circumstances, common problems and questions often arise.

Perhaps one of the most obvious problems commonly encountered is that of a damaged infrastructure. The challenge presented here requires a multidisciplinary

approach. Engineers and architects must work with judicial personnel to determine what will be required in the short term in order for the justice sector to function. Not only will it be necessary to repair or reconstruct courthouses, prosecutors' offices, and police facilities, it is also critical not to overlook the repair or reconstruction of correctional facilities. This has been another common failing in international missions such as Kosovo and East Timor. The oversight has been attributed to the fact that donors are often squeamish about corrections and correctional facilities out of fear that involvement in corrections may later associate them with allegations of human rights abuse.¹⁰ Be that as it may, it is clear that security cannot be established in a post-conflict setting if there are no correctional facilities to detain dangerous and violent criminals. In addition, although even the most basic repair of the infrastructure may be resource-intensive, it is a *sine qua non* of the overall rule of law mission.

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It will also be necessary to determine on a priority basis whether the local actors in the judicial sector will be capable of facing the challenges associated with establishing security in the immediate aftermath of conflict. The answer to this question will in turn determine whether international judicial personnel will be required. While it is always preferable to prioritize local ownership of the judicial sector, where possible, it has become clear that a bold international presence may be required initially in those cases where the local judiciary is not fully capable for one reason or another to assume the task without international assistance.¹¹ In East Timor and Kosovo, for example, international actors decided to immediately rely on local judicial personnel without giving adequate consideration to these questions.¹² As a result, in both cases, local actors had to be replaced by internationals in the early stages of the mission. This mistake had unfortunate consequences. It naturally fostered resentment and resistance on the part of the locals, who felt humiliated by the decision. The obvious lesson to be learned from both of these cases is that it is vastly preferable to begin with a "bold international presence" and restore local ownership gradually as capacity is built, rather than to rely on locals initially only to remove them in order to train them later.¹³

Nevertheless, both missions failed to devote sufficient effort to local capacity building. As result, the locals' ability to reclaim responsibility for the justice sector has proven to be a sensitive issue. In Kosovo, UNMIK has only recently transferred that responsibility, and in East Timor, questions on the capacity of the locals have continued to plague the justice sector after the mission has ended.¹⁴ In hindsight, it is clear that internationals have put the emphasis on getting the job done, sometimes at the expense of local capacity building. Internationals must therefore remain mindful of the fact that, in any international mission involving rule of law promotion, the day will eventually come when the internationals depart, leaving full responsibility for the administration of justice with the local actors.

The failure to give adequate consideration to the need of building the capacity of local actors in the judicial sector can also be understood in light of the fact that capacity building in post-conflict situations is a relatively new and underdeveloped science. While there are, of course, educational institutions in developed countries around the world that prepare candidates for judicial and prosecutorial careers, these institutional models do not address the problems of competence and impartiality commonly encountered in the post-conflict context. As noted above, there are a whole range of problems relating to the capacity of the judicial personnel that impede the administration of justice in post-conflict settings. In some cases, such as Cambodia and East Timor, those who are called upon to function in the role of judge or prosecutor have had no prior experience at all in the performance of these roles. Although they may have had the required legal education, they lack the necessary skills of practice. Consequently, institutional models for education and training in developed countries are generally inappropriate, and training programs focused on practical courtroom skills are thus required. The challenge is compounded by the exigent circumstances that commonly impose significant time restraints. As a result, quick-impact programs must be developed to involve training judges, prosecutors, and police together in simulated exercises, which will expedite the task of building local capacity.

In addition, the problems relating to the performance of local judicial personnel are not always related to their professional skills. In some cases, local judges and prosecutors have shown themselves to be incapable of dispensing justice impartially, an issue that is usually related to factors associated with the conflict. Designing programs to address this failing is therefore particularly challenging. While there is no panacea, some capacity building measures have proven effective. One technique involves engaging judges and prosecutors in the development of their own codes of ethics, which must address issues of prejudice and partiality. Mentoring can sometimes address these issues, especially where mentoring programs are appropriately designed to ensure trust and confidentiality. Mentors can, without interjecting themselves into the performance of the judicial or prosecutorial role, engage the local judicial personnel in consideration of professional and ethical issues affecting their impartiality.

Furthermore, local judges will not be able to decide cases impartially if they lack judicial independence. In general, the protection of judicial independence, wherever it exists, depends upon the existence of appropriate institutions for the appointment, evaluation, promotion, and discipline of judges. The goal in establishing these institutions must be to insulate the judiciary from the control or influence of the other branches. The most undesirable situation is one where these critical decisions are made directly by the executive branch. Developed countries have had to learn this lesson from experience. In response, they have typically created collegial institutions and charged them with the responsibility of making these decisions. These institutions are in some cases composed of members of the judiciary exclusively. In other cases, they are composed of representatives of the all three branches, and in some recent cases they have included members of civil society.

