

## FROM NEO – COLONIALISM TO A ‘LIGHT FOOTPRINT APPROACH’: RESTORING THE JUSTICE SYSTEM IN POST – CONFLICT OPERATIONS

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### ABSTRACT

*The article attempts to briefly analyse state – building theories and methods, as applied to justice system reform in post conflict scenarios. In this respect, the international authorities involved in the reconstruction process may traditionally choose between either a ‘dirigiste’ or a consent – based approach, which represent the essential terms of reference of past interventions. However, features common to most reconstruction missions and relatively poor results confirm the need for a change in the overall strategy. This requires the international donors to focus more on the ‘demand for justice’ at local level than on the traditional supply of legal aid. In this respect, the article stresses the need for effectively promoting the ‘local ownership’ of the reform process, without this expression being merely used by international actors as a political umbrella under which to protect themselves from potential failures.*

**KEYWORDS:** Justice System, Law Reforms, Local Ownership, Post – Conflict Reconstruction, United Nations

**LENGTH:** About 7,800 words

### 1. INTRODUCTION

*Experience has shown that the number of UN agencies flying their flags in a country is not proportionate to the overall success achieved*

Lakhdar Brahimi<sup>1</sup>

The idea of justice in state – building missions undertaken by the UN aegis has always represented the cornerstone of the new social order in war – torn countries. International missions in

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Somalia, Bosnia, East Timor and Kosovo (see Table 1) have indeed been marked by full participation of international officials in the policy – making process, acting as a sort of trustees (Stahn 2001a: 114). In consequence, these legal systems are familiar with the inclusion of new laws and codes that ring of authoritarianism and appear to be dropped from high quarters. This period has seen the use of ‘mixed’ (i.e. internationally – nationally staffed) tribunals. It has also been characterized by the establishment of courts composed by international judges in charge of the administration of a novel victor’s justice, along with a muscular imposition of human rights – inspired legal models, directly derived from the strong idealistic character of military interventions which originated the civil reconstruction missions in the first place. The post – conflict justice system in Afghanistan has instead been shaped according to a slightly different perspective. The latter consists mainly in paying due attention to the legal and judicial systems previously in place, leaving the restoration of the sector to be in charge of the Afghan government (at least formally), with international actors performing a limited coordination role (Tondini 2007). A limited role in the justice sector’s reform has been also performed by the UN missions in the Democratic Republic of Congo (hereafter DRC), Haiti, Burundi and Liberia, while in Cambodia the UN has gone till the enactment of statutory laws, with the acquiescence of the national authorities (O’Connor 2005: 234, 241). Yet, apart from the establishment of a special court to prosecute war criminals and crimes against humanity perpetrators, in Sierra Leone, the UN mission’s advisory task has focused more on advising the local government about police sector’s reform than on the restoration of a viable system of justice (United Nations 2003: 51).

Whatever has been the role of international players in reforming the legal systems of post – conflict countries, it has implied a form of cultural influence and/or imposition. Failures and limited accomplishments in establishing functioning legal and judicial systems in war – torn countries have further led to the birth of peace – building theories and strategies, based on the lessons learned from previous interventions. However, such strategies raise further doubts. Are they successful? Are they useful? What is wrong with them? In order to address such issues, the article attempts to analyse state – building theories and approaches, as applied to justice system reform in post – conflict scenarios. The first part briefly shows the need to seek a balance between either fully imposed or consensual solutions, also stressing the need to firmly settle the political order before providing to law or judicial reforms. The second paragraph illustrates the reasons for choosing a model of reform based on local consensus and how to successfully rely on it (i.e. considering the real ‘demand for justice’). There then follows a tentative analysis of some common characteristics of peace – building operations, in which international authorities play a role in the reform of local systems of justice. The study does not directly take into account the Iraqi case, first because of the limited role

played by international actors other than the US in reconstruction, and secondly due to the current civil war situation in the country. However, some comments are included throughout the text.

## 2. THE UNSOLVABLE DILEMMA: A NEO – COLONIALIST OR CONSENT – BASED APPROACH?

Institutional changes in territories recovering from conflicts do not usually follow the same rationale nor present the same options. Each situation reveals unique and non – repeatable characteristics which prevent from drawing up a ‘one – size – fits – all formula’ (Stahn 2005c: 425; Strohmeyer 2001b: 123). Relevant variables might include the security situation, the historical reasons for the armed conflict, and the starting level for the restoration (see Table 2), while the results of the reconstruction process may be deeply influenced by strategic and operational choices of both local and international political actors. Naturally, the availability of economic resources (sustained by donors’ commitments) also plays a key role, although the efficacy of financial aid may be ruined by a high level of corruption: e.g. Afghanistan and Haiti, notwithstanding the international statebuilding missions in place, are considered among the most corrupted countries in the world (Jones *et al* 2005: 100). In addition, historically, the reestablishment of the judicial system in a country has mainly followed the foundation of a new political order, imposed at the end of a conflict. In other words, a stable and secure political order has always represented the *conditio sine qua non* of post – conflict reconstruction’ (CSIS & AUSA 2003: 7). Therefore, in the absence of a secure environment, any efforts to promote national reconciliation as well as to establish a functioning justice system are doomed to fail (Stromseth *et al* 2006: 134). However, recent examples like those in Iraq, Afghanistan (by military means alone) and to some extent, Kosovo and Timor Leste (through massive international political apparatus) show that this ‘natural paradigm’ has shifted towards a new model encompassing the use of external institutional design to shape the novel political order, which has not rooted yet. This seems to be a successful option when the foundations of the new political system are solid and the renovation of the political class is effectively carried out, also by means of a peace agreement or a formal surrender (Jones *et al* 2005: 15). Nevertheless, it may turn into a debilitating factor when the authority in charge of it fails in prevailing on the military plane over competing forces or otherwise is not accepted by a relevant part of the population. As it has been sharply argued, ‘contemporary international intervention takes place in weak states, not conquered ones’ (Belloni 2007: 103). Some scholars note that such kind of problems has always occurred in the past:

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‘the reestablishment of the rule of law is reserved invariably for the postconflict stage. But, as in all of the recent UN peace missions – not just in Cambodia, but in places like Bosnia, Angola, and Western Sahara – the lines blurred between when the war ends and the peace begins. Justice officials will inevitably find themselves in a similarly grey area’ (Plunkett 1998: 63).

