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Post Conflict Peacebuilding and International Law

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INTRODUCTION

Peacebuilding, like the concept of peacekeeping, is neither defined nor specifically provided for in the UN Charter.¹ While intrinsically linked, neither concept lends itself to precise definition and may include a myriad of tasks. Peacebuilding is not an entirely recent phenomenon. The UN played such a role in the Congo in the early 1960s, while the United States and its allies rebuilt Germany and Japan in the aftermath of World War II.

As the dynamic of conflict in the world changed, so too did the response of the UN, and other international organisations and states.² Since 1985 there has been a significant increase in the number of peacekeeping missions established, with a corresponding increase in the complexity of the mandates. These are often referred to as 'second generation' peacekeeping operations.³ The traditionally passive role of peacekeepers has been replaced by a more active role involving, inter alia, national

¹ See R. Paris (2007), 'Post-Conflict Peacebuilding', in T. Weiss and S. Daws (eds), *The Oxford Handbook on the United Nations*, Oxford University Press, pp. 404-26; B. Simma(ed) (2007), *The Charter of the United Nations: A Commentary*, Oxford University Press, 2nd ed., pp. 648-700; N. Azimi, and C. Lin (eds) (2000), *The Nexus Between Peacekeeping and Peacebuilding, Debriefing and Lessons*, Kluwer; N.D. White (1997), *Keeping the Peace*, Manchester University Press, 2nd. Ed., pp. 207-84; United Nations (1996), *The Blue Helmets - A Review of United Nations Peacekeeping*, 3rd ed., pp. 3-9.

² J.L. Holzgrefe and R.O. Keohane, (eds) (2003), *Humanitarian Intervention*, Cambridge University Press; International Commission on Intervention and State Sovereignty (2001), *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*, International Development Research Centre, pp. 8-9. I. Johnstone (2004), 'US- UN Relations After Iraq: The End of the World (Order) As We Know It?' *European Journal of International Law*, 15, p. 813 at p. 823.

³ United Nations, 1996. *The Blue Helmets*, p. 5.

reconstruction, facilitating transition to democracy, and providing humanitarian assistance.⁴

The resolution of internal or domestic conflict has been a dominant feature of recent peacekeeping operations and has involved the establishment of 'democratic' governments culminating in the nation building attempted in Somalia, Kosovo, Afghanistan and Iraq. International administration of this kind is not subject to a clear UN doctrine. Operations in Eastern Slavonia, Bosnia-Herzegovina, Kosovo and East Timor [Timor-Leste] have been characterised by the UN and other international organisations assuming responsibilities that evoke the historically sensitive concepts of trusteeship and protectorate.⁵

Although the UN has little experience in the actual governance of territories, such activity is consistent with the objects and purpose of the Charter.⁶ Making international administrations accountable and preventing them from adopting neo-colonial roles is imperative and a major challenge for contemporary peacebuilding operations.⁷ While the

⁴ J. Roper, M. Nishihara, O. Otunnu, and E. Schoettle (1993), *Keeping the peace in the post-Cold War era: Strengthening Multilateral Peacekeeping*, A report of the Trilateral Commission, p. 4.

⁵ M. Berdal and R. Caplan (2004), 'The Politics of International Administration', *Global Governance*, 10, pp. 1-5.

⁶ See M.J. Matheson (2001), 'United Nations Governance of Postconflict Societies', *American Journal of International Law*, 95, p. 76 at p. 83.

⁷ See A. Devereux (2009), 'Selective universality? Human-rights accountability of the UN in post-conflict operations', B. Bowden, H. Charlesworth and J. Farrell (eds), *The Role of International Law in Rebuilding Societies after Conflict: Great Expectations*, Cambridge University Press, p. 198. K. Mansson (2008), 'Integration of Human Rights in Peace Operations', in R. Murphy and K. Mansson (eds) (2008), *Peace Operations and Human Rights*, Routledge, ; R. Murphy (2008), 'An Assessment of UN Efforts to address Sexual Misconduct by UN Personnel', in R. Murphy & K. Mansson (eds), P. 75; J. Cerone (2005), 'Reasonable Measures in Unreasonable Circumstances: A Legal Responsibility Framework for Human Rights Violations in Post-conflict Territories under UN Administration', in N.D. White and D. Klaasen (eds) (2005), *The UN, Human Rights and Post-conflict Situations*, Manchester University Press, p. 42; F. Mégret and F. Hoffmann (2003), 'The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities', *Human Rights Quarterly*, 25, pp. 314-45; B. Kondocho (2005), 'Human Rights Law and UN Peace Operations in Post-conflict Situations', in N. D. White & D. Klaasen, p. 19; G. Verdirame (2005), 'UN Accountability for Human Rights Violations in Post-conflict Situations', in N. D. White & D. Klaasen, p. 81.

UN has little experience in the actual governance of territories, it has been an integral part of post-conflict peacebuilding efforts and the need for co-ordination of post-conflict strategies was evident for some time. Maintaining impartiality can present peacekeepers with a dilemma, especially when they confront situations in which civilians are victimised, or when UN forces are themselves the subject of attack.⁸ Similar challenges exist for peacebuilding operations where the question of the consent of the host state or parties to a conflict to a UN presence is particularly problematic.

The UN and Peacebuilding

In June 1992, then UN Secretary-General Boutros Boutros-Ghali published *An Agenda for Peace*.⁹ The report expressed the optimism and confidence of the time, but these were to be short lived. Subsequent events highlighted the deficiencies in the UN system, in particular the controversy over UN policy in Somalia and Rwanda, and the failure to secure peace and protect Bosnia in the former Yugoslavia. However, the report stimulated a major international debate about the role of the UN, and the international community, in securing and maintaining peace in the post-Cold War era. The Secretary-General recognised the need to not only end conflicts but also to rebuild communities and prevent the resurgence of violence. Henceforth post-conflict peacebuilding became part of the lexicon and *raison d'être* of UN peacekeeping. This marked a major development in UN policy and similar shift in thinking which was reflected in the view of the Secretary-General emphasized in 1993: 'U.N. operations now may involve nothing less than the reconstruction of an entire society and state', for an extended period involving 'social, economic, political, and cultural aspects far beyond [the] traditional military dimension'.¹⁰ In this way, the

⁸ United Nations, 1996. *The Blue Helmets*, p. 5.

⁹ (1992) *An Agenda for Peace—Preventive Diplomacy, Peacemaking and Peace-Keeping*: Report of the Secretary-General, UN Doc. A/47/277 - S/24111. The report aimed to provide 'analysis and recommendations on ways of strengthening and making more efficient ... the capacity of the UN for preventive diplomacy, for peacemaking and for peacekeeping'.

¹⁰ B. Boutros-Ghali (2003), 'Beyond Peacekeeping', *New York University Journal of International Law and Politics*, 25, p. 113 at p. 115.

Security Council came to add the crucial task of post-conflict peacebuilding to its peacekeeping operations and this soon became a UN priority.¹¹ Consequently, the mandate of peacekeeping evolved from comprising lightly armed interpositional forces monitoring a truce, into a new spectrum of responsibilities, 'including supervising and running elections, upholding human rights, overseeing land reform, delivering humanitarian aid under fire, [and] rebuilding failed states.'¹² Today, peacekeeping includes a range of multi-dimensional tasks from building peace to establishing a system of international administration that entails all of the responsibilities of governance. Peacebuilding should be seen as complementary to peacemaking (bringing an end to hostilities) and peacekeeping (maintaining peace through military force to separate conflicting parties). As such, peacebuilding aims to foster and create the means to sustain peace in a post-conflict environment without the need for a peace support operation.

The UN Secretary-General has described post-conflict peacebuilding in the following terms:

By post-conflict peace-building, I mean actions undertaken at the end of a conflict to consolidate peace and prevent a recurrence of armed confrontation. Experience has shown that an integrated peace-building effort is needed to address the various factors that have caused or are threatening a conflict. Peace-building may involve the creation or strengthening of national institutions, monitoring elections, promoting human rights, providing for reintegration and rehabilitation programmes, and creating conditions for resumed development. Peace-building does not replace ongoing humanitarian and development activities in countries emerging from crisis. It aims rather to build on, add to, or reorient such activities in ways designed to reduce the risk of a resumption of conflict

¹¹ See (1992) *An Agenda for Peace*, paras. 55–59, (introducing post-conflict peacebuilding as a UN priority).

