Beyond Brahimi

The Effectiveness and Sustainability of UN Legal Codes in Post-Conflict Situations

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UN pre-formulated legal codes are one of the instruments for state building situations. During the period of transition form war to peace, these codes could play a crucial role, but they should be used in relation to domestic values.

Since the Brahimi Report's release in 2000,[2] the debate surrounding the use of pre-formulated legal codes has attracted interest from academics, international organisations and military establishments. Research into the development of such codes is ongoing. Tools relating to justice sector mapping, transitional justice codes, hybrid and domestic prosecutorial mechanisms, and truth and reconciliation fora are being developed.[3] The first inter-agency project dedicated to the development of an international criminal code will release its findings later this year.[4]

These developments have the potential to modify the way in which legal reconstruction efforts are undertaken — not only by the UN, but also by non-UN authorities. As recent events have shown, it is not just the UN who may become involved in the transitional administration of states affected by unforeseen political and military events. Military intervention by the United States of America and other forces in Afghanistan and Iraq immediately come to mind.

But are UN 'justice packages' an appropriate intervention and should such models form part of the transitional jurisprudential modelling process given the plenary powers that characterise this new era of international conflict management?

The difficulty in answering these questions is that the codified approach to judicial administration advocated in the Brahimi Report has not yet been tested. Judicial reconstruction efforts undertaken by recent UN transitional administrations, however, closely resemble a Brahimi-style intervention. From such missions, it is possible to isolate some of the major problems inherent in a codified approach to judicial rehabilitation.

I. Potential Challenges Associated with UN Legal Codes

First, there is a risk that the mores and standards enshrined in a Brahimi code will be at odds with the socio-legal contexts of post-conflict environments. As previously stated, a UN code will be the product of international jurisprudential principles, the strictest human rights doctrines, and the legal and social norms of the most powerful and influential (western) states in the international community. It is unlikely, however, that a Brahimi-style intervention will ever be necessary in a state with a modern western legal culture, boasting all of the institutional and infrastructural niceties of an affluent society. Rather, the societies in which judicial rehabilitation will be needed can be expected to have a history of oppression, human rights violations, discrimination and economic underdevelopment.

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2 UNGA 'Report of the Panel on United Nations Peace Operations' UN GAOR 55th Session UN Doc A/55/305–S/2000/809.

3 UNSC Report of the Secretary General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (2004) UN Doc S/2004/616 [57].

4 Conference on Transitional Justice and the Rule of Law, Office of the UN High Commissioner for Human Rights, Geneva, 27–29 September 2004.

In East Timor, the transitional administration quickly discovered that the introduced legal model (drawn from international law and informed by a variety of legal traditions) contained core legal values that were either not represented in, or were not consistent with, the domestic legal culture. For example, while the administration's lawyers considered disputes emanating from the practice of black magic and bride-price to fall outside their jurisdiction, according to East Timorese legal culture (and because such disputes had the potential to disrupt the social balance) a judicial resolution was required. Further, the transitional administration's standards on evidence collection, pre-trial detention and a fair trial stood in stark contrast to those that applied during the Indonesian occupation, many of the characteristics of which had, for better or for worse, become part of East Timorese legal culture.

The result was that the introduced legal system was ill-suited to resolve highly localized disputes and to deal with culturally specific modes of behaviour. Particularly in rural areas, the model became irrelevant, largely unenforceable and the catalyst for an increasing sense of injustice and dissatisfaction. These communities found themselves, once again, living under an imposed regime that failed to reflect indigenous values and customs, and the socio-economic realities of village life.

Brahimi-style codes may also be at risk because they make over-optimistic assumptions about pre-existing resources, personnel, infrastructure and institutional endowments. These assumptions stem from the fact that Brahimi legal codes will need to incorporate certain rules, either to bring the justice system into line with international standards and expectations, or to facilitate core operations. If the code insists upon the judicial resolution of gender crimes, for example, this implies that there must be a welfare state which can allow such laws to work. If the code states that there will be no impunity for the perpetrators of international crimes, it must assume that the model for processing such crimes has sufficient resources, infrastructure, institutional capacity and legal practitioners to get the job done. Simply stated, without these assumptions the law the codes are required to uphold cannot be written.

In East Timor, there was no modern, operational welfare state to support the progressive gender crimes laws that UNTAET introduced. By failing to take account of domestic social and economic conditions, the model could not respond to the practical needs of victims that these crimes created, and UNTAET was unable to produce the social changes the international community required.[5]

Likewise, UNTAET, under pressure to create a judicial review system for those incarcerated by military forces prior to its arrival, assumed that district courts could be expeditiously established. However, without agencies equipped to rebuild, the institutional capacity to support rehabilitation and the logistics necessary to relocate judges, this did not occur.[6] Similar suppositions regarding human and material resource availability led to delays in investigations, arrests and a backlog of trials. Over time, trying cases at the district courts became so problematic that strict adherence to the law was impossible. The judicial system became informally reserved for crimes of a serious nature such as assault, murder and rape. Less serious offences were resolved at a local level and by extra-judicial processes — a situation that was not only acknowledged but also tacitly encouraged by authorities.

Clearly, the root problem is one of dual-responsibilities. When designing and implementing a UN legal code, authorities are not only obliged to meet the needs of the target population, they are also obliged to meet the needs of the international community. The results of this are twofold.

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5 E. Harper interview with expatriate UNTAET employee (Dili, East Timor 18 June 2003); Amnesty International East Timor: Justice Past, Present and Future (Report) (July 2001) AI-Index ASA 57/001/2001, 40–41; letter from Deputy Chief of Operations Civpol Headquarters to Civpol Community Policing Headquarters (12 February 2001). Note that identities have been withheld in all references to interviews conducted by the author pending publication of PhD dissertation, research under which was conducted subject to ethics and confidentiality agreements.

6 E. Harper interview with expatriate civilian police officer (Covalima, East Timor 21 July 2003); E Harper interview with East Timorese employee (Covalima, East Timor 15 June 2003).

On the one hand transitional administrations are prevented from undertaking certain action, even when this is inconsistent with core cultural or legal norms, or results in popular legal needs not being met. On the other hand, transitional administrations are compelled to intervene in certain situations even when there is good reason to believe that such action might be counter productive.

This problem is becoming more recognized. *The Report of the Secretary General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* (2004) highlighted the need to enhance legitimacy, respond to local expectations and protect cultural traditions. However there is still no answer for how to implement a locally-driven or needs-based approach, when that approach involves practices that are inconsistent with a UN mandate.

II. A Role for a UN Legal Code?

Given these challenges, would the availability of a pre-formulated UN legal code available for use in all types of post-conflict situations, provide any overall benefit?

As the Brahimi Report highlights, it would be 'much easier'. UN personnel could be pre-trained to the code's provisions. A body of police, prosecutors and judges experienced in the code could be developed for this specific purpose. Further