In any case, the ongoing reconstruction process in Afghanistan may be regarded as a clear example of such trend, whereas the limited accomplishments in the restoration of the justice sector (Tondini 2007) couple with the stalemate in military operations (Jones 2006: 115). Nonetheless, at the recent July 2007 Rome Conference on the Rule of Law in Afghanistan, both Afghan and international political leaders, involved in the reconstruction of the justice sector, replied to such allegations by stating that the achievement of stability in the country is firmly anchored to the country’s social and economic development, basically indicating that military operations and reconstruction can (*rectius*, need to) move forward together.<sup>2</sup> Indeed, this new credo in the Western oriented ‘rule of law’, as the necessary precondition to secure stability and democracy, may be deceptive. As it has been remarkably pointed out by Thomas Carothers, ‘the idea that specific improvements in the rule of law are necessary to achieve democracy is dangerously simplistic’, as in Western countries (and my country – Italy – first) ‘[d]emocracy often, in fact usually, co – exists with substantial shortcomings in the rule of law’ (Carothers 2003: 7). Indeed, scholars mostly agree that the overall impact on domestic legal systems of legal reform efforts inspired by western oriented rule of law theories, has been at best limited. For instance, while currently Russia owns a refined corporate law, drafted according to inputs received by US advisors, the shareholder rights are systematically trampled and the trustworthiness of judicial and administrative institutions is extremely poor (Berkowitz *et al* 2003: 165).

Other authors point out that the theory and practice of United Nations post – conflict reconstruction have progressively shifted from a ‘consent – based model’, as in case of the UN missions in Namibia, Cambodia and El Salvador, towards a ‘neo – colonialist model’, as in Somalia, Kosovo and Timor Leste. Eventually, the overall UN approach would return to look minimalist with the recent UN Assistance Mission in Afghanistan (UNAMA) (Kreilkamp 2003: 622, 634, 657). In this respect, the so – called ‘light footprint approach’ (United Nations 2002: 16), which is currently experimented in Afghanistan, would reflect those past failures and excesses registered in the establishment of quasi – state administrative apparatus run by international authorities, which have deeply conditioned the reform of local state institutions according to foreign – imposed models. However, this clear – cut subdivision raises some further issues. On the one hand, generally, this ordinary ‘vulgate’ of representing an evolution in considering the wide powers of the so – called post – 1989 second generations peacekeeping operations has been recently

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challenged, as it would be misleading and normatively unhelpful (Wilde 2004: 76). On the other, with regard to post – conflict justice system reform, it has been sharply noted that both the ‘dirigiste’ (i.e. neo – colonialist) and the light footprint models present in any case a common feature, being the active and ‘direct involvement of international actors in the restoration of justice and the rule of law’ (Stahn 2005b: 314 – 315). A few scholars also suppose that originally the ‘light footprint’ approach would have merely represented a first step, justified by the circumstances of the case, towards the further establishment of a full administrative structure, modelled according to the ones in Kosovo or East Timor (Kreilkamp 2003: 664).

The neo – colonialist approach would mainly develop in prearranging ‘justice packages’, ready to be deployed on the field in case of need (Plunkett 1998: 68). The ‘packages’ should encompass both legal experts (trainers, attorneys and judges, clerks, etc.) and applicable norms (e.g. substantive and procedural model criminal codes), in order to fill the possible vacuum in the justice administration. The creation of such packages follows the recommendations contained in the 2000 Brahimi Report (United Nations 2000: 14) and in the subsequent 2004 Report of the UN Secretary General on Transitional Justice (United Nations 2004: 11). Yet, nowadays, titled research centres carry out projects aimed at drafting new applicable codes in peacekeeping operations (O’Connor 2005: 247; Huang 2005: 4).<sup>3</sup> These ongoing projects may raise doubts on whether this ‘dirigiste’ trend has been definitively abandoned. Besides, the real efficacy of choices based on lessons learned from other operational scenarios is open to debate, as recently admitted by the same UN Secretary General in a report which follows – up that of 2004: ‘Pre – packaged solutions are ill – advised. Instead, experiences from other places should simply be used as a starting point for local debates and decisions’ (United Nations 2004: 11). The power of reforming in depth the local justice system vested by UN international administrations or assistance missions has also been questioned by influential authors, who argue that even if one assumes that such authority might legitimately stem from a mission’s mandate issued under Chapter VII of the UN Charter, the mandate itself does not often contain nor can be interpreted as being implicitly according to it (Stahn 2005a: 12). In trying to avoid risks of excessive external influence, experts suggest that it should be national authorities who decide which part of this pre – drafted legislation should be included in their own country’s legal framework (Huang 2005: 4). While in theory this principle could sound good, it still shifts the issue on the real capacity of local political elites to be genuinely autonomous from external influence in taking significant political decisions and being accountable to local population more than to foreign actors involved in the reconstruction process. The situation in Afghanistan seems evocative of such a paradigm (Goodhand 2004: 76). In this respect, scholars’ debate is focused on the political role played by the newly established rule of law institutions, as well as the

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political nature of programs supported by international actors (Hurwitz & Studdard 2005: 10): the tensions between those who deem institutional design as the core objective of the reconstruction process and those who lament the lack of dialogue between local and international actors, reflect the unresolved dilemma between imposition of foreign administrative templates and true humanitarian aid. The problem appears irresolvable, since in practice every act of external institutional assistance towards countries recovering from conflict implies a certain level of cultural influence. Moreover, foreign powers could (realistically) intervene in post – conflict scenarios for pure national interest. For example, as it was argued by Stephen Krasner, in order to secure the interests of foreign investors, exploiting resources in a third world country, against arbitrary contractual revisions by the local government, one could merely ‘leaven[ing ...] [domestic] commercial courts with foreign judges’ (Krasner, 2005: 80). Nevertheless, here other and more practical issues are at stake. Indeed, as was rightly pointed out in the case of the UN Mission in Liberia, how is it possible not to rely on ‘pre – packaged’ codes and stand – by personnel where

‘[t]here are no cars to transport suspects, no courtrooms in which to conduct trials [...] no paper to document cases [, where] [t]here is a dearth of trained lawyers, [...] [t]he local law reports and books have been looted [and] [q]uite a number of judges do not even have access to the applicable criminal laws that they are to apply’ (O’Connor 2005: 231 – 232)?