¹² S. Tharoor (1995), 'The Changing Face of Peace-Keeping and Peace-Enforcement', *Fordham International Law Journal*, 19, p. 408 at p. 411 and R. Wedgwood (1995), 'The Evolution of United Nations Peacekeeping', *Cornell International Law Journal*, 28, p. 631 at p. 635.

and contribute to creating the conditions most conducive to reconciliation, reconstruction and recovery.¹³

With regard to post-conflict peacebuilding, Franck has referred to the need to support the emergence of a 'holistic approach to humanitarian rescue' which can act in the short term to save lives, while supporting the longer term restoration of political stability.¹⁴ The UN Secretary-General has outlined the following priorities for post-conflict peacebuilding:

To avoid a return to conflict while laying a solid foundation for development, emphasis must be placed on critical priorities such as encouraging reconciliation and demonstrating respect for human rights; fostering political inclusiveness and promoting national unity; ensuring the safe, smooth and early repatriation and resettlement of refugees and displaced persons; reintegrating ex-combatants and others into productive society; curtailing the availability of small arms; and mobilizing the domestic and international resources for reconstruction and economic recovery. Every priority is linked to every other, and success will require a concerted and coordinated effort on all fronts.¹⁵

The end of the Cold War also heralded a significant increase in the UN's willingness to pursue its role in the maintenance of international peace and security by the adoption of military solutions. The UN and the international system seemed unprepared and ill-equipped for the potential consequences of the 'new world order'. Not surprisingly, the UN has come under considerable criticism. However, there is sometimes a failure to distinguish between the UN and its separate organs, especially the Security Council. In this context, there is merit in remembering that the institution is only as strong or effective as its member states will allow. Therefore, some of the blame for ineffectiveness can be laid at the feet of the member states that vote to take action, but then fail in subsequent resolutions to provide the means to support the very operations they had earlier deemed critical. The establishment of the Peacebuilding Commission was

¹³ Report of the Secretary-General on the work of the Organization (1998), *The causes of conflict and the promotion of durable peace and sustainable development in Africa*, UN Doc. A/52/871 – S/1998/318, 13, para. 63.

¹⁴ T. Franck (2002), 'A Holistic Approach to Peace', in C.A.J. Coady (ed), *The Ethics of Armed Humanitarian Intervention*, US Institute for Peace, p. 31. See also International Commission on Intervention and State Sovereignty (2001), pp. 39-45.

¹⁵ Report of the Secretary-General on the work of the Organization, 1998, para. 66.

an attempt to plug one gap in the UN post-conflict reconstruction strategy.¹⁶ Chesterman ('From State Failure to State Building') considers state-building efforts and prospects for the Commission. He points out that generally it is not the state that 'fails' – it is the government or individual leaders. He concludes that the evolution of the Commission is a somewhat typical example of ideas being diluted as the negotiation process progressed through the labyrinth of policy and intergovernmental machinery (Chesterman, 170). Despite its broad mandate, early warning and formulating strategy were initial casualties making it look more like a standing conference. In addition to clarity of purpose, success requires time and money. Lengthy engagement in the past did not ensure success, but premature departure guaranteed failure (Chesterman, 164). Yet the Commission remains a significant development for facilitating co-ordination and highlighting the need for a sustained post-conflict peacebuilding effort.

The adoption by the UN of resolutions under Chapter VII of the Charter involving enforcement measures has been one of its most controversial actions in recent years. The real problem is not the legality of such activity, but the question of which states decide when it is appropriate and the criteria used to form that decision.¹⁷ The current practice allows the permanent members of the Council to determine the agenda, thus facilitating a very selective, secretive and undemocratic response to international crises. The situation is made worse by the ambiguity surrounding the extent to which peaceful settlement procedures, including diplomatic efforts must be exhausted before military sanctions are

¹⁶ In the enabling resolutions establishing the Peacebuilding Commission, resolution 60/180 and resolution 1645 (2005) of 20 December 2005, the United Nations General Assembly and the Security Council mandated it, *inter alia*, to bring together all relevant actors to marshal resources and to advise on the proposed integrated strategies for post-conflict peacebuilding and recover; to help ensure predictable financing for early recovery activities and sustained financial investment over the medium to long-term; and to develop best practices on issues in collaboration with political, security, humanitarian and development actors. The resolutions also identify the need for the Commission to extend the period of international attention on post-conflict countries and where necessary, highlight any gaps which threaten to undermine peacebuilding.

¹⁷ This is so despite the fact that the practice of the Security Council authorisation for states to use armed force does not correspond to the express text of Chapter VII of the Charter.

applied.¹⁸ The problem has been compounded by the willingness of states to take action outside the framework of the UN such as occurred in Iraq (2003) and Kosovo (1999), and the role of a select industrialised group of nations, especially in relation to Kosovo, which has been to function as a kind of shadow Security Council, but with no real accountability. All of these factors impact on UN peacebuilding efforts. If military intervention is contemplated, then it must take account of post-intervention strategy.¹⁹ The object being to ensure the reasons that necessitated the intervention do not arise again. In this way the responsibility to protect or react implies a similar responsibility to follow through and rebuild.²⁰ Failed states are inevitably associated with internal and endogenous problems, though they may have cross frontier dimensions.²¹ The situation is one of implosion rather than explosion of the structures of power and authority. An initial priority must be the provision of security, including disarmament, demobilisation and re-integration and rebuilding of national forces. This should be followed by a justice and reconciliation policy to include the right of returnees and refugees, and lastly a development policy aimed at improving the overall economic climate.²²

UN High-level Panel on Threats, Challenges and Change

Post-conflict peacebuilding has been adopted to describe the assumption of governance functions by the UN i.e. 'action to identify and support structures which will tend to

¹⁸ This was a source of controversy and debate before the adoption of SC Resolution 678 (1991), which authorized collective measures against Iraq and led to Operation Desert Storm. See O. Schachter (1991), 'United Nations Law in the Gulf Conflict'. *American Journal of International Law*, 85, p. 452; and L.C. Green (1991), 'Iraq, the U.N. and the Law', *Alberta Law Review*, 29, p. 560.

¹⁹ International Commission on Intervention and State Sovereignty (2001), para. 5.3.

²⁰ International Commission on Intervention and State Sovereignty (2001), para. 5.1.

²¹ D. Thurer (1999), 'The 'Failed State' and International Law', *International Review of the Red Cross*, p. 836 at p. 731 and B. Ramcharan (1996), 'UN Policies and Strategies: Preventing State Failures and Rebuilding Societies', *Journal of International Law and International Relations*, 2, p. 141 p. 143.

²² See N. Tschirgi (2003), *Peacebuilding as a Link between Security and Development: Is the Window of Opportunity Closing?* New York: International Peace Academy.

strengthen and solidify peace in order to avoid a relapse into conflict.’²³ The expansion of the Security Council’s mandate has focused attention on whether the underlying legal authority for peacekeeping provides a legitimate foundation for these new missions.²⁴ As the mechanisms of Security Council action under Chapters VI and VII of the UN Charter were established with more traditional peacekeeping in mind rather than post-conflict peacebuilding, practitioners and commentators have considered an alternative framework for intervention. This would replace the current rather ad hoc system of Security Council action. Some commentators²⁵ have recommended transferring the administration and reconstruction of collapsed states to the now-dormant Trusteeship Council, the UN organ responsible for steering dependent territories to independence.²⁶

In 2000, the UN Secretary-General convened an expert Panel on United Nations Peace Operations to make recommendations for reform of the peacekeeping system. The final report (‘Brahimi Report’) outlined a wide range of proposals for reform. It also contained blunt criticisms and warned that without significant institutional change, the

²³ (1992), *An Agenda for Peace*, 1992. para. 21; see also (2004), *A More Secure World: Our Shared Responsibility - Report of the High-Level Panel on Threats, Challenges and Change*, UN Doc A/59/565 para. 229 (‘[T]he core task of peacebuilding is to build effective public institutions that, through negotiations with civil society, can establish a consensual framework for governing within the rule of law.’).

²⁴ See for example S.R. Ratner (1995), *The New UN Peacekeeping: Building Peace in Lands of Conflict After the Cold War*, St. Martin’s, pp. 58–60.

²⁵ S. Mohamed (2005), ‘From Keeping Peace to Building Peace: A Proposal for a Revitalized United Nations Trusteeship Council’, *Columbia Law Review*, 105, p. 809. See also (2001), International Commission on Intervention and State Sovereignty, paras. 5.22 to 5.24.

²⁶ Personal interview, DPKO official, UN headquarters, New York, December 2009. The Trusteeship Council was responsible for colonies and territories that at the end of World War I were ‘inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world’. See F.B. Sayre (1948), ‘Legal Problems Arising from the United Nations Trusteeship System’, *American Journal of International Law*, 42, pp. 263–68 and K.W. Abbot, & D. Snidal (1998), ‘Why States Act Through Formal International Organizations’, *Journal of Conflict Resolution*, 42, p.3 at p. 20. The panel convened by the Secretary-General, (2004), *Report of the High-Level Panel on Threats, Challenges and Change*, proposed abolishing the Trusteeship Council, see para. 299.