In international missions relating to the rule of law, international and local actors should work together to develop an appropriate institutional response to the challenge of judicial independence. Given the urgency of appointing competent and impartial judges in post-conflict situations, those with executive authority may be tempted to appoint judicial personnel directly. These authorities should resist this temptation. Although such action may meet the challenge of the moment, it serves as a poor example. It has the potential of encouraging the kind of direct involvement by the executive in judicial affairs, which is almost certain to compromise the independence of the judiciary in the long term.

Moreover, in those cases where judicial personnel are already in place, the question arises as to whether they should be vetted for their competence, ethical standing, and impartiality. There is, unfortunately, no easy answer to this question. Although decision makers in post-conflict situations may feel compelled to weed out the bad apples, it is essential to note that vetting is an enterprise wrought with danger wherever it occurs.¹⁵ The greatest challenge in this connection is designing a vetting program which affords sufficient due process protections to those who will be disenfranchised. One of the greatest dangers is that the process will become politicized, much to the detriment of those who are subject to it.¹⁶ For these reasons, authorities have urged careful consideration as to whether the risks of vetting outweigh the benefits.¹⁷ Although the Coalition Provisional Authority did recently effectively vet judges and prosecutors in Iraq, examples of failed attempts abound elsewhere. In the Brcko District of Bosnia, authorities required judicial personnel to resign and reapply through a procedure that was both transparent and merit-based.¹⁸ Where vetting proves to be too difficult, the Brcko experience could serve as a model for an alternative approach.

Finally, the lack of strategic planning has frequently led to an inappropriate focus on police and prosecutorial functions in the interest of security. The faulty logic of this emphasis is, however, readily apparent, since neither police nor prosecutors can successfully ensure security without working hand in glove with well-functioning courts and prisons. The failure of international missions in this area of reform stands as a clear example of the much-acclaimed need for a “holistic” approach to rule of law promotion.¹⁹

LAW DEVELOPMENT

Even if infrastructure can be repaired and competent and impartial judges and prosecutors appointed, it goes without saying that no judicial system can function in the absence of an appropriate legal framework. After the conflict, the establishment of a new constitution provides a legal framework that will, to some extent, address foundational questions regarding the nature of the political regime, and the determination of fundamental values, such as human rights. However, more specific challenges relating to the establishment of security will typically remain.

Once again, a number of relevant cases illustrate these foundational questions. Where the conflict has been associated with the abuses of an authoritarian regime or

a dictatorship, the law will often have been the object of neglect.²⁰ In other cases, successive political regimes may have established conflicting legal regimes, resulting in post-conflict confusion as to which body of law applies. Furthermore, the question of “applicable law” may be complicated by cultural factors.²¹ In any of these scenarios, the law in place will, in many respects, violate international human rights norms. The international missions in East Timor and Kosovo attempted to resolve this latter issue by simply establishing the principle that all laws in effect immediately prior to the effective date of the mission will remain in effect as long as they do not violate international norms.²² This approach failed because it implicitly required a review of local law, which ultimately proved to be too long and too cumbersome to be effective. In hindsight, it has become clear that the success of post-conflict missions depends upon a readily available legal framework, which deals with the areas of the law that are essential for establishing security.

In recent years, the United States Institute of Peace has engaged in a project to develop model legal codes to help address these problems. The USIP Project has produced four such codes—a Code of Criminal Procedure, a Penal Code, a Police Act, and a Detention Act. These codes have been developed through a process of broad consultation with local and international actors in many parts of the world who have been actively involved in the rehabilitation of the rule of law post conflict.²³ They contain all the basic provisions minimally required for the establishment of security without violating human rights. Although they could serve for “off the shelf use” in an urgent post-conflict setting, they have been specifically designed as tools for reforming existing local law in order to meet the challenges outlined above.²⁴

DEMOCRATIC POLICING

As noted above, the international community has devoted a great deal of attention and effort to the policing function in post-conflict societies, often at the expense of required reform in other parts of the justice sector. This emphasis is to some extent understandable, as the police function is the one most obviously associated with establishing security, and it is axiomatic that no reform efforts will move forward in the absence of security. The international community has now achieved a fairly long history of police reform in many different countries, and many international agencies have expended considerable energy and resources on this activity. Starting with Namibia in 1989, missions with a police component have occurred in El Salvador, Cambodia, Haiti, Bosnia, Kosovo, East Timor, Rwanda, Croatia, Georgia, Abkhazia, Burundi, Sierra Leone, Guatemala, Angola, Liberia, the Democratic Republic of the Congo, Afghanistan, and Iraq. These missions have been led by various agencies such as the United Nations Development Program (UNDP), the UN Department of Peace Keeping Operations (DPKO), the Organization for Security and Cooperation in Europe (OSCE), and the United States Department of Justice’s Investigative Training Assistance Program (ICITAP).²⁵