### 3. CONSIDERING LOCAL CONSENSUS AND DEMAND FOR JUSTICE AS PRECONDITIONS FOR SUCCESS

Willing to draft a model aimed at establishing functioning and reformed judicial institutions in post conflict countries, scholars come to the self – evident conclusion of looking for consensus and political legitimacy from a double perspective: domestic and international (Morphet 2002). This practically means, on the one hand, that the foundation of the mission’s mandate should lie on firm legal basis, particularly including ‘lawful’ international law agreements and/or Security Council’s clear mandates (Stahn 2005a: 15); on the other, that such reforms should be accepted by the population to which they apply. With regard to this, success in establishing a renewed system of justice may be achieved only by receiving an unambiguous mandate from the authorities who effectively (and maybe legally) exercise sovereignty on the field. That may signify looking for consensus of local political elites, to be considered as *de facto* subjects of international law. In this respect, the full involvement of the Kosovo Liberation Army in the 1999 NATO military campaign against Yugoslavia has probably influenced the foundation of the new system of justice in the province. On the other hand, the initial referendum for independence in Timor Leste has further led to the first April 2002 political elections in the country. The elections consecrated a new

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internationally recognized political elite (President Xanana Gusmão received 82.7 per cent of the votes) who in turn legitimated the judicial system previously established by international authorities administering the territory. Indeed, the temporary collapse of state institutions in April and May 2006 may be addressed to the profound division among state institutions (President, Prime Minister and Chief of the Defence Forces) which naturally generated ‘failures of the rule of law and accountability’ (United Nations 2006a: 22, 52). Once again a functioning judicial system depends on a stable political order. Actually, this is recalled by the limited success and the clear failure in reforming the Afghan (Tondini 2006) and Iraqi (Bayley 2006) justice systems, respectively. These examples suggest that establishing the rule of law is not a panacea to solve political instability. As it was authoritatively remarked, “‘Rule of law’ regulation through the prioritization of law above the political sphere cannot compensate for, or overcome, the political problems involved in peacebuilding and post – war reconstruction’ (Chandler 2004: 314). Besides, another relevant issue at stake is the effects of the reconstruction process on the local political sphere. In this respect, maybe with a bit of retro spirit, it has been said that building state institutions implies the interdependent exercise by a sovereign authority of coercion, capital and legitimacy (Rubin 2005: 95). Well, in most of the current peace support operations, the management of all three resources is often led by diverse international authorities, with local institutions playing a limited role: international organisations provide the international framework through which states may intervene abroad legitimately with military forces, international financial institutions guarantee economic resources, and a plethora of agencies, NGOs and other organisations provide *in itinere* the adequate formal legitimisation towards both the population and the international community. This seems true in the case of Afghanistan, where the reconstruction of the judicial sector is mostly financed by a few trust funds managed by the World Bank<sup>4</sup> and the operational activities are in truth contracted out to numerous agencies and organisations (Tondini 2007). This leads us to doubt on the real capacity of such process to eventually strengthen national sovereignty by reforming the domestic judicial system. Perhaps, after the limited accomplishments of the ‘Two to Tango’ doctrine in Kosovo (ICG 2003b) and the ‘Tiptoeing’ policy in Afghanistan (Chesterman 2002b: 12; 2005: 95), it might be the case for the international community not to change another step but to focus on another ‘music’.

The reconstruction process, in other words, must not avoid the drawing – up of a ‘social compact’ (Mani 2005: 33) between all the relevant stakeholders, including of course the local population. Therefore, willing to secure the local ownership of the rule of law reforms, it becomes fundamental to identify the relevant actors to be involved in the reconstruction process. As it has been recently noted, they may be grouped into three main categories: (a) the population (citizens,

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civil society and business community); (b) political authorities (political leadership – at both national and local level – and civil service); and (c) justice and security sector institutions members (Hansen & Wiharta 2007a: 5 – 6). In addition, this principle of local ownership is to be applied also by international consultants engaged in constitution making process (Aucoin 2004: 90). Conversely, relying excessively on local ownership is not without risks, because, even if this usually safeguards domestic culture against the dangers of external interference, it may still cause reduction in the level of individual rights protection if domestic policy makers are unwilling or unable to promote human rights protection or criminal prosecution (Stahn 2005b: 337 – 338). Moreover, being law a cultural marker, just like folklore or language, it can easily turn into a divisive force. In this respect, relying only on local ownership could fuel conflict instead of ordering social life: e.g. in the self proclaimed Republic of South Ossetia, law schools only teach Russian law, as the region aims at joining the Russian Federation, while it is still formally part of Georgia (Waters 2005: 115). Basically, the same situation occurs in Kosovo, where the legal framework in place (established by the UN) is completely different from the Serbian one, even if officially Serbia still holds sovereignty on the region. In any case, this social strategy, which reminds us the social dimension of the justice phenomenon, may consist in a part of a more comprehensive plan. According to the UN (United Nations 2006b: 13), rule of law reconstruction activities in the context of conflict and post – conflict situations includes two components: transitional justice and strengthening of national justice systems and institutions. The latter encompasses, *inter alia*, work to strengthen legal and judicial institutions, as well as policing and criminal justice reform. Surprisingly, such strengthening efforts may include, among the priorities to be pursued, customary, traditional and community – based justice, as well as alternative dispute resolution mechanisms. This attention towards informal justice mechanisms to some extent may confirm the shift from a less orthodox to a more realistic perspective in the overall UN approach. Besides, forms of tribal justice have been successfully employed in the post – genocide reconciliation phase in Rwanda, through the so – called ‘Gacaca Courts’ (Daly 2002: 367), while tribal justice is currently fostered in Afghanistan by a specific project run by the UNDP (Tondini 2006: 100). It has to be stated that these informal justice mechanisms have been supported by international and national authorities primarily for practical reasons. For instance by 2001, the Rwandan government estimated that it would take 200 years to try in state courts all the individuals responsible for the genocide (100,000 prisoners) (Chirayath *et al* 2005: 19).