UN would not be capable of executing the critical peacekeeping and peacebuilding tasks that the Member States assign.²⁷

The 2004 *UN High-level Panel on Threats, Challenges and Change* evaluated UN policies with regard to collective security and provided recommendations for strengthening the organisation taking into account 21st century challenges to global security.²⁸ It offered a blue print for reform, while acknowledging the strengths of the Organization.

The [U.N.'s] role in this area arises from its international legitimacy; the impartiality of its personnel; its ability to draw on personnel with broad cultural understanding and experience of a wider range of administrative systems, including the developing world; and its recent experience in organizing transitional administration and transitional authority operation.²⁹

The High-level Panel recognized that peacebuilding is essential given contemporary challenges, but deplored that work and resources in this area remain too dispersed. It concluded that there was 'no place in the United Nations system explicitly designed to avoid state collapse...or to assist countries in their transition from war to peace'.³⁰ Amongst its proposals was the establishment of a Peacebuilding Commission dedicated to supporting states in their reconstruction and development efforts. This was later endorsed by the Secretary-General and in a subsequent report entitled *In Larger Freedom: Towards Development, Security and Human Rights for All*, the Secretary-General recommended the establishment of a Rule of Law Assistance Unit within the

²⁷ (2000) *Report of the Panel on UN Peacekeeping Operations* (Brahimi Report,) UN Doc A/55/305-S/2000/809, paras. 1, 8. See also UN (2001), *No Exit Without Strategy: Security Council Decision-Making and the Closure or Transition of United Nations Peacekeeping Operations: Report of the Secretary-General*, para. 21, UN Doc S/2001/394.

²⁸ (2004), *Report of the High-Level Panel on Threats, Challenges and Change*, UN Doc A/59/565.

²⁹ *Ibid.*, para. 262.

³⁰ *Ibid.*, para. 261.

Peacebuilding Commission ‘to assist national efforts to re-establish the rule of law in conflict and post-conflict societies’.³¹

Rule of Law³²

The establishment of the rule of law is vital for all those involved in post-conflict peacebuilding.³³ Prisons, police stations and court houses may be destroyed. Lawyers, judges and police may have fled leading to a situation where the criminal justice system is dysfunctional or has ceased to function completely. According to Tolbert and Solomon (‘United Nations Reform and Supporting the Rule of Law in Post-Conflict Societies’) the phrase ‘rule of law’ became part of the lexicon of post-conflict peacebuilding and is accepted by many commentators as central to the rebuilding process (Tolbert and Solomon, 29). The current rule of law promotion field began in the mid-1980s in Latin America and has since expanded to include Eastern Europe, the former Soviet Union, Asia, and sub-Saharan Africa (Carothers, ‘Promoting the Rule of Law Abroad’, 11). However, there is still some confusion and scepticism about what rule of law means in practice and if the various programmes achieve anything.³⁴ Lord Ashdown, then High

³¹ (2005), *In Larger Freedom: Towards Development, Security and Human Rights for All- Report of the Secretary-General*, UN doc A/59/2005, p. 36. See also The Secretary-General’s Remarks on the Launch of the Peacebuilding Fund (New York, 11 October 2006).

³² See S.N. Carlson (2006), *Legal and Judicial Rule of Law Work in Multi-Dimensional Peacekeeping Operations: Lessons Learned Study*, UN Peacekeeping Best Practices Unit; J. Stomseth, D. Wippman & R. Brooks (2006), *Can Might Make Rights? Building the Rule of Law after Military Intervention*, Cambridge University Press.

³³ See V. O’Connor, and C. Rausch, C.(eds) (2007), *Model Codes for Post-Conflict Criminal Justice*, Vol. 1, United States Institute of Peace, 3; V. O’Connor (2005), ‘Traversing the Rocky Road of Law Reform in Conflict and Post-conflict States: Model Codes for Post-conflict Criminal Justice as a Tool of Assistance’, *Criminal Law Forum*, 16, pp. 231-55.

³⁴ ‘When rule-of-law practitioners gather among themselves to reflect on their work, they often express contradictory thoughts. On the one hand they talk with enthusiasm and interest about what they do, believing that the field of rule-of-law assistance is extremely important. Many feel it is at the cutting edge of international efforts to promote both development and democracy abroad. On the other hand, when pressed, they admit that the base of knowledge from which they are operating is startlingly thin. As a colleague who has been closely involved in rule-of-law work in Latin America for many years said

Representative for Bosnia-Herzegovina, is on record as saying: 'In hindsight, we should have put the establishment of the rule of law first, for everything else depends on it: a functioning economy, a free and fair political system, the development of civil society, public confidence in the police and courts'.³⁵ Strohmeyer came to a similar conclusion based on his study of the 'Collapse and Reconstruction of a Judicial System', when considering the UN missions in Kosovo and East Timor (Strohmeyer, 46-63). The administration of justice must be a top priority from the outset and he proposes a number of practical recommendations to achieve this goal. This is no simple task when there is no system to be administered, no qualified personnel available and no physical structure left intact.

The UN Secretary-General has defined rule of law as follows:

The rule of law is a concept at the very heart of the Organization's mission. It refers to 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 law, equality before the law, accountability to the law, fairness in the application of the law, legal certainty, avoidance of arbitrariness and procedural and legal transparency.³⁶

Although this may be viewed as a somewhat narrow and legal perspective on the rule of law, by definition it must be embedded in legal principles. This begs the question, which legal principles? The rule of law is a key element in the UN's post-conflict agenda. The two central tenets espoused as part of this agenda are: the promotion of international norms and standards and facilitating the development of local

to me recently, 'we know how to do a lot of things, but deep down we don't really know what we are doing.' (Carothers, 5).

³⁵ P. Ashdown (2002), 'What I Learned in Bosnia', *New York Times*, 28 October 2002, at A2.

³⁶ (2004), *Report of the Secretary-General: The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc. S/2004/616, para. 5.

ownership.³⁷ However, this is likely to lead to situations where both components cannot be satisfied simultaneously.

Brahimi advocated, inter alia, a 'light footed' and bottom up approach by the UN to post-conflict rebuilding based on his own experience in missions such as Afghanistan. This approach should minimize the UN and other international presence while facilitating local ownership.³⁸ Avoidance of adopting a neo-colonial approach and ensuring the creation of a sustainable post-conflict society are paramount considerations. However, these must be reconciled with the imperative of creating a framework based on international norms and standards espoused in the 2004 report *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*.³⁹ This report constitutes the foundation of UN peacebuilding theory and represented a new approach to rule of law policy in post-conflict societies. An obvious problem with international norms is that they are easy to sign up to but much more difficult to live up to.

Finding means of engaging national stakeholders is crucial to the success of any strategy devised to promote legitimacy and sustainability. Such stakeholders include justice sector officials, civil society, professional associations, traditional leaders, women, minorities, displaced persons, and refugees.⁴⁰ These must be given a real say in driving the process of reform. Identifying national partners and recognizing their leadership role

³⁷ S. Vig (2009), 'The Conflictual Promises of the United Nations' Rule of Law Agenda: Challenges for Post-Conflict Societies', *Journal of International Peacekeeping*, 13, pp.131–58.

³⁸ Ibid., at p. 138 and S. Schmemmann (2001), 'U.N. Envoy Says All Options Are Open on a Post-Taliban Afghanistan', *New York Times*, 18 October, B4.

³⁹ UNSC, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (23 August 2004) UN Doc S/2004/616, 3. See generally I. Aersten, J. Arsovska, H.C. Rohne, M. Valinas, K. Vanspauwen, (eds) (2008), *Restoring Justice After Large Scale Violent Conflicts – Kosovo, DR Congo and the Israeli-Palestinian case*, Willian Publishing.

⁴⁰ UNSC, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (23 August 2004) UN Doc S/2004/616, 6. See S. Chesterman (2007), 'Ownership in Theory and Practice: Transfer of Authority in UN Statebuilding Operations', *Journal of Intervention and Statebuilding*, 1, pp. 1, 3, 8; C. Lopes and T. Theisoohn (2003), *Ownership, Leadership and Transformation: Can We Do Better for Capacity Development?* Earthscan, p. 29.

should be a priority task for those involved in peace operations.⁴¹ This will require cultivation of support among all sectors, former combatants and social elites and those marginalized under previous regimes.