Although it is problematic to neglect reform in other areas of the justice sector, the emphasis on security, so often associated with the policing function, is justified. In the early stage of international missions, the scene is often ripe for renewed conflict or, perhaps more commonly, the onset of lawlessness and chaos created by the power vacuum typically accompanying the overthrow of the former regime. The recent history of Iraq serves as a poignant example. It is now beyond question that security is the priority in this context. Nevertheless, establishing and maintaining security is a challenge, when, as is often the case, the police are either non-existent, in total disarray, or so closely associated with the abuses of the former regime as not to be trusted to protect the population. In addition, the deployment of international civilian police forces takes time, and for this reason, it has been common for international peacekeeping forces to fill the gap in the maintenance of order. The deployment of military forces at this stage of the mission is essential. Yet, it is not without its problems *vis-a-vis* police development, for it often sets the stage for a confusion of roles between the civilian police and the military as the mission progresses. This is a problem that has received too little attention; it must be the object of study and research in the future.

Be that as it may, once the military has been able to establish security, international civilian police forces have been deployed to assist in the development of the law enforcement function. The role of international civilian police forces has evolved over time. In the past, their activities have been defined and limited by what has been referred to in UN circles as the “SMART concept:” supporting, monitoring, advising, reporting, and training local police. However, with the increasing complexity and security challenge that arise with the increased involvement of the international community, the role of international civilian police has evolved from the SMART concept to full-fledged executive policing, such as in East Timor and Kosovo.²⁶ Executive policing has meant that international police forces engage directly in law enforcement, sometimes in the place of local police, at least in the early stages of the mission. With this relatively new development has come the need to improve the international community’s performance in this domain. This has been enormously challenging since the UN civilian police (CIVPOL) have been consistently composed of police units from member states who come from vastly different police cultures with equally different police practices. The challenge inherent in this state of affairs is complicated by the fact that up until now, there has been no uniform international pre-deployment training of these forces. This responsibility has been left to individual member states. The UNDPKO is currently working on reform in this area.²⁷

In any event, as international missions evolve so does the role of the international police. Increasingly, they devote their effort and attention to building a competent and reliable local police force. The goal has been to prepare local forces for their engagement in what has come to be called “democratic policing.” The term refers to the transformation of the local force from one which abusively serves an

authoritarian political regime, to one that serves and protects the people and respects human rights.²⁸

The role that the international community plays, and the activities which it undertakes in pursuit of this goal, will depend largely on the context of policing that previously existed. In cases where the army served as the repressive arm of the regime in the function of law enforcement, there may not be a remaining police force per se. In other cases, the police might have been corrupted through their relation with the powers-that-be and will thus be inept and unreliable.

Consequently, the local police force will require significant reform, and will often need to be rebuilt almost from scratch. This reality recalls one of the methodological axioms which should guide all rule-of-law promotion activities; in this context in particular, experience has shown that police forces must be built from the “bottom up.” Police, no less than any of the other actors in the justice sector, will resist reforms that are imposed from the outside.²⁹ Successful police reform has typically been guided by local authorities who devise the reform strategy and coordinate international assistance. In addition, civil society should ideally be involved in the process. If members of civil society are involved in, and educated on, the issues associated with reform, they can be the force within society that will assure the sustainability of the reform once the international community has left.³⁰

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The issue of vetting also arises in regards to police reform. However, the need for it here is perhaps more compelling as it is essential that the people see the new force as clearly distinct from the abusive forces of the past. This aspect of police reform, therefore, entails a delicate balance, since the need for human resources may be such that, as one author has put it, “suitable former fighters cannot be wasted or safely excluded.”³¹ Here, as in other areas of rule of law promotion, approaches will differ significantly from one mission to the other, depending upon the context. In Haiti, for example, the previous FAH’d forces had been so notorious that, in the early nineties, locals and internationals decided to work together in building a force from scratch.³² On the other hand, in Iraq, the need for human resources has required the integration of at least some who served as police officers under Saddam Hussein.