Signing a ‘social compact’ for justice with local population, in order to promote compliance with the law and general stability would in other words mean, to move on from this ‘rule of law orthodoxy’, primarily based on the reestablishment of courts, towards a more balanced approach,

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which would comprise the ‘legal empowerment’ of a growing part of the population (Golub 2003: 37). This should help in creating a reformist political process which would in turn lead to a more realistic establishment of the rule of law, which may differ from the original Western idea of *Rechtsstaat*. Conversely, relegating the political process behind the restoration of the justice system would reverse the theory of rule of law as derived from the liberal democratic contract theory of consent and would encourage arbitrary rule – making of local political elites (Chandler 2006: 483). A similar strategy also evidently mirrors the theory of restorative justice in criminal law, as applied to transitional justice (Bell & O’Rourke 2007: 40), whereas it seeks solutions to the harmful effects of inter – personal conflicts generated by crimes, and it is aimed at promoting redress, reconciliation and collective security more than merely punishing the culprits. Indeed, forms of post – conflict restorative justice are reported to have succeeded in Northern Ireland (Braithwaite 2002: 572), in the heart of the ‘civilised’ European Union.

Generally speaking, at least up until the missions in Afghanistan and Iraq, the trend was that of combining justice and reconciliation models, by integrating truth commissions and prosecution rather than considering them mutually exclusive transitional justice mechanisms. This was the case of the UN missions in Cambodia, Sierra Leone, Kosovo and Timor Leste (Stahn 2002: 196). Conversely, the transitional justice phase has not yet been established in Afghanistan (Deledda 2006: 163), while it has been conducted by means of a sort of ‘victors’ court’ in Iraq (Zolo 2006: 160). In the former case the maintenance of the *status quo* has been availed to avoid destabilisation resulting from attempts to achieve a renewed political order, which seems still in the making (Rubin 2003: 575). In this respect, the recent amnesty, passed by the Afghan parliament and strongly criticized by international officials (Walsh 2007), appears as only favouring impunity for war crimes and crimes against humanity perpetrators, without truly aiming at political reconciliation. Nevertheless, first steps towards a transitional justice phase seem to have been undertaken with the launch of a specifically dedicated Action Plan in December 2006 (Nadery 2007: 179). As for Iraq (Hall 2004), the de – baathification of public institutions made by occupying powers (Coalition Provisional Authority – hereafter CPA) has resulted in an institutional vacuum and in strong popular resentment which in turn has fuelled the insurgency (Fontan 2006: 221 – 222, 225). Moreover, the establishment of a special tribunal in order to prosecute the top leaders of the previous regime has been perceived as illegitimate by a part of the population and the Arab leaders, while the court’s procedural rules have been authoritatively found in sharp contrast with the civil law system previously in place in the country and even with some relevant provisions of human rights law (Bassiouni 2005: 358 – 359, 363, 381 – 385). The amendments of its rules of procedure in October 2005 (the tribunal was also renamed ‘Iraqi High Tribunal’) have even lowered the

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procedural guarantees for defendants, together with the court's overall perceived fairness (Mettraux 2007: 292). Nevertheless, the Iraqi case might be considered as the breaking point with the past 'Kelsenian' trend. In fact, the creation of 'new' judicial and legal systems set up according to a novel concept of justice is not perceived as corresponding with the highly idealized *casus belli* (apart from the never – found WMD). Therefore, the usual pattern of conducting a 'just war' in order to achieve a 'just order' has been brutally interrupted. Indeed, a succeeding perspective should in practice reverse the terms of the problem. In economic language, the theory of peace – building, as applied to law reforms, should shift from concentrating on the supply of justice to the effective demand for justice. Research proves that a demand for law must exist so that the law formally in force is actually put into practice and policy makers and law professionals must be responsive to it. The population would probably use the new body of law, as 'transplanted' into the post – war order, if adapted to the local conditions or if the local population was already familiar with its basic principles. This in turn should strengthen the public demand for institutions to enforce the rule of law. On the contrary, if the new body of law was merely imposed (as in the case of colonisation) the initial demand for using it would probably be weak, conditioning the effectiveness of the overall rule of law reform (Berkowitz *et al* 2003: 165).

#### 4. COMMON FEATURES OF POST – CONFLICT JUDICIAL SYSTEM REFORMS

Apart from the above – mentioned demarcation in the missions' mandates, it seems possible to draw – up a few characteristics common to the majority of justice system restorations in post – conflict situations: (a) a high level of destruction of judicial buildings with consequent missing official records (that implies problems e.g. in identifying property rights); (b) a domestic judicial system characterised by the strong interference of local executive authorities (corruption and the so – called 'telephone justice'); (c) the law in force not integrally consistent with international human rights standards and/or its validity contested by the population; (d) the presence of a parallel/non – official system of justice; (e) constrained human and material resources (Sannerholm 2007: 70 – 71). Another common feature is the fragmented consolidation process of the legal systems concerned, which 'almost never conform to the technocratic ideal of rational sequences on which the indicator frameworks and strategic objectives of democracy promoters are built. Instead they are chaotic processes of change that go backwards and sideways as much as forward, and do not do so in any regular manner' (Carothers 2002: 15). This may prevent from assessing accurately the outcomes of any single reconstruction process, because the performance metrics may be hampered by too many variables. However, some useful indicators may be identified in order to evaluate success in reconstruction: (1) serious crime rates (especially homicides and violent crimes); (2)

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other crime indicators (drug trade, etc.); (3) level of political violence and insurgency; (4) perception of security (Jones *et al* 2005: 24).<sup>5</sup> In addition, some research shows that people's compliance with the law 'depends most heavily on the perceived fairness and legitimacy of the laws, characteristics that are not established primarily by the courts but by other means, such as the political process' (Carothers 2003: 8 – 9). In turn, the people's perceived fairness of a single justice system depends on the level of expectations and on other irrational elements. For instance, Table 3 shows that the appraisal of people on government anti – corruption policies may be really better in Africa than in Europe or North America. Table 4, instead confirms a high level of distrust in the respective justice systems perceived by EU citizens. Therefore, basing evaluations only on the overall perception and not on concrete indicators may be misleading. We may offer some more remarks on the issue by drawing – up a few examples which have occurred during past and present reconstruction operations.