International missions in Somalia, Bosnia, East Timor and Kosovo have been characterized by international officials participating fully in policy making and in the process acting as kinds of trustees. New laws and codes were introduced that were described by Tondini as having ‘the ring of authoritarianism and appear to be dropped in from on high’ (Tondini, ‘From Neocolonialism to a ‘Light-Footed’ Approach, 237; but see Strohmeyer, 46-63). The need for some form of intervention in failed states does not bestow authority or grant a licence on those intervening to do what they will. A central objection against UN action in post-conflict societies is that ‘rich and powerful states perpetuate their domination, fulfill their own foreign policy objectives, and impose their own models of government and society under the veil of the UN’.⁴²

In Rwanda, the widespread engagement of international actors in justice system reform was said to have created a ‘donor-driven justice’,⁴³ completely separated from the country’s legal tradition. In Afghanistan, on the other hand, the justice system has been shaped in a manner that paid due attention to the legal and judicial systems formerly in place (Tondini, 237).⁴⁴ This placed primary responsibility for the restoration of the sector on the Afghan government (at least formally), with international actors performing a limited coordination role which the UN termed adopting the so called ‘light-footprint approach’.⁴⁵ This approach, despite criticisms, builds on the premise that the UN is a

⁴¹ L. Brahimi (2007), ‘State-building in Crisis and Post-Conflict Countries’, 7th Global Forum on Reinventing Government Building Trust in Government, Vienna 26-29 June 2007, 3.

⁴² S.K. Han (1994), ‘Building a Peace That Lasts: The United Nations and Post-Civil War Peace-Building’, *New York University Journal of International Law and Politics*, 26, p. 837 at p. 888.

⁴³ B. Oomen (2005), ‘Donor-Driven Justice and Its Discontents: The Case of Rwanda’, *Development and Change*, 36, p. 887 at p. 894.

⁴⁴ See also M. Schoiswohl (2006), ‘Linking the International Legal Framework to Building the Formal Foundations of a “State at Risk”: Constitution Making and International Law in Post-Conflict Afghanistan’, *Vanderbilt Journal of Transnational Law*, 39, pp. 819-863.

⁴⁵ (2002), ‘The Situation in Afghanistan and Its Implications for International Peace and Security’, Report of the Secretary-General, UN doc. A/56/875-S/2002/278, p.16.

partner in the process, rather than sovereign administrator (Chesterman, 'From State Failure to State Building, 159).⁴⁶ Both Afghanistan and Iraq are examples of 'post-conquest peacebuilding' which raise legitimate fears of the peacebuilding project being overtaken by other agendas.⁴⁷ In theory, democratic institutions and structures put in place should continue after the departure of the UN. However, Afghanistan remains a test case and at the time of writing it is not clear if the peacebuilding mission there, which amounts to state-building and the promotion of good governance by means of democratic institutions, will succeed.⁴⁸

Carothers has drawn attention to the weakness of many rule of law programmes and the lack of knowledge at many levels of conception, operation, and evaluation. Among the most common lessons learned, for example, are 'programs must be shaped to fit the local environment' and 'law reformers should not simply import laws from other countries' (Carothers, 11). The fact that common sense lessons of this type are put forward by institutions as lessons learned is an unfortunate indicator of the weakness of many such efforts.

Widner ('Courts and Democracy in Postconflict Transition') offers a social scientist's perspective of the role courts in achieving peace and building new democracies in Africa (Widner, 64-75). She focuses on how law plays a central but delicate role in many peace settlements and democratic transitions on the African continent. She cautions against placing too much faith in courts as their relationship with postconflict stabilization is not always straightforward. There are no 'quick fix' solutions. The attitude of other social actors, the efficacy of the courts in indicating their ambition for

⁴⁶ See also S. Chesterman (2005), 'Transitional Administration State Building and the U.N.', in Chesterman, Ignatieff & Thakur, *Making States Work*, United Nations University, p. 339; S. Chesterman (2007), 'Ownership in Theory and Practice: Transfer of Authority in UN Statebuilding Operations', *Journal of Intervention and Statebuilding*, p. 1 at p. 9.

⁴⁷ See N. Tschirgi, *Post-Conflict Peacebuilding Revisited: Achievements, Limitations and Challenges*, International Peace Academy, 1.

⁴⁸ See also M. Schoiswohl (2006), 'Linking the International Legal Framework to Building the Formal Foundations of a 'State at Risk': Constitution Making and International Law in Post-Conflict Afghanistan', *Vanderbilt Journal of Transnational Law*, 39, pp. 819-863; (2005), *The UN's Role in Nation Building- - From the Congo to Iraq*, Rand Corporation.

intervention, the character of the law itself and mobilization of resources all impact on the contribution the courts can make (Widner, 75).

Legal reforms and situations to date indicate that finding a formula that has universal application is not possible. However, achieving a stable political and security situation is imperative in any post-conflict reconstruction.⁴⁹ Efforts to identify the applicable law have often been haphazard and ad hoc in nature. This question has now been resolved with the publication of the Model Codes for Post-conflict Criminal Justice. These sought to address one of the most daunting and fundamental challenges confronting and peacebuilding mission i.e. identifying and applying a relevant and acceptable code of law. While establishing a legal framework is essential, Tolbert and Solomon point out that it is also necessary to ensure an independent and competent judiciary, legal profession and reputable schools for training lawyers (Tolbert and Solomon, 44-50). Closely linked to the Rule of Law is that of transitional justice. This can take many forms which combine 'prosecutorial styles of justice, local mechanisms for truth recovery and a programme for criminal justice reforms'.⁵⁰ Issues of good governance are uppermost on the agenda of transitional administrations. Unfortunately, the mandates of those administrations are often ambiguous and broad. They are the result of political compromise. Nevertheless, this has been identified for some time as a weakness in peacekeeping missions. Security Council resolutions are too ambitious to provide secure guidance for post-conflict justice.⁵¹

The expansion of the UN's role in peace operations was accompanied by a new emphasis on 'human rights' and the 'rule of law'.⁵² Stahn recommends that the existing international law framework needs to be extended beyond the boundaries of the dualist conception of *ius ad bello* and *ius in bellum* (Stahn, 'Jus ad Bellum, Jus in Bello, Jus Post

⁴⁹ CSIS and AUSA (2003), *Play to Win: Final Report of the Bi-Partisan Commission on Post-Conflict Reconstruction*, p. 7.

⁵⁰ C. Campbell (2000), 'Peace and the laws of war: The role of humanitarian law in post-conflict environment', *International Review of the Red Cross*, 839, pp. 527-51.

⁵¹ C. Stahn (2005), 'Justice Under Transitional Administration: Contours and Critique of a Paradigm', *Houston Journal of International Law*, 27, p. 320 at p. 311.

⁵² H. Correl (2005), 'Authorization for State-Building Missions: Legal Issues Related to their Creation and Management', *American Society of International Law Proceedings*, 99, p. 31.

Bellum?', 940-1)⁵³ He suggests a new approach to determining the legal framework applicable to post-conflict situations and proposes the development of an *ius post bellum*, that is, a specific post-conflict regime with the potential to draw on both human rights and humanitarian law in peacebuilding. This argument certainly has appeal. The ultimate purpose of fair and just peace-making is to remove the causes of violence. This will mean more than a return to the *status quo ante* but the positive transformation of the domestic order of a society. Ideally this will endeavour to achieve a higher level of human rights protection, accountability and good governance than had existed before (Stahn, 936). There is also a move from collective to individual responsibility.⁵⁴ Modern international practice, particularly in the area of peace-building, appears to focus on a model involving targeted accountability in peace processes. This involves amnesties for less serious crimes, and the establishment of truth and reconciliation commissions with a functioning criminal justice system (Stahn, 941). Lastly, he also suggests that it include provision for 'people centred government':

Peace-making, more than ever before, is tied to the ending of autocratic, undemocratic and oppressive regimes, and directed towards the ideal of 'popular sovereignty' held by individuals instead of states or elites. (Stahn, 941)

Lessons from UNMIK

⁵³ Stahn recommends the *ius post bellum* includes a move from collective to individual accountability and the harmonisation of justice and reconciliation. He also suggests provision for 'people centred government' that would 'create, inter alia, a duty for domestic or international holders of public authority in situations of transition to institute political structures that embody mechanisms of accountability vis-à-vis the governed population and timelines to gradually transfer power from political elites to elected representatives' (Stahn, 941). See also A. Roberts (2006), 'Transformative Military Occupation: Applying the Law of War and Human Rights, *American Journal of International Law*, 100, p.580, at pp. 595-90. Roberts is pessimistic about the possibilities of developing a more coherent *jus post bellum* regime either through *ad hoc* modification or formal revision of existing regimes.

⁵⁴ B. Orend (2000), *War and International Justice, A Kantian Perspective*, Wilfrid Laurier University Press, p. 232.