Regardless, of whether the force is entirely reconstituted or integrated with former officers and new recruits, however, the need for training is uniform. With the relatively long history of the international community’s involvement in local police reform, the training of police has been quite well developed. The training organized in recent years by UNMIK at the Kosovo Police Service School serves as an example. There, three broad themes guide the program. First, cadets receive instruction in basic police skills, such as “police patrol, criminal investigation, interview techniques, report writing, traffic control, gathering forensic evidence,

relevant law, defensive tactics, the use of firearms, first aid, and the skills related to the special needs of police in Kosovo.”³³ Second, they receive training in supervision and management, and thirdly, the training program includes a “train the trainers” approach which is designed to ensure the sustainability of the reform.³⁴

The second prong of this particular training program evokes one of the most challenging aspects of police reform—institutional development. While it has been estimated that basic training of the police should take between six to twelve months in order to be effective, it has become clear that rebuilding the police as an institution will take much longer.³⁵ Rebuilding the police as an institution takes time because it typically involves changing the police culture from one which has acted as the abusive arm of an authoritarian regime, to one which serves and protects the population. It also involves building a force whose management, and rank and file, accept the respect of human rights as part of its mission.³⁶

Once again, there is no easy recipe for bringing about this kind of cultural change. However, the establishment of sound and reliable accountability mechanisms has proven to be essential to the overall police reform effort, and there is no doubt that this element can contribute to the required cultural transformation. One authority has said, “creating effective disciplinary systems within the police should be a first-order priority.”³⁷ Typically, an office of the Inspector General within the force serves to insure internal accountability,³⁸ but it has become clear that external accountability is desirable as well. This is usually accomplished through the development of civil society organizations, which assume a watch dog function. Accountability must also include a mechanism for individuals to file complaints when they feel that they have been victims of police abuse. In addition, both the government and civil society must engage in civic education to inform the society of the accountability of the police, and make them aware of their access to these mechanisms.³⁹

In spite of the progress achieved in many aspects of police reform, success in this realm continues to be a significant challenge; the need to integrate this area of reform with all of the other activities of rule of law promotion makes it all the more so.

ACCOUNTABILITY/FIGHTING IMPUNITY

Most conflicts include the commission of atrocities or abuses of human rights; in the case of authoritarian regimes, these crimes have often been committed with impunity. Recently, the science of achieving justice and establishing accountability for these crimes has emerged as a new field, called transitional justice. Former Secretary-General Kofi Annan defined this new field as involving the study of

*the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice, and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all), and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.*⁴⁰

Typically, in post-conflict societies, there has been a tendency to place emphasis on the retributive aspect of accountability in the pursuit of post-conflict justice, particularly in the early post-conflict stage. In any given situation, a number of choices should serve as appropriate institutional responses to achieve accountability through prosecution.

Since the tribunals of Nuremberg and Tokyo, in the aftermath of World War II, the international community has asserted jurisdiction over certain international crimes. Since July 1, 2002, the date of the entry into force of the Rome Statute of the International Criminal Court (ICC), the ICC may be an option, in cases where crimes against humanity, genocide, and war crimes have been committed.⁴¹ It is much too early in the history of the Court to fully analyze its pros and cons as a mechanism for the prosecution of post-conflict atrocities. However, it would seem logical that much of what has been learned was gained from the experience of the ad hoc international criminal tribunals post Nuremberg. Following the example of Nuremberg and Tokyo, tribunals have been created to establish accountability for atrocities committed in war, involving the break-up of the former Yugoslavia and the genocide in Rwanda. Perhaps the first thing to note in analyzing the experience of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) is that those courts have focused on the prosecution of only a few of the most important criminal cases. It follows that prosecution before the ICC will similarly involve only a few of the “big fish” who are accused of committing international crimes in association with any conflict, and this observation has been borne out in the cases thus far before the Court.

Consequently, it has become clear that international prosecution is not sufficient to fully achieve justice and accountability post-conflict since many, many more individuals than the limited capacity of the court is equipped to prosecute will have typically been involved in the commission of the relevant crimes. It thus becomes obvious that other mechanisms will be required for the prosecution of the “mid-level managers,” and of the rank and file. In some recent post-conflict areas, an entirely new type of tribunal has been created to meet this need. International and local actors have worked together in Bosnia, Cambodia, Kosovo, Sierra Leone and East Timor to create new “hybrid” tribunals, which involve both local and international judges and prosecutors. Typically, they operate under the auspices of the international community, and they are established in the countries where the atrocities have been committed.⁴²

This latter point has proven to be significant. The international tribunals have been insufficient not only because of the relatively few cases which they have handled, but also because their proceedings have been conducted very far away from the daily lives of those affected by the conflict. It is now clear that justice requires an alternative with greater relevance to the local population. The hybrid tribunals are an appropriate alternative, as they offer prosecution in a context which is less costly and more relevant to the local population. In addition, since they do have an international dimension, they have typically involved the much needed marshalling of

international resources and expertise in the prosecution of these highly specialized international crimes.⁴³

Be that as it may, even in those situations where both international and hybrid tribunals have prosecuted international crimes associated with a particular conflict, domestic tribunals invariably will be burdened with the prosecution of these and other crimes associated with the conflict long after it is over. Transitional justice efforts therefore must focus not only on the more visible international and hybrid mechanisms, they must also include significant assistance designed to strengthen the local justice sector and equip it for the prosecution of these specialized crimes. There has thus far been an unfortunate emphasis in this new and emerging field on the international mechanisms at the expense of the local. In the future, many of the lessons learned in the promotion of the rule of law in domestic systems, which have been discussed in this study, will also, therefore, be relevant to the strengthening of the domestic tribunals for this purpose.