*a) Collapse of the Previous Justice System*

As it was argued by a practitioner in 1999, '[e]stablishing the judicial system in East Timor entails building a system "from scratch"' (Strohmeyer 2000: 266). Over 70 per cent of all administrative buildings were partially or completely destroyed, while most courts had been torched or looted, resulting in the loss of registers, records, archives and legal resources. The first recruiting campaign for personnel to serve in the judicial administration was carried out by launching leaflets from an airplane throughout the region (Strohmeyer 2001a: 50). The UN administration found that only about 70 Timorese citizens, who still lived in the country, had graduated from law school, while none of them had been practicing law under the Indonesian control of the country (Dobbins *et al* 2005: 169). Other sources confirm that the number of indigenous lawyers remaining after the referendum on independence was less than ten (Strohmeyer 2000: 263). In Kosovo, since the very beginning of the UN mission it was apparent that the law enforcement and judicial system had collapsed. To overcome the lack of buildings and personnel, a judicial mobile unit, comprised of nine among judges and prosecutors (including three Serbs) was initially established, while in three weeks their number had increased up to 28 (Strohmeyer 2001a: 48, 53). In Afghanistan the formal system of justice in place during the Taliban period (founded on both Islamic courts and tribal councils) collapsed with the downfall of Kabul in late 2001. Judicial buildings were almost crumbling and correctional facilities were close to nonexistent (excluding the Policharki complex, outside Kabul). In addition, since July 1964 no one has made a compilation of the applicable laws passed during the 30 years of turbulent history, since due to past destructions there was no complete set of Official Gazette available for reference (Tondini 2006: 83).

*b) Fear and Judicial Corruption*

The functionality of the justice system may be threatened by the security situation. In Kosovo, at the beginning of the UN mission, due to the Milošević – imposed post – 1989 purge in the administrative personnel, only 30 out of 756 judges and prosecutors were Kosovar Albanians. Following the re – entry of the Albanian refugees and displaced people, most of the Serbian magistrates moved back beyond the Serbian borders. The few who decided to stay were considered to be linked to the previous regime and immediately threatened, as was the case for the members of the Council in charge of initial judicial appointments (Strohmeier 2001a: 50, 52). As a consequence, local judges are reported to have often ruled in favour of Kosovar defendants even though the law supported the Serbian plaintiffs, for fear of reprisals (Pepys 2007: 5). In Rwanda, over 300 survivors, who were also witnesses in genocide trials before state courts, were murdered between 1994 and 1997, paralysing the justice system (Widner 2001: 67 – 68). Alternatively, staffing local courts with international judges (thus creating different types of ‘mixed courts’ – Stahn 2005c) has usually been deemed as being a helpful short – term solution. These courts may be also officially in charge for the transitional justice phase, as in the case of Sierra Leone (Special Court for Sierra Leone – Sriram 2006), East Timor (Special Panel in the Court of Dili – Linton 2001b), Cambodia (Extraordinary Chambers in the Courts of Cambodia) (Turns 2001: 134, 141, 146, 159) and Bosnia (War Crimes Chamber of the Court of Bosnia and Herzegovina, established in 2005) (Linton 2006). International judges also serve in the Kosovo judiciary, under a two – track system. On the one hand international judges are appointed to the regular courts, on the other hand special internationalised panels are created for the most sensitive war crimes trials (Stahn 2005c: 438). Basically, international judges in Kosovo do not receive case assignments from the president of the court in which they sit, but from the UN administration’s Department of Justice: thus they act as a *de facto* parallel (i.e. special) jurisdiction (Perriello & Wierda 2006: 15).

It is easy to imagine that corruption is another decisive factor that weakens the credibility of justice in post – war countries. According to the Corruption Perception Index 2006, almost all the countries, in which UN missions in charge for the legal reforms take place, are among the most corrupted in the world, with Haiti being at the bottom of the list.<sup>6</sup> In Afghanistan, the judiciary is even considered by the population the most corrupted among state institutions (CPHD 2007: 61). As a consequence, the UN doctrine suggests to vet the bench and exclude individuals associated with past abuses (United Nations 2006: 9, 13). However, vetting the judicial personnel for their impartiality or competence may entail initial judicial vacuum or allegations of system’s politicisation. In this respect, the administration of the Brčko District in Bosnia, where international

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authorities required judicial personnel to resign and reapply through a more transparent procedure (Karnavas 2003: 122), may be taken as a model and a successful compromise (Aucoin 2007: 38).

c) *Reform of the Applicable Law*

That of the applicable law is a recurring issue in peace – building operations. In fact, the domestic law formally in force may be seen by the population as an instrument of the previous regime and thus perceived as radically unfair or illegitimate, as was the case of Kosovo. Domestic law may also violate international human rights law provisions, as in the case of several Indonesian laws applied in Timor Leste, or being discriminatory against women, as in Haiti. Moreover, domestic law may be outdated and may not contain relevant crimes such as trafficking, money laundering, organised crime, as in Angola and Haiti (penal codes dated back to 1886 and 1925, respectively) (O'Connor 2005: 236). Moreover, the presence of parallel administrative bodies, as a reaction to the imposition of the past tyrannical or colonial rule, may entail the spread of non – statutory customary law. Whatever role they formally played in the sector's reconstruction, international actors often support the re – establishment of the legislative framework established earlier than the previous regime, even if perhaps 'solely for practical reasons' (Strohmeyer 2001a: 58). This has often been, together with the repeal of those provisions of law, in contrast with human rights standards and with the regulations issued by the UN administration, where appropriate. The UN missions in Kosovo, Timor Leste, Somalia, and Afghanistan are typical examples of such trend. In Kosovo, the UN administration decided that the law in force must be the one established in 1989 (pre – Milošević era). In Timor Leste, at the very beginning of the intervention, the laws in force remained provisionally those applied before the UN mission, even if a list of Indonesian laws contrary to human rights to be repealed was also published (Linton 2001c: 136). Usually, domestic criminal law provisions are among the first to be abolished. In Somalia, the Special Representative of the UN Secretary General declared that the 1962 Somali criminal code was to be in force in the country, to which specific *habeas corpus* provisions were added in order to make it compliant with human rights law. Eventually, the UN authorities assisted local delegates in the constitution making process (Stahn 2001b: 131). At the beginning of the international intervention in Afghanistan, according to the "Bonn Agreement", the interim legal system in force would consist of the 1964 'monarchical' Constitution and of the full compilation of domestic laws and regulations passed since that time, unless in contrast with the constitution or the Agreement themselves. A former Italian magistrate also redrafted an interim criminal procedure code to be applied in Afghanistan, pending the enactment of a new code by the Afghan parliament (Tondini 2006: 85, 95). On the other hand, the criminal procedure code was also redrafted in the Brčko District. The new code was