The Marshall and Inglis study of UNMIK ('The Disempowerment of Human Rights-Based Justice in the United Nations Mission in Kosovo') found that establishing a de facto government incorporating a new justice system is a significant challenge in any situation, but especially when a society is nursing deep wounds from recent conflict (Marshall and Inglis, 144).⁵⁵ In spite of the achievement in Kosovo, UNMIK provides some sobering lessons in the area of criminal justice and human rights from which future post-conflict peacebuilding operations could learn. The mission failed to establish a framework based on international human rights standards within which UNMIK and KFOR could determine the extent and quality of their actions (Marshall and Inglis, 96). Long term strategic goals were unclear, especially in regard to the justice sector, and there was no consistent, transparent and inclusive process. UNMIK created a system of governance whereby it was effectively above the law and even the human rights components of the mission were marginalized in the legislative process (Marshall and Inglis, 98). This made reviewing proposals for human rights compliance almost non-existent.

Peacebuilding missions need to recognize that developing a justice system based on the rule of law and human rights is the cornerstone of a successful transition to democracy. International administration must be structured to limit the amount of power vested in the transitional administrator and ensure a system of checks and balances. A clear legal framework is needed, and an independent courts system must be an essential element in this (Marshall and Inglis, 144). It is inevitable that certain peacebuilding missions will require the vesting of supreme powers in an administrator. Where this occurs it is imperative that an effective system of checks and balances are put in place to ensure that fundamental principles of good governance are adhered to. A legal framework based on international standards can provide the benchmark by which to measure compliance by civilian and security components of peacebuilding missions. Such a framework must be supported by an effective court system incorporating an overarching constitutional or Supreme Court with appropriate jurisdiction (Marshall and Inglis, 144). The design of a constitution and the process leading to its adoption is identified by

⁵⁵ See generally R. Murphy (2007), *UN Peacekeeping in Lebanon, Somalia and Kosovo: Legal and Operational Issues in Context*, Cambridge University Press.

Samuels as an integral and difficult part of the peacebuilding process (Samuels, 'Post-Conflict Peace-Building and Constitution-Making', 681). The adoption of institutional structures that promote moderate behaviour is a crucial aspect of the architecture of governance in post-conflict environments. This is especially so in relation to electoral and power sharing models chosen. Unfortunately, short term political goals may mitigate against long term institution building needs. Identifying best practice is fraught with practical difficulties owing to the multiplicity of factors impacting on the outcome.⁵⁶

Naarden and Locke's study of the UNMIK experience ('Peacekeeping and Prosecutorial Policy' demonstrates that it has been a test case for the viability of including a prosecutorial component in transitional criminal justice systems (Naarden and Locke, 727-43). Future missions must evaluate the criminal justice environment before international prosecutors are introduced. There must be an analysis of the nature of the crimes that affect the peace process and the ability of law enforcement agencies to deal with those crimes. The ability to prosecute dangerous crimes was fundamental to ensuring peace and security. This required a comprehensive framework and strategy to ensure UNMIK reforms became institutionalized. However, corruption hinders the development of effective, legitimate and transparent public institutions in Kosovo (Naarden and Locke, 730). Success can be measured by the degree to which local prosecutors are willing to pursue prosecutions in the absence of international assistance.

de Wet ('The Governance of Kosovo') analyses the challenges to the governance of Kosovo arising from the establishment European Union Rule of Law Mission in Kosovo (EULEX) (de Wet, 83-96). The deployment of EULEX raised a significant controversy in regard to its reconcilability with UN Security Council Resolution 1244. Russia persisted in questioning its legality, a position supported by the Serbian minority in Kosovo. The evolution of the mandate for civil administration in Kosovo demonstrates the difficulties that arise in the face of such an open-ended mandate under Chapter VII of the Charter. Changed circumstances require an amendment, but political realities and the risk of a reverse veto currently preclude exercising such an option. In order for EULEX to exercise its mandate in accordance with Resolution 1244, all stakeholders must be

⁵⁶ J. Widner (2007-8), 'Constitution Writing in Post-Conflict Settings: An Overview', *William and Mary Law Review*, 49, p. 1513 at p. 1537.

willing to compromise. de Wet also analyses the challenges of coordinating the international responsibility of UNMIK and EULEX and the implications of the *Behrami* decision of the European Court of Human Rights.⁵⁷ If EULEX and its member states try to shield themselves behind this decision, an accountability vacuum will result as no other entity is likely to take responsibility.

Threat from Corruption

Corruption is acknowledged to be a significant factor in determining the success or otherwise of peacebuilding missions.⁵⁸ In his essay ('Corrupting Peace?'), Le Billon presents some of the arguments linking liberal peacebuilding with higher levels of corruption (Le Billon, 350). Corruption and conflict are often perceived to be synonymous during the post-conflict reconstruction phase.⁵⁹ It weakens the legitimacy and effectiveness of the architecture of good governance, creates obstacles to economic recovery and international investment and facilitates a return to violence. This in turn marginalizes local populations leading to disempowerment and political unrest.⁶⁰

⁵⁷ *Behrami & Behrami v. France; Saramati v. France*, Joint App. Nos. 71412/01 & 78166/01, Admissibility Decision, (May 31, 2007), available at <<http://echr.coe.int/echr/en/hudoc>>

⁵⁸ (2005) *Corruption: Threats and Trends in the Twenty-first Century*, UN doc., A/CONF.203/6 ; P. Le Billon(2008), 'Corrupting Peace? Peacebuilding and Post-Conflict Corruption', *International Peacekeeping*, 15, p. 344 at p. 344.

⁵⁹ See, for example, opinion polls: 'South East Europe Public Agenda Survey' by the South East Europe Democracy Support, 2002; Nicaragua, 'National Integrity Survey', CIET International, 1998; 'Governance and Anti-corruption Report for Sierra Leone', World Bank, 2003; 'Cambodia Governance and Corruption Diagnostic', World Bank, May 2000.

⁶⁰ E. Bolongaita (2005), 'Controlling Corruption in Post-conflict countries', Kroc Institute Occasional Paper No. 26; P. Le Billon(2005), 'Corruption, Reconstruction and Oil Governance in Iraq', *Third World Quarterly*, 26, pp. 679–98; P. Le Billon (2005), 'Overcoming Corruption in the Wake of Conflict', *Global Corruption Report*, Berlin: Transparency International, pp. 73–82; A. Boucher, W.J. Durch, M. Midyette, S. Rose, and J. Terry (2006), 'Mapping and Fighting Corruption in War-torn States', Washington, DC: Henry L. Stimson Centre; M. O'Donnell (2008), 'Post-conflict Corruption: A Rule of Law Agenda?', in A. Hurwitz and R. Huang (eds), *Civil War and the Rule of Law*, Lynne Rienner, .

According to the UN Secretary-General, ‘corruption, illicit trade and money-laundering contribute to state weakness, impede economic growth and undermine democracy. These activities thus create a permissive environment for civil conflict’.⁶¹

The pervasiveness of corruption in Bosnia and Herzegovina is often cited as a major factor in the country’s political and economic setbacks since the 1995 Dayton Accord.⁶² The Brahimi Report on peace operations advocates ‘support for the fight against corruption’ and stressed that it is the first priority among the ‘essential complements to effective peacebuilding’.⁶³ Sannerholm (‘Legal, Judicial and Administrative Reforms in Post-Conflict Societies’) has criticized the rule of law template as not sufficiently broad to deal with post-conflict reconstruction (Sannerholm, 92).⁶⁴ The emphasis has been on security and law and order, and the protection of civil and political rights, while deficient in relation to other sectors of the state. This has resulted in widespread corruption and embezzlement of state assets in war-torn societies. A new trend is, however, ‘vaguely discernable’ in the practice of international actors engaged in peacebuilding that gives priority to the rule of law in public sector reform, including governance and economic management issues (Sannerholm, 85).⁶⁵

Holt and Boucher (‘Framing the Issue’) argue that there is an implicit link between the objectives of UN peace operations and rule of law missions intended to combat transnational crime (Holt and Boucher, 21).⁶⁶ The UN’s definition of

⁶¹ (2004), *Report of the High-Level Panel on Threats, Challenges and Change*, para. 23.

⁶² General Accounting Office (GAO), ‘Bosnia Peace Operation: Crime and Corruption Threaten Successful Implementation of the Dayton Peace Agreement’, GAO/ NSIAD-00-156, Washington, DC, 2000; International Crisis Group (ICG), ‘Courting Disaster: The Misrule of Law in Bosnia and Herzegovina, Balkans’, Report No. 127, Brussels, 2002; V. Devine (2005), ‘Corruption in Post-war Reconstruction: The Experience of Bosnia and Herzegovina’, in D. Large (ed), *Corruption in Post War Reconstruction. Confronting the Vicious Circle*, Beirut: Lebanese Transparency Association, TIRI and UNDP.