While international and local actors may have tired their back on local customary law in the past, some in the present are beginning to see its potential.

However, with the emergence of this new field of transitional justice, it has become clear that the healing and reconciliation associated with broader and less retributive notions of justice will require mechanisms other than prosecution. Truth commissions, sometimes referred to as “Truth and Reconciliation Commissions,” are the most well known institutional response to this need. TRC’s have been the subject of a great deal of study and analysis. They offer some advantages over other mechanisms of transitional justice.⁴⁴

In some cases, they have, in the process of unearthing the truth, engaged in naming and shaming those who were involved in the commission of atrocities. In this way, they have been able to establish at least a certain kind of accountability for not only the “big fish” but for all of those who were involved. In addition, and this has proven to be one of the most important functions of TRC’s, they offer victims the opportunity to come forward and tell their story, and for them, this can be an extremely important aspect of justice. In fact, it is important to note that one of the most salient features of TRC’s is that they are victim centered. This is an important factor, which serves not only to establish a sense of justice for the victims, but also paves the way for reconciliation in the long term.⁴⁵ Finally, in some cases they have been used to create an official record of what actually happened during the conflict.

As in the case of other institutions in the justice sector, many questions arise in connection with the establishment of TRC’s. There is, for example, the question as to whether the commission should be composed exclusively of internationals, locals, or whether a combination of the two will be most appropriate.⁴⁶ In addition, important decisions will need to be made as to its mandate. Since the mandate of the commission typically involves an attempt at getting at the “truth,” or at the various

views of the truth held by the society, it is necessary to decide when in the history of the conflict this truth-seeking effort should begin. This is a key decision, as it will sometimes be necessary to dig deep into the past in an attempt to achieve reconciliation.⁴⁷

One very important question that arises is whether those witnesses who appear before the commission to recount their version of the truth ought to be given amnesty in exchange for their testimony. This was the procedure followed by South Africa's very famous Truth and Reconciliation Commission. In that case, it proved effective as a way of getting at the overriding need to know the truth of what happened in the apartheid era. However, most countries that have since engaged in truth-seeking through a TRC have excluded amnesty, viewing it as impunity.⁴⁸

In addition, local and international actors who devise strategies for transitional justice should remain mindful that the TRC may not always be the appropriate truth-seeking mechanism in the aftermath of conflict. Where wounds are too fresh, and the perceived need for retributive justice too compelling, other truth-seeking modalities may need to be sought. In this respect, in some countries, such as those of the former Yugoslavia, civil society has played a significant role in documenting victims' stories and creating theatrical productions that depict the shared experience of victimhood of parties on different sides of the conflict. Where the time is not ripe for a TRC, these and other creative measures may be called for in the search for truth, justice, and reconciliation.⁴⁹

Finally, the awarding of reparations to those who have been victims of human rights abuses is perhaps the farthest reaching mechanism of transitional justice. Its potential for fostering reconciliation is obvious, as it will serve to acknowledge the harm that all victims have suffered, and seek to make them whole at the same time. The availability of reparations will, of course, depend on the resources available for that purpose. In addition, it may not always be easy to decide upon an appropriate formula to determine the amount of reparations to be distributed to each individual victim. However, one lesson has emerged from experience. The distribution of lump sums has the potential of being perceived by the victim as an unseemly pay-off, whereas the life long distribution of reparations recognizes the continuing loss, particularly for those whose loved ones have perished in the conflict.⁵⁰

FIGHTING CORRUPTION

Much has been learned in recent years about how post-conflict environments can be insidious breeding grounds for corrupt practices which, having taken root, could prove to be the downfall of the entire reconstruction enterprise. Where justice and security are lacking in the aftermath of conflict, crime rushes in to fill the vacuum. Black and grey markets often emerge, undermining security and negating the rule of law.⁵¹

The literature analyzing the fight against corruption in post-conflict situations does not boast of numerous success stories.⁵² However, one lesson is particularly

poignant. The humanitarian assistance of the international community may itself be a significant source of corruption involving internationals and locals alike. In the face of this reality, there has been a worrisome tendency on the part of the international community to turn a blind eye on corrupt practices, sometimes taking the view that corruption can, in certain circumstances, serve to bring together opposing factions.⁵³ Authorities who have observed this phenomenon point out that a cost benefit analysis does not support the logic behind the assumption implicit in the practice.⁵⁴ In the long term, corrupt practices will inevitably do more harm than good, and they will usually serve as a mechanism for exclusion of various sectors of the population, denying them the kind of equality that is the hallmark of the rule of law.