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inspired by a party driven approach, also abolishing the investigating judge and allowing the judge to play a more limited role (Karnavas 2003: 122). Moreover, also the UN administration in Timor Leste repealed the Indonesian Criminal Procedure Code (Fairlie 2003: 180) and enacted new Transitional Rules of Criminal Procedure, while the UN mission in Cambodia set forth new substantive and procedural criminal provisions to be applied during the transitional period (O'Connor 2005: 240). The UN administration in Kosovo followed this trend by issuing a Provisional Criminal Procedure Code and a Criminal Code in 2003. Apart from enacting new codes, this practice of implicitly repealing laws inconsistent with human rights, instead of clearly stating which law provisions are to be repealed, may entail dangerous consequences for the certainty of the law, since it virtually delegates to local judges the decision on the applicable law.

*d) Parallel/Non – Official Justice Systems*

As for the existence of non – official justice systems in post – conflict operations, it may be stated in advance that in many developing countries, customary systems operating outside of the state administration ‘are often the dominant form of regulation and dispute resolution, covering up to 90% of the population in parts of Africa [...]. Customary tenure covers 75% of land in most African countries, affecting 90% of land transactions in countries like Mozambique and Ghana’ (Chirayath *et al* 2005: 3). In 1999, customary law was reported to be largely spread in the countryside of Timor Leste, although the role of traditional dispute resolution mechanisms were defined ‘indispensable’ for the stability of the country’s justice system (Strohmeyer 2001c: 179). In Kosovo, the establishment of parallel judicial institutions by the Albanian population during the Milošević regime has been followed by the birth of parallel municipal courts, ruled by Kosovo Serbs, after the UN intervention (OSCE 2007: 15). Two different non – statutory legal and judicial systems, i.e. Islamic law and customary law (called ‘Xeer’), existed (and still exist) in Somalia at the beginning of the UN intervention. In particular, they represented a consolidated normative framework in rural areas (Sannerholm 2007: 72). A similar situation takes place in Afghanistan, where councils of elders, applying both customary and Islamic law, couple with statutory courts in the provinces outside Kabul (Senier 2006).

*e) Constrained Human and Material Resources*

Lack of financial and human resources for the restoration of the justice system is a common feature of reconstruction missions. In this respect, the reestablishment of a police service is often considered more important than the judicial system for short – term stability: this, for instance, was the case of the UN mission in Somalia (Kelly 1999: 78). However, it has obviously been noted that

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a successful strategy may not depart from both services being fully operational and working in partnership (Aucoin 2007: 38). In this respect, in order to give a clear idea of the priorities of the international donors in Afghanistan, it might be noted that in 2004, the United States provided approximately \$10 million to the judicial sector, out of a total of \$2.1 billion assistance to the country (Jones *et al* 2005: 78). Moreover, until early 2005, the justice sector had only received 2 – 4 per cent of the financial resources allocated to the entire security sector (Sedra 2006: 100). Recently, at the July 2007 Rome Conference on the Rule of Law in Afghanistan, donor countries have comprehensively allocated \$360 million for the entire rule of law sector's reform. However, the pledged funds also concern police and counter – narcotics. Lack of funds for the judicial system is also reported in the case of Sierra Leone, where the priority of the police reform and the establishment of the special court for the prosecution of serious crimes committed during the conflict, have drawn financial resources away from the development of the justice system (United Nations 2003: 51). In Timor Leste, the shortage of both physical and financial resources is reported as having hampered even the functioning of the Special Crime Panels established within the Dili Court (Katzenstein 2003: 259, 263 – 264). In Somalia, in order to overcome the lack of qualified judicial personnel, the restoration of law and order at district level relied on 'neighborhood forums'. The Australian force used to identify former judges who were acceptable to local community members and to convince them to resume their role (Widner 2001: 66).

*f) Current Situation*

The progress made by peace – building missions in the justice sector's reconstruction does not appear particularly encouraging. The situation in Africa is critical. In the DRC the status of lawyers' associations seems weak and access to justice is seriously restricted for the majority of people (Tzunga & Deya 2007: 95). In several parts of the country, the military and civil justice systems are reported as being non – functioning. In August 2006, it was the president of the Congolese Military High Court to denounce the ineffectiveness of the court system, corruption and the need of law reforms. Only 60 out of 180 courts of first instance officially in place practically exist, while only 30 seem to be actually functioning. Moreover, there is a wide gap (about half) in the number of judges required for the system to sustain. Such inefficiencies, coupled with the population's lack of trust, have led the customary justice system to flourish. (Mobekk 2006: 19). In Sierra Leone, functioning courts are currently concentrated in the sole capital city Freetown, together with most of the judges and attorneys (90 out of 100 practicing lawyers in the country work in Freetown). Customary law is spread all over the remaining territory as it was to some extent fostered by the British colonial regime (Golub 2007: 135). According to the World Bank, 'approximately 85% of

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the population falls under the jurisdiction of customary law' (Chirayath *et al* 2005: 3), which is also sanctioned in the Constitution. Integration between formal and informal systems of justice occurs within the statutory 'local courts', which apply local customary law and whose judges are appointed by local administrative leaders with the approval of the Ministry of Local Government & Community Development (Golub 2007: 135). Notwithstanding this, the population 'perceives the judicial system to be slow, ineffective and corrupt' (ICG 2003a: 21). In Somalia the UN mission (UNOSOM II) achieved limited success in stabilizing the security situation and in reconstructing the Somali justice system (Stahn 2001a: 127 – 128). By March 1995, at the end of the UN mission's mandate, 11 Appeal, 11 Regional and 46 District Courts were operating in the country, although 'this meant that not all of the 18 Regional and 92 District councils had a judicial system in place to support the maintenance of order' (Kelly 1999: 77 – 78). Currently, the UNDP is managing a Rule of Law & Security Program (ROLS, originally established in 1997) throughout the country, although its activities appear to be concentrated in Somaliland, due to more stable political conditions. The program's efficacy has yet to be assessed.