⁶³ (2001) *Report of the Panel on UN Peacekeeping Operations*, p. 24.

⁶⁴ See generally J.N. Clark (2009), ‘The Limits of Retributive Justice – Findings of an Empirical Study in Bosnia and Hercegovina’, *Journal of International Criminal Justice*, 7, p. 463.

⁶⁵ See also S.C. Agbakwa (2003), ‘A Path Least Taken: Economic and Social Rights and the Prospects of Conflict Prevention and Peacebuilding in Africa’, *Journal of African Law*, 47, pp. 38-64.

⁶⁶ UN involvement in tackling transnational crime and corruption are centered on a range of offices outside headquarters from the UN Office on Drugs and Crime (UNODC) to the

transnational crime is broad and based on the 2000 UN Convention on Transnational Crime.⁶⁷ This definition has led to scholars adopting phrases such as ‘illicit networks’, ‘transnational crime’, ‘illicit enterprise and illegal economies’,⁶⁸ to describe modern global networks and how these affect global economies and societies, especially their ability to maintain and build peace.⁶⁹

Corruption, similarly, is seen as the abuse of entrusted office for illegitimate private gain, as well as both a cause of conflict and an impediment to peacebuilding.⁷⁰ Combined with involvement in illicit networks, it can lead to renewed grievances and conflict.⁷¹ Together, they undermine peacebuilding efforts and the rule of law.

The negative impact of continued criminal activity by rebel groups was evident in Liberia.⁷² Post-conflict structures can institutionalize corruption. Government and rebel forces can be involved in illegal trading of weapons and commodities such as diamonds, timber and gold. Unfortunately, UN forces and personnel can also be a source of instability and corruption.⁷³

UN Development Programme (UNDP), with some liaison and coordination with Interpol and other international bodies, such as the Organization for Security and Cooperation in Europe (OSCE).

⁶⁷ (2000) United Nations Convention Against Transnational Organized Crime, articles 2–3. A crime is transnational when it is planned, committed, and has effects in more than one state. It considers an organized criminal group as a ‘structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offenses established in accordance with this Convention’.

⁶⁸ See A. Standing (2003), ‘Rival Views of Organized Crime’, Monograph 77, Pretoria: Institute for Security Studies.

⁶⁹ J. Cockayne (2007), ‘Transnational Organized Crime: Multilateral Response to a Rising Threat’, New York: International Peace Academy.

⁷⁰ US Agency for International Development (USAID) (2005), ‘Anticorruption Strategy’, Washington, DC. pp. 5–8.

⁷¹ A. Boucher, W. Durch, M. Midyette, S. Rose, and J. Terry (2007), *Mapping and Fighting Corruption in War-Torn States*, Washington, DC: Henry L. Stimson Center.

⁷² International Crisis Group (2005), ‘The Congo’s Transition Is Failing: Crisis in the Kivus’, *Africa Report*, No. 91, p. 30; UN (2003), ‘Report of the Secretary-General to the Security Council on Liberia’, UN Doc., S/2003/875, para.15. UN (2006), ‘Report of the Panel of Experts on Liberia’, UN Doc., S/2006/379, paras. 24–25, 102.

⁷³ In November 2007, over 100 Sri Lankan peacekeepers were sent home from the UN mission in Haiti for suspected involvement in sexual exploitation of local women. Similarly, a Pakistani unit deployed with the UN mission in the DRC was investigated for trafficking gold and weapons with militia groups in that country see S. Mendelson,

There are inconsistencies and contradictions in the role of UN peace operations and panels of experts in addressing corruption and transnational crime. Panels of experts are small fact-finding teams appointed by the Security Council to monitor and investigate how UN targeted sanctions such as embargoes on arms, diamonds and timber; asset freezes and travel bans, are violated.⁷⁴ Holt and Boucher ('Framing the Issue') have highlighted the work of such panels in tracking transnational criminal networks (Holt and Boucher, 25). However, no single tool is designed to address the variety of vexing problems associated with criminal networks and corruption. Nonetheless, cooperation between panels of experts and peace operations could be more extensive and arrangements more systematic. Their combined effort in the field, such as occurred in Liberia, has the potential to enhance successful outcomes (Holt and Boucher, 28). Before this can happen, transnational crime must be identified as the threat it is to peace and stability, and institutional cooperation between the UN Peacebuilding Commission and agencies like Interpol increased. Panels of experts are like all UN creations, they need resourcing, planning and support from the Security Council. Ultimately better tools and systems will produce improved results.

Gender and peacebuilding

(2005), 'Barracks and Brothels: Peacekeepers and Human Trafficking in the Balkans', Center for Strategic and International Studies: Washington, DC; M. Vandenberg (2002), *Testimony on Trafficking of Women and Girls to Bosnia and Herzegovina*, House Committee on International Relations Subcommittee on International Operations and Human Rights, available at <http://hrw.org/backgrounders/wrd/trafficking-testim-april.pdf>. UN, IRIN (2007), 'DRC: Probe into MONUC Gold, Arms Trafficking Allegations "Well Advanced"'; M. Plaut (2007), 'Eastern DRC, UN Troops "Traded Gold for Guns"', *BBC News*; M. Plaut (2007), 'Trading Guns for Gold: Pakistani Peacekeepers in the Congo', *Review of African Political Economy*, 34, pp. 580–8.

⁷⁴ Panels of Experts were initially created to monitor the arms embargo on Rwanda and then sanctions on Angola, panels of experts have since looked into how sanctions are violated in Sierra Leone, Liberia, the DRC, Cote d'Ivoire, Sudan, and Somalia, and by Al Qaida and the Taliban. The panels were among the first to link criminal networks to continuing conflict, detailing how spoilers secure arms and undermine peace, and in some cases how governments use these networks to continue war.

Gender is a term often used in the context of peacebuilding, but not frequently explained. Gender analysis involves understanding the differences between men and women.⁷⁵ Ensuring women's voices are heard is crucial in war-torn societies. They have separate and distinct set of roles and experiences in times of conflict and Maguire ('Security Starts with the Law') inquires into the role of international law in the protection of women's security in post-conflict societies. Research was conducted in three societies at various stages of post-conflict transition, Northern Ireland, Lebanon and South Africa (Maguire, 218-43). As Mazurana notes, irrespective of the positive impact women can have in times of conflict;

...post-conflict reconstruction processes and peacekeeping operations routinely fail to see the larger gendered political and economic structures supporting the armed conflict or the value of women's peacebuilding work at local and regional levels. Because for the most part the politics of gender are not recognised and gendered causes and consequences are overlooked, the few international and national policies and programs developed to empower women or promote them in peacebuilding too often remain superficial, because they do little to challenge and dismantle the structures that cause and fuelled the violent conflict. Rather the conditions for inequality and refuelling the violence remain in place.⁷⁶

Awareness that gender involves socially constructed roles of men and women is particularly important in this context. What men and women do in society, their position, roles and status, cannot be attributed in sole part to their inherent nature. It is also shaped by the norms and hierarchy of a predominantly masculine society.⁷⁷ In the context of peacebuilding, gender should be seen as ensuring that projects and programmes are

⁷⁵ Pankhurst defines gender in the following manner: 'Gender is a term used in contrast to sex, to draw attention to the social roles and interactions between women and men.... Gender relations are social relations, which include the ways in which the social categories of male and female interact in every sphere of social activity, such as those who determine access to resources, power, and participation in political, cultural and religious activities'; D. Pankhurst (2003), 'The 'Sex' War and Other Wars: Towards a Feminist Approach to Peace Building', *Development in Practice*, 13, p. 166.

⁷⁶ D. Mazurana (2005), 'Introduction' in D. Mazurana, A. Raven-Roberts, and J. Parpart (eds), *Gender Conflict and Peacekeeping*. Rowman and Littlefield.

⁷⁷ N. Puechguirbal (2004), 'Involving Women in Peace Processes: Lessons from Four African Countries (Burundi, DRC, Liberia and Sierra Leone) in Gender and Peacebuilding in Africa', working paper for the Norwegian Institute of International Affairs (NUPI), Oslo.

executed in an effective manner, without perpetuating existing discrimination, or inadvertently harming men or women, and promoting equality, human rights and internationally mandated values.⁷⁸ Unfortunately, in 1992 *An Agenda for Peace* did not formulate peacebuilding through the lens of gender analysis.⁷⁹ Confirmation that this had occurred at international level was with the landmark Security Council Resolution 1325 (2000), which called for a gender perspective to be incorporated into the policy and practice of reconstruction and peacebuilding.⁸⁰

Case studies show that despite the political legitimacy conferred on women's activism by Resolution 1325, and efforts to integrate these into the political process at national level, old obstacles to participation remain.⁸¹ Some cross-cutting issues were noted from a case study of Burundi, the Democratic Republic of Congo, Liberia and Sierra Leone. Common to these post-conflict situations was that provisions in the peace agreements reached failed to make adequate reference to women's agency and capacity for instigating change. Women are still grouped in the vulnerable 'women-and-children' category. This constructs the woman in terms of her passivity and dependence on men, and relegates her out of the political sphere. Some of the main obstacles to involvement of women in peace processes noted in the context of the above countries were: lack of political literacy and strategy, lack of experience in formal political techniques, a lack of visibility of women's conflict-resolution activities, insufficient material and financial

⁷⁸ S. Anderlini (2007), 'Women Building Peace What They Do, Why it Matters', in *How the International System Lets Women Down*. Lynne Rienner Publishers.