Consequently, some who have studied the problem recommend some measures to reduce the potential for corruption associated with international assistance. First, they recommend that all international assistance should include accountability mechanisms on both the international and local levels. Second, they suggest that awarding smaller contracts to locals on a decentralized basis could serve to diminish the potential for corruption, especially where local NGO's are called upon to serve a watch dog function.⁵⁵ Beyond these basic measures, the international community still has a lot to learn about how to fight the insidious effects of corruption in this context.

THE USE OF LOCAL CUSTOMARY PRACTICES

Finally, perhaps the newest strategy for the promotion of the rule of law, which both international and local practitioners have just begun to consider, is the use of local customary practices. The topic is very controversial. Those who have in the past opposed this strategy have pointed to the undeniable fact that local customary law frequently involves the abuse of human rights, often through discrimination against women and children. On the other hand, those who are beginning to consider its use point to the fact that, in many post-conflict societies, local custom enjoys an infinitely higher degree of legitimacy in the eyes of the local population than the fledgling formal system. In places like Afghanistan and East Timor, for example, various tribes and ethnic groups within these societies have utilized their local custom to resolve disputes and prevent conflict for centuries. In those countries, there is no denying the fact that the local population is much more inclined to follow the rulings of their local elders than those of a distant, recently created, formal court whose workings are foreign to them.⁵⁶

Consequently, while international and local actors may have turned their back on local customary law in the past, some in the present are beginning to see its potential. When they consider the enormous challenges associated with establishing post-conflict justice and accountability for even the most serious types of crimes, they cannot fail to appreciate the potential that local custom offers for dealing with minor crimes and other lesser matters. In East Timor, for example, given the resources, human and otherwise, that were required for the prosecution of international crimes,

the UNTAET mission was able to do little to build the capacity of the domestic system to deal with other cases. As a result, some international actors within the mission began to use local custom by default, particularly in the area of minor crimes.⁵⁷ Since that time, others have begun to consider its use as a reliable mechanism for the resolution of land conflicts in East Timor and elsewhere.⁵⁸ This latter point is significant because authorities have come to recognize the failure of formal systems in resolving land conflicts in post-conflict countries. Since land is, for many, often central to conflict, it has become clear that rule of law practitioners can no longer turn their back on local custom.

At the same time, it is interesting to note that in East Timor, women in particular have come to realize the benefit of the formal system for dealing with domestic violence. Two recent studies have shown that the majority of East Timorese believe that cases involving sexual violence ought to be handled by the formal system, and some women are choosing the formal system over the informal in cases involving domestic violence.⁵⁹ This phenomenon suggests that there may be ways of carving out a workable coexistence between formal law and local custom that can take advantage of the practical benefit of local custom while offering meaningful protection of human rights in the formal system.

Nevertheless, these discrete examples of practice in East Timor only suggest solutions for the future and, once again, a great deal of research remains to be done before it can be determined whether and how formal and informal justice systems can be used in tandem in the promotion of post-conflict security and rule of law.

CONCLUSION

In a world where gross human rights atrocities in places as diverse as Darfur and Iraq increasingly shock the conscience of people everywhere, the science of bringing justice and rebuilding the rule of law in the aftermath of conflict is becoming increasingly important. Kofi Annan has stated: “Justice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives.”⁶⁰ The lessons of the past, outlined in this study, must inform the future. Local and international actors will, therefore, need to continue to learn how to work together in a spirit of collaboration and mutual respect. Only then will there be hope that the world community can meet this formidable challenge.

Notes

¹ United Nations, *Report of the Panel on UN Peace Operations* (the Brahimi Report), A/55/305-S/2000/809, August 21, 2000, pp. 39–40, 47, 79–83, 126; William G. O’Neill, *Kosovo: An Unfinished Peace* (Boulder, CO: Lynne Rienner, 2002), 76.

² United Nations Security Council, *The rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary General*, S/2004/616, August 23, 2004, 4.

³ Louis Aucoin, “The Role of International Experts in Constitution-Making: Myth and Reality,” *Georgetown Journal of International Affairs* 5, no. 1 (Winter/ Spring 2004): 94.