In Afghanistan, judiciary is reported as being politicised and often staffed with corrupt officers. This lowers public confidence in the statutory law and facilitates the establishment of unofficial courts ruled by Taliban (Nadery 2007: 175). The overall situation of the judicial sector in the country is relatively poor, while the entire reconstruction process is hampered by the security situation on field and has scarcely reached rural areas far from Kabul (Tondini 2007).<sup>7</sup> In Timor Leste, a research by the Judicial Sector Monitoring Programme confirms that a high number of cases concerning sexual abuses or domestic violence is informally settled by village councils. Police sources admit that law enforcement officials often prefer to refer complainants of minor crimes to such forums instead of formally charging the suspects (Nyamu – Musembi 2007: 126). In addition, the Serious Crime Special Panels at the Dili Court ended their activities in May 2005 with meagre results: only 101 out of 440 indicted persons came before the court, while just 87 were tried to a verdict (MacCarrick 2005: 49). The Cambodian justice system is reported as being in a 'catastrophic state' (Linton 2006: 329), while in Haiti the violent crime rates are among the highest in the world: the Organisation of American State estimates that from September 2004 to April 2005 there have been about 600 murders, including 19 police officers (JSCA 2007). In Kosovo, the overall level of confidence in the judiciary is reported as being relatively low (30.8 per cent), although the public perception of results differs on the basis of ethnic origin. Corruption is considered to be the greatest challenge for the system to sustain, while undue political interference would still condition courts' rulings (SEESAC 2006: 47 – 48). Although the crime rates were dramatic at the beginning of the mission (in the period from January to August 2000 international

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authorities reported 14,878 criminal offences and arrested 3,734 persons – Strohmeyer 2001b: 111), the number of violent crimes has progressively decreased in the first three years of reconstruction (Wilson 2006: 168), even if in 2003 still one third of the prisoners in Kosovar detention facilities (about 400) were accused of murder (Jones *et al* 2005: 45). In 2003, 6,282 persons were convicted for criminal offences by municipal and district courts (OSCE 2004: 49). However, the judicial consequences of the March 2004 riots will probably make the crime statistics leaven.

## 5. CONCLUSIVE REMARKS: THE NEW MANTRA OF LOCAL OWNERSHIP

In our opinion, this (and in general every) classification of peace operations on the basis of official mandates and functions, may to some extent be useful for theoretical studies, but may nevertheless be tricky and deceitful. As regards the restoration of the justice system, this partition does not take into account the *real* authority exercised by international actors in such reform. Indeed, to be scientifically valuable a research should quantitatively reveal the level of transfer of knowledge among all the international players involved (including hired consultants detached in local government institutions) and domestic authorities. On the other hand, the study should qualitatively illustrate which international and domestic actors are engaged in the reconstruction process, also showing the presence of opponents (Hansen & Wiharta 2007b: 25). In this respect, even a ‘light footprint’ international engagement such as that in Afghanistan may very closely resemble more complex missions such as those in Timor Leste or Kosovo. This is the case if laws are officially passed by the Afghan parliament but are in fact drafted by ‘independent’ experts hired by foreign government cooperation agencies and assigned to local institutions, while the latter are in turn pressured by international donors to ‘cooperate’.

On the contrary, a real change of trend would simply mean ‘promoting ownership beyond simply assessing it’ (Brinkerhoff 2007: 118). Indeed, this actual tendency of publicly affirming the local ownership of state – building processes may represent a mere political umbrella under which to protect oneself in case of failure.

‘When delays, obstacles, and drawbacks cannot be ignored any longer, they are blamed on the local actors. While success has a thousand fathers, failure is an orphan. Time and again, lack of progress is blamed on the lack of indigenous democratic traditions and the influence of post – war trauma.’ (Belloni 2007: 107).

In this respect, this assumed ‘light approach’ in reconstruction, decided by international policy makers, is simply a result of their incapacity of imposing order (also by military means) on the ground and, *a fortiori*, the acknowledgement of the weakness of the legal values ‘exported’ to

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countries recovering from conflicts. Perhaps, looking for the effective ‘demand for justice’ may represent the only way to successfully influence the legal culture of war – torn societies. However, this concerns the genuine aims of the international actors engaged in peace operations.

TABLE 1 – UN State – Building Missions before UNAMA (Chesterman 2002a: 49)

<i>Territory</i>	<i>Mission</i>	<i>Date</i>	Primary responsibility for policing?	Primary responsibility for referendum?	Primary responsibility for election?	Executive power?	Legislative power?	Judicial power?	Treaty-making power?
West Papua	UNTEA	1962–63	YES		regional elections only	YES	limited		
Namibia	UNTAG	1989–90			YES				
Western Sahara	MINURSO	1991–		YES					
Cambodia	UNTAC	1992–93	YES		YES	as necessary			
Somalia	UNOSOM II	1993–95					disputed		
Bosnia and Herzegovina	UNMIBH	1995–2002		in practice					
Eastern Slavonia	UNTAES	1996–98	YES		YES	YES			
East Timor	UNAMET	1999		YES					
Kosovo	UNMIK	1999–	YES		YES	YES	YES	YES	
East Timor	UNTAET	1999–	YES			YES	YES	YES	YES

TABLE 2 – Initial Conditions (Jones et al 2005: 180)