⁷⁹ See generally C. Chinkin (2004), *International Legal Framework and Peacebuilding – Gender and Peacebuilding in Africa*. Working paper for the Norwegian Institute of International Affairs (NUPI), Oslo; R. Paris (2004), *At War's End – Building Peace after Civil Conflict*, Cambridge University Press.

⁸⁰ UN Security Council Resolution 1325, 31 October 2000. For more background see the Inter-Agency Network on Women and Gender Equality (IANWGE), Taskforce on Women, Peace and Security, 'From the Charter to Security Council Resolution 1325.' www.womenwatch.org/womenwatch/ianwge/taskforces/wps/history.html. The Security Council has since adopted three more resolutions on women peace and security in order to expand and complement the content of Resolution 1325, namely Resolution 1820, 1888, and 1889.

⁸¹ N. Puechguirbal (2004), 'Involving Women in Peace Processes: Lessons from Four African Countries (Burundi, DRC, Liberia and Sierra Leone)', in *Gender and Peacebuilding in Africa*, working paper for the Norwegian Institute of International Affairs (NUPI), Oslo.

resources and the utilization of inappropriate methods of expression for formal negotiations. As well as this the onus on women to return to more traditional roles after the peace process has ended makes it more difficult to re-engage when reconstruction begins.⁸²

Zimbabwe

In this volume, Du Plessis and Ford ('Transitional Justice') consider the complex variety of challenges confronting Zimbabwe and the extent to which an international legal framework not only forms a backdrop to national choices on justice and reconciliation, but may shape and constrain the institutional and procedural options available (Du Plessis and Ford, 73-117). They reflect on a variety of transitional justice experiences and conclude that three main avenues are now used to formally address injustices relating to past violence: criminal trials (the majority of these operations have seen the use of 'mixed' internationally–nationally staffed tribunals); truth for amnesty commissions and a hybrid strategy entailing both conditional amnesties and selective prosecutions. Despite the growth in 'best practices' and guidelines, transitional justice choices remain eclectic. They argue that peacebuilding institutions extend a margin of appreciation to transitional societies to find their own ways to reconcile with the past as part of building a sustainable future peace (Du Plessis and Ford, 73-117). As the normative framework is evolving, bona fide national measures must be respected. The real challenge is to adopt a strategy to address a diverse range of past human rights tragedies from torture to land disputes and economic deprivation. The choice is not between peace or justice and there is a need to move on from the simplistic analysis that presents these as mutually inconsistent objectives in a post-conflict environment.⁸³

⁸² Ibid., p. 59.

⁸³ See generally N. Grono. and A. O'Brien (2008), 'Justice in Conflict? The ICC and Peace Processes' in *Courting Conflict? Justice, Peace and the ICC in Africa*. London: Royal African Society; P. Siels and M. Weir (2005), *The International Criminal Court and Conflict Mediation*, International Centre for Transitional Justice, New York; P. Williams and M. Scharf (2002), *Peace With Justice? War Crimes and Accountability in the Former Yugoslavia*, Rowman & Littlefield.

Conclusion

The UN is often required to play multiple roles in post-conflict environments. These are not always consistent and on occasion can come into conflict. This was nowhere more evident than in Sudan where, among other things, the Security Council established a Chapter VII peace keeping operation in conjunction with the African Union but on terms dictated by the Sudanese government, while at the same time it referred the situation in Darfur to the International Criminal Court.

The record of peacebuilding, like that of peacekeeping, is varied.⁸⁴ The UN can go from being a peacekeeper under Chapter VI to a peace enforcer under Chapter VII, and back again. While enforcing the peace and rule of law in places like Kosovo, it can at the same time decline to arrest suspected war criminals.⁸⁵ This can give mixed messages to national and international stakeholders, in addition to being confusing for UN staff on the ground.

The UN is increasingly overstretched in terms of its current commitments, while in Timor-Leste and Bosnia-Herzegovina, it has learnt to its cost the importance of a long term commitment. Sometimes it seems like the Security Council has lost touch with reality. Despite an inability to find enough troops and helicopters for the mission in Sudan, the Council continued to approve missions elsewhere.⁸⁶ Operations have increased in size and complexity, while UN personnel on the ground are required to face ever increasing challenges from insecure environments to multi-dimensional mandates.

The mandates for current peace operations cover a wide spectrum from traditional peacekeeping and monitoring of ceasefire arrangements (UNDOF on the Golan Heights) to assisting with the organization of elections and the rebuilding of national institutions (as in the DRC), to administering territory such as Kosovo under complex legal and political arrangements. In addition to struggling to implement these broad mandates, the

⁸⁴ R. Paris (2007), 'Post-Conflict Peacebuilding', in T. Weiss and S. Daws (eds), *The Oxford Handbook on the United Nations*. Oxford University Press, p. 404 at p. 416.

⁸⁵ M. Lyck (2007), 'International Peace Enforcers and Indicted War Criminals: The Case of Ramush Haradinaj', *International Peacekeeping*, 14, pp. 418–32.

5. For example, the UN created an Office of Rule of Law and Security

⁸⁶ (2009) *Annual Review of Global Peacekeeping 2009*,. Lynne Rienner: Boulder USA, p. 2.

UN has to integrate a wide range of activities with other UN programmes and agencies, and international and local actors.

The UN itself is a large bureaucracy and post-conflict interventions can be challenging on every front. 'Integration' and 'coherence' has been identified as critical for peacebuilding as is the engagement of a broad range of actors, including national authorities and the local population.⁸⁷ In response, the UN has developed a series of 'integration reforms' aimed at enhancing its capacity to integrate post-conflict efforts into a single coherent strategy.⁸⁸ At the level of the UN Secretariat, reforms have led to the creation of offices dedicated to strengthening the rule of law, and increasing the capacity of DPKO's to deal with contemporary issues.⁸⁹ Peacebuilding, at least initially, will exist in the grey zone between war and peace where lines are blurred as to where one ends and the other begins.⁹⁰ While UN involvement remains central, the Organization can be hindered by bureaucracy and inertia. It is difficult to mobilize its resources to best effect, while its management culture and internal accountability mechanisms can be deficient.⁹¹ Its diversity too can be a weakness, with meritocracy being supplanted by patronage and political necessity.

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Peacebuilding will always be linked to the peace process that preceded it and any agreement concluded. The terms used can evoke conflicting perceptions about the process undertaken. In this way, according to Bell ('Peace Agreements'), a peace agreement may be perceived as a 'ceasefire agreement' by some and as 'surrender' by

⁸⁷ UN Secretary-General, 'Note of Guidance on Integrated Missions, 17 January 2006, para. 2.

⁸⁸ S.P. Campbell (2008), '(Dis)integration, Incoherence and Complexity in UN Post-conflict Interventions', *International Peacekeeping*, 14, pp. 556-569.

⁸⁹ The UN created an Office of Rule of Law and Security Institutions (OROLSI) in DPKO. See, 'UN Rule of Law, Security Officials Outline Key Priorities for 2008', *UN News Service*. Another initiative was the creation of a Rule of Law Coordination and Resource Group, which gathers the heads of eight UN departments, including DPKO, UNDP, UNODC, to discuss better integration of rule-of-law efforts. 2008. Migiro, 'Rule of law drives work and mission of UN', *UN News Service*.

⁹⁰ M. Plunkett (1998), 'Reestablishing Law and Order in Peace-Maintenance'. *Global Governance*, 4, pp. 61-79 at p. 63.