⁴ Vivien Hart, *Democratic Constitution Making*, Special Report No. 107. (United States Institute of Peace, July 2003), 2. Available at: <http://www.usip.org/pubs/specialreports/sr107.html> (accessed February 2, 2007).

⁵ *Ibid.*, 3.

⁶ *Ibid.*, 3–4.

⁷ Ibid., 7.

⁸ Aucoin, “The Role of International Experts in Constitution-Making,” 94.

⁹ *United Nations Peacebuilding: Recommendations on the Establishment of the Rule of Law From the Field* (Harvard University, The Project on Justice in Times of Transition (May 2003), 5. Available at: <http://www.pjtt.org/Final%20set%20of%20Recommendations%20from%20UN%20Program.doc> (accessed February 2, 2007).

¹⁰ Jane Stromseth, et al., *Can Might Make Right? Building the Rule of Law After Military Interventions*. (New York: Cambridge University Press, 2006), 218–219.

¹¹ See Michael Hartmann, *International Judges and Prosecutors in Kosovo: A New Model for Peacekeeping*, Special Report No. 112. (United States Institute of Peace, October 2003), 13. Available at: <http://www.usip.org/pubs/specialreports/sr112.html> (accessed February 2, 2007). where the author makes the point that a majority of international judges was necessary to sit in panels judging sensitive cases in Kosovo—cases involving ethnic violence, crimes against humanity, and war crimes.

¹² See “East Timor Report.” *A Review of Peace Operations: A Case for Change*. (London: The International Policy Institute, King’s College), pp. 241. Available at: <http://ipi.spp.kcl.ac.uk/rep006/toc.html> (accessed February 2, 2007) and Michael Hartmann, *International Judges and Prosecutors in Kosovo*, 13.

¹³ Hartmann, *International Judges and Prosecutors in Kosovo*, 13.

¹⁴ David Cohen, *Indifference and Accountability: The United Nations and the Politics of International Justice in East Timor*. East-West Center Special Reports, No. 9. (Honolulu: East-West Center, 2006), 91–106.

¹⁵ Herman Schwarz, “Lustration in Eastern Europe,” *Parker School of East European Law* 1, no. 2 (1994), 141–171, excerpted in Neil Kritz, ed., *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, Volume I: General Considerations (Washington, DC: United States Institute of Peace Press, 1995): 459–489.

¹⁶ Kritz, *Transitional Justice*, 475.

¹⁷ Ibid., 471.

¹⁸ Stromseth, et. al., *Can Might Make Right?*, 232.

¹⁹ Ibid., 217.

²⁰ Vivienne O’Connor and Colette Rausch, “Creating the Rule of Law Amidst Chaos: The Relevance and Applicability of Model Codes,” in *Civil War and the Rule of Law: Security, Development, Human Rights*, eds. Agnes Hurwitz and Reyko Huang, (Boulder, CO : Lynne Rienner, forthcoming 2007).

²¹ O’Neill, *Kosovo: An Unfinished Peace*, 79–81.

²² Hansjörg Strohmeyer, “Collapse and Reconstruction of a Judicial System: The United Nations Mission in Kosovo and East Timor,” *American Journal of International Law* 95, no. 1 (Jan 2001): 58.

²³ O’Connor and Rausch, “Creating the Rule of Law Amidst Chaos,” 12.

²⁴ Ibid., 18–26.

²⁵ William O’Neill, “Police Reform in Post Conflict Societies: What We Know and What We Still Need to Know,” *International Peace Academy* (April 2005): 1. Available at : <http://www.ciaonet.org/wps/ipa001/> (accessed February 2, 2007).

²⁶ Robert Perito, *Where is the Lone Ranger When We Need Him?* (Washington, DC: United States Institute of Peace Press, 2004), 87–90.

²⁷ For example, see the annex of the UN Security Council Special Report No. 5, *Twenty Days in August: The Security Council Sets Massive New Challenges for UN Peacekeeping*, September 8, 2006. Available at: http://www.securitycouncilreport.org/site/c.gKWLMTIsG/b.2056585/k.A1E/Special_Research_Report_No_5_8_September_2006.htm (accessed February 24, 2007).

²⁸ Eirin Mobekk, “Policing from below: community policing as an objective in peace operations,” in *SIPRI Research Report 16: Executive Policing: Enforcing the Law in Peace Operations*, ed. Renata Dwan (London: Oxford UP, April 27, 2006), 60.

²⁹ William O’Neill, “Police Reform in Post Conflict Societies,” 2–3.

³⁰ Janice M Stromsen and Joseph Trincellito, *Building the Haitian National Police: A Retrospective and Prospective View*, Haiti Papers, No. 6 (Trinity College, April 2003), 2–3.