Country	Peace Agreement or Formal Surrender	Strong Central Government	Status of Security Forces	Status of Rule of Law <sup>a</sup>
Panama (1989)	No	Yes	Fair; near-total destruction of Panamanian Defense Forces	Good
El Salvador (1992)	Yes; 1992 Chapultepec Agreement	Yes	Good; but highly repressive	Fair
Somalia (1992)	No	No	Poor; warlords controlled much of the country	Poor; informal justice system
Haiti (1994)	Yes; 1994 Carter-Cedras Agreement	No	Fair; but repressive	Poor
Bosnia (1995)	Yes; 1995 Dayton Accord	No	Good	Poor
East Timor (1999)	Yes; 1999 independence referendum and ratification by Indonesia	No	Poor; exodus of most Indonesian police in 1999	Fair; adopted Indonesian law
Kosovo (1999)	Yes; 1999 military technical agreement	No	Poor; security forces withdrew	Poor; informal justice system
Afghanistan (2001)	No	No	Poor; warlords controlled much of the country	Poor; informal justice system
Iraq (2003)	No	No	Poor; security apparatus largely evaporated	Poor

<sup>a</sup> The rule of law is based on Freedom House ratings during the first year of reconstruction. A score of "good" corresponds with a Freedom House score of one or two; "fair" corresponds with a score of three, four, or five; and "poor" corresponds with a six or seven. Freedom House (2004a).

TABLE 3 – *How Would You Assess Your Government's Actions in the Fight against Corruption?* (Transparency International 2007: 317)

	Total sample	EU+	South East Europe	NIS	Africa	Latin America	Asia-Pacific	North America
Very effective	5%	4%	6%	3%	17%	7%	4%	2%
Effective	17%	18%	21%	14%	27%	18%	15%	17%
Not effective	38%	42%	30%	40%	24%	29%	34%	50%
Does not fight at all	16%	14%	19%	24%	20%	19%	18%	9%
Encourages it	15%	14%	9%	15%	9%	23%	15%	19%
Don't know	8%	8%	14%	5%	3%	4%	15%	4%

Source: TI Global Corruption Barometer 2006

TABLE 4 – *Confidence in the Justice System, Canada and European Nations (2001)* (Roberts, 2004: 10)

	Great deal or quite a lot of confidence	Not very much or no confidence at all
Denmark	79%	21%
Austria	69%	31%
Finland	66%	34%
Germany	62%	38%
Sweden	61%	39%
Canada (2003)	57%	43%
Ireland	55%	45%
United Kingdom	49%	51%
Northern Ireland	48%	52%
Greece	47%	53%
France	46%	54%
Portugal	40%	60%
Belgium	37%	63%
Spain	32%	68%
Italy	32%	68%
European Average	45%	55%

Sources: *Sourcebook of European Values Study* (2001); *Statistics Canada* (2003)

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## NOTES

- <sup>1</sup> Speech given at the 'Great Negotiator' Award Acceptance, Harvard Law School, 2 October 2002, quoted in Kreilkamp 2003: 665.
- <sup>2</sup> The Conference Chairs Conclusions (Afghanistan, Italy and United Nations) reports that 'without justice and the rule of law no sustainable security, stabilization, economic development and human rights can be achieved', thus linking the success of the military strategy to that of the reconstruction process. In addition, the Italian Ministry of Foreign Affairs stated that 'success in Afghanistan will never be achieved through a military victory. The overall success stems from the country's reconstruction and development, as well as from schools, electricity, employment' (Nigro 2007 – translation from Italian provided by the author). It seems significant that both the Chairs Conclusions and the Conference Final Recommendations (involving all the 26 official delegations present at the event) acknowledge that 'establishing effective rule of law throughout Afghanistan will require long term commitment': that could indirectly mean that none of players on the ground foresees a short term solution for the political crisis. Conference documents are available at <http://www.rolafghanistan.esteri.it>.
- <sup>3</sup> See in particular the 'Model Codes for Post – Conflict Criminal Justice Project', run jointly by the Irish Centre for Human Rights in Galway and the United States Institute of Peace. The model codes package includes a Model Criminal Code, a Model Code of Criminal Procedure, a Model Detention Act and a Model Police Act, drafted in consultation with close to 300 leading experts from all over the world. More information is available at [http://www.nuigalway.ie/human\\_rights/Projects/model\\_codes.html](http://www.nuigalway.ie/human_rights/Projects/model_codes.html). See also the Crisis Response Pool established by the Norwegian Ministry of Justice and the Police. It basically consists of a stand – by force for civilian response to external crisis situations, managed by international organisations and deployable on field within 30 days. Crisis Response Pool's personnel currently serve in Bosnia – Herzegovina and in Georgia.
- <sup>4</sup> See in particular the Afghanistan Reconstruction Trust Fund – ARTF; the Law and Order Trust Fund for Afghanistan – LOTFA; the Counter – Narcotics Trust Fund – CNTF; and the forthcoming Rule of Law Trust Fund.
- <sup>5</sup> The number of international casualties, also listed in the RAND Corporation's analysis, has been omitted because, in our opinion, it can be easily included into the level of political violence.
- <sup>6</sup> Haiti received a score of 1.8 out of 10; the DRC: 2.0; Cambodia: 2.1; Sierra Leone: 2.2; Burundi: 2.4; Rwanda: 2.5; Timor Leste: 2.6 (Lambsdorff 2007).
- <sup>7</sup> Reliable sources show that a little over 2,000 judges were serving in 2003, together with approximately 3,000 prosecutors. Only 20 per cent of judges were properly qualified and less than 2 per cent were women. Moreover, according to UNAMA, in 2005 only 100 judges had university degrees in law and political science; 500 had a degree in *sharia*; 200 had a 12<sup>th</sup> or 14<sup>th</sup> grade education; 250 had below a 12<sup>th</sup> grade education; while 523 posts were vacant. In 2004, 9 per cent of the courts and 12 per cent of the prosecutor offices were run by administrative personnel only. In 2003 only 35 per cent of judicial staff were located in the provinces. In 2004, of the total number of prosecutors, 44 per cent were located in Kabul, 30 per cent in the provincial capitals, and only 26 per cent in the districts. In the case of judges, 31 per cent served in Kabul, 23 per cent in the provincial capitals and 46 per cent in the districts. It was also estimated that women judges represented only 3 per cent and women prosecutors 5 per cent of the entire professional staff. As for the number of practicing lawyers, it seems to be comprised between 50 and 170.

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