⁹¹ (2005) Independent Inquiry Committee into the United Nations Oil-for-Food Programme, esp. vol. 1, Report on The Management of the United Nations Oil-for-Food Programme, 7 September 2005, available at http://www.iic-offp.org/Mgmt_Report.htm

others (Bell, 373).⁹² Bell provides a comprehensive analysis of the nature and legal status of peace agreements. She argues that peace agreements have produced practices of legalization marked by some consistency across varying peace processes and that this constitutes an emerging 'law of peace makers (*pax pacificatoria*)'. The main factors affecting the likelihood of parties remaining committed to a peace agreement include the dynamics of third party interventions; the structural characteristics of conflict processes; the changing regional/systemic power relationships and balances; and the range of issues covered by the agreement. Many variables can influence the outcome, including regime change, environmental changes and economic uncertainty. In places like Afghanistan, the regional context cannot be ignored and security issues in parts of Pakistan have a direct impact. The potential negative role of so called 'spoilers', individuals or parties who work against a peace process, must also be taken into account.⁹³

Muggah and Krause ('Closing the Gap between Peace Operations and Post-Conflict Insecurity') highlight how instruments for addressing the sources of armed conflict need to include the development of practical armed violence prevention and reduction programmes that draw upon scholarship and practice from criminal justice and health sectors (Muggah and Krause, 136-50). They point out the deficiencies of small arms control programmes and recommend ways to promote more comprehensive approaches to armed violence reduction in post-conflict or violent environments.

Tondini analyses peacebuilding theories and methods, as applied to justice system reform in post-conflict societies. The evidence available indicates the need for a change of strategy in the approach adopted to the reform of justice in war-torn societies, as interventions tend to be largely ineffective (Tondini, 247). It is imperative that the UN deal with the challenges presented by transnational crime and its impact on peacebuilding and the rule of law. The success rate of peacebuilding missions in the re-establishment of justice systems does not appear encouraging. The situation in Africa is especially critical

⁹² See further C. Bell, *Peace Agreements and Human Rights*, Oxford University Press.

⁹³ See S. Stedman (1997), 'Spoilers Problems in Peace Processes', *International Security*, 22, pp.5-53; K.M. Greenhill S. Major (2006), 'The Perils of Profiling: Civil War Spoilers and the Collapse of Intrastate Peace Accords', *International Security*, 31, pp. 7-40. I.W. Zartman, (1989), *Ripe for Resolution: Conflict and Intervention in Africa*, Oxford University Press; M.E. Brown (ed) (1996), *The International Dimensions of Internal Conflict*. MIT Press.

(Tondini, 246). The ‘war on terror’ has remedied the traditional neglect of the continent, but interventions have more to do with strategic priorities of powerful states rather than needs.⁹⁴ Likewise, there should be no dilution of criminal accountability for violations of international human rights or humanitarian law. Such short-term expediency can unravel the successes and achievements of post-conflict peacebuilding. This is why establishing an effective legal framework within which an independent judiciary and legal profession can function is essential.

The rule of law assistance programme may not be assumed to be a coherent field of international aid as it still lacks a well grounded rationale and proven analytic method (Carothers, 13-14). The notion that specific improvements in the rule of law will provide the necessary ‘quick fix’ to achieve democracy is dangerously simplistic, as in Western countries ‘[d]emocracy often, in fact usually, co-exists with substantial shortcomings in the rule of law’ (Carothers, 7). Rule of law is just one element in the peacebuilding process. It cannot compensate for or resolve the political problems involved in peacebuilding and post-war reconstruction.⁹⁵

While a secure environment is essential for peacebuilding, state-centric security concerns have led some governments to compromise on commitments to human rights, good governance and the rule of law. A state of emergency precipitating an intervention cannot be allowed justify the suspension of fundamental rights and guarantees, however challenging a task a peacebuilding mission may prove to be. Field missions must endeavour to have personnel with relevant expertise at the both the legislative proposal and implementation stages. This requires judges, prosecutors and investigators of international standing from the earliest stage in the mission. National ‘ownership’ by key stakeholders is a critical component in ensuring the sustainability of initiatives aimed at developing a justice system. In Somalia, the re-establishment of the national police forces

⁹⁴ S. Chesterman (2007), ‘Ownership in Theory and Practice: Transfer of Authority in UN Statebuilding Operations’, *Journal of Intervention and Statebuilding*, p. 1 at p. 5.

⁹⁵ D. Chandler (2004), ‘Imposing the “Rule of Law”: The Lessons of BiH for Peacebuilding in Iraq’, *International Peacekeeping*, 11, p. 312 at p. 314 and D. Chandler (2006), ‘Back to the Future? The Limits of Neo-Wilsonian Ideals of Exporting Democracy’, *Review of International Studies*, 32, p. 475 at p. 483.

was prioritised over judicial systems.⁹⁶ Shortage of resources often leads to such decisions, but a better strategy would be to view both as essential and in partnership.

UN mandates are often ambiguous and in practice this may mean that UN administrations grant themselves far reaching legislative, executive and judicial powers as occurred in East Timor and Kosovo. Although some may question if the UN should be so deeply involved in transitional administration,⁹⁷ there seems little alternative. The experience to date demonstrates that justice can be a malleable concept. Establishing basic judicial functions and safeguards remains a fundamental priority. But it must take into account domestic particularities. International and national bodies must be accountable. International standards should be the benchmark to scrutinize actions, especially those outlining the minimum protections for human rights.

Peacebuilding has become a matter of state-building with the UN and similar international organizations promoting democratic institutions as a basis for good governance.⁹⁸ It is ironic that what were deemed free and fair elections in Palestine in 2006 were rejected by the United States and Europe when they did not like the outcome. The 'war on terrorism' has meant that military responses dominated strategies in both Iraq and Afghanistan. The causes of terrorism are complex and multi-faceted, but contemporary peacebuilding seeks to address these while at the same time transforming environments that allows terrorism to grow.

The ideas of reconstruction, justice, and reconciliation are often put forward as merits of sustainable peacemaking, however, they are also a post hoc means of justifying

⁹⁶ M.J. Kelly (1999), *Restoring and Maintaining Order in Complex Peace Operations: The Search for a Legal Framework*, Kluwer, p. 78.

⁹⁷ (2001) *Report of the Panel on UN Peacekeeping Operations*, para. 78 and C. Stahn (2004-5), 'Justice under Transitional Administration: Contours and Critique of Paradigm', *Houston Journal of International Law*, 27, (2) p. 311 at p.326.

⁹⁸ M. Schoiswohl (2006), 'Linking the International Legal Framework to Building the Formal Foundations of a "State at Risk": Constitution Making and International Law in Post-Conflict Afghanistan', *Vanderbilt Journal of Transnational Law*, 39, p. 819 at p. 821; and I. Johnstone (2004), 'U.S.- U.N. Relations After Iraq: The End of the World (Order) As We Know It?', *European Journal of International Law*, p.813 at p. 823.

liberal interventions.⁹⁹ In some cases, public affirmations of the local ownership of state-building processes may be a mask behind which international actors protect themselves in case of failure. Moreover, '[w]hen delays, obstacles, and drawbacks cannot be ignored any longer; they are blamed on the local actors.'¹⁰⁰ Mistakes are often repeated by the same or different entities, this need not be the case.¹⁰¹ The Peacebuilding Commission, despite its broad but somewhat ill-defined mandate and some deserved criticism, remains a significant development for facilitating co-ordination and focusing on the need for a sustained post-conflict peacebuilding effort. While it should remedy the 'strategic deficit' highlighted in recent studies,¹⁰² the Commission needs a charismatic leader, enhanced budget, role and revised terms of reference.¹⁰³ International law can provide a framework for an enhanced role. It is not a solution in itself. This will only be found when peacebuilding incorporates social and economic reconstruction that takes account of the historical context, and the range of political, social, economic and environmental factors that contributed to this.

⁹⁹ C. Stahn (2004-5), 'Justice under Transitional Administration: Contours and Critique of Paradigm', *Houston Journal of International Law*, 27, p. 311 at p. 315.

¹⁰⁰ R. Belloni (2007), 'Rethinking "Nation-Building": The Contradictions of the Neo-Wilsonian Approach to Democracy Promotion', *Whitehead Journal of Diplomacy and International Relations*, 8, p. 97 at p. 107.

¹⁰¹ (2004) Report of the Secretary-General: The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, UN Doc. S/2004/616 (23 August 2004), para. 14- 3.

¹⁰² S. Verstegen, et al. (2005), *The Stability Assessment Framework: Designing Integrated Responses for Security, Governance and Development*, prepared by the Clingendael Institute for the Netherlands Ministry of Foreign Affairs, January; D. Smith (2004), *Towards a Strategic Framework for Peacebuilding: Getting Their Act Together*. Overview Report of the Joint Ustein Study of Peacebuilding. Brattvaag, Norway: Royal Norwegian Ministry of Foreign Affairs.

¹⁰³ D. Salmonds, 'On the far side of conflict: the UN Peacebuilding Commission as optical illusion', in Danchin et al, *United Nations Reform and Collective Security*, Cambridge University Press, pp. 195-211. See also E.E. Oboyo (2010), 'The new peacebuilding architecture: an institutional innovation of the United Nations' in Danchin, pp. 212-233.