³¹ Robert Perito, “National police training within an executive police operation,” in *SIPRI Research Report 16: Executive Policing: Enforcing the Law in Peace Operations*, ed. Renata Dwan (London: Oxford UP, April 27, 2006), 94.

³² Stromsem and Trincellito, *Building the Haitian National Police*, 10.

³³ Ibid. page 88–89

³⁴ Ibid., page 88.

³⁵ Ibid., 93.

³⁶ Ibid., 94.

³⁷ Stromseth, et. al., *Can Might Make Right?*, 213.

³⁸ Stromsem and Trincellito, *Building the Haitian National Police*, 10.

³⁹ William O’Neill, “Police Reform in Post Conflict Societies,” 7.

⁴⁰ United Nations Security Council, *The rule of law and transitional justice in conflict and post-conflict societies*, 4.

⁴¹ The ICC has jurisdiction over these crimes when they are committed by a State Party (or a state recognizing the Court's jurisdiction) or within the territory of a State party. Additionally, the Security Council may refer situations to the ICC, regardless of where they occur. Most controversially, the Prosecutor also has the independent authority to investigate situations where crimes within ICC jurisdiction may have been committed. Currently, the Court has four cases before it. Three of them involve the alleged commission of these international crimes in the Central African Republic, Uganda, and the Democratic Republic of the Congo. These cases were referred to the Court by States Parties. The fourth case, referred by the Security Council, involves the alleged commission of atrocities in the Darfur region of Sudan. Further information regarding cases before the International Criminal Court are available at the Court's website, <http://www.icc-cpi.int/cases.html>.

⁴² Laura Dickinson, "The Promise of Hybrid Courts," *American Journal of International Law* 97, no. 2 (2003): 295–310.

⁴³ *Ibid.*, 305–310.

⁴⁴ Miriam Aukerman, "Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice," *Harvard Human Rights Journal* 15 (Spring 2002): 82.

⁴⁵ Priscilla Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions* (New York: Routledge, 2001), 24–30.

⁴⁶ *Ibid.*, 32–48.

⁴⁷ Louis Aucoin and Eileen Babbitt, "UNDP Assessment Survey: Transitional Justice in Bosnia-Herzegovina, Croatia, Kosovo, Serbia and Montenegro," United Nations Development Program, January 2006.

⁴⁸ Neil Kritz, "Progress and Humility: The On-going Search for Post Conflict Justice," in *Post-Conflict Justice*, ed. M. Cherif Bassiouni, (Ardsey: New York: Transnational Publishers, 2002), 67.

⁴⁹ Louis Aucoin and Eileen Babbitt, "UNDP Assessment Survey: Transitional Justice in Bosnia-Herzegovina, Croatia, Kosovo, Serbia and Montenegro," 62–72 and 103.

⁵⁰ Hayner, *Unspeakable Truths*, 173.

⁵¹ Michael Driedzic, "Developing a Political Economy Viable Peace," in *The Quest for Viable Peace: International Intervention and Strategies for Conflict Transformation*, ed. Jock Covey et al., (Washington D.C.: United States Institute of Peace Press, 2005) 180–210.

⁵² Madalene O'Donnell, "Fighting Corruption: A Rule of Law Agenda?" in *Civil War and the Rule of Law: Security, Development, Human Rights*, eds. Agnes Hurwitz and Reyko Huang, (Boulder, CO : Lynne Rienner, forthcoming 2007).

⁵³ Daniel Large, "Corruption in Post War Reconstruction: Confronting the Vicious Circle." A Transparency International publication of the 11th annual International Anti-Corruption Conference. May 25, 2003: 41.

⁵⁴ *Ibid.*, 40.

⁵⁵ *Ibid.*, 29.

⁵⁶ *Law and Justice in East Timor: A Survey of Citizen Awareness and Attitudes Regarding Law and Justice in East Timor*, The Asia Foundation (February 2004), 5.

⁵⁷ See, e.g., Christian Ranheim. "Legal Pluralism in East Timor: The formal judicial system and community based customary law" (October 2003), 15. Draft prepared as part of the Fletcher/USIP project on The Role of Informal Justice Systems in Fostering the Rule of Law in Post-Conflict Societies.

⁵⁸ Agnes Hurwitz, "Managing Land, Property and Housing Disputes: Legal Policy Options," in *Civil War and the Rule of Law: Security, Development, Human Rights*, eds. Agnes Hurwitz and Reyko Huang, (Boulder, CO : Lynne Rienner, forthcoming 2007.)

⁵⁹ Aisling Swaine, *Traditional Justice and Gender Based Violence*, Research Report, International Rescue Committee (August 2003), 34.

⁶⁰ *The rule of law and transitional justice in conflict and post-conflict societies*, 1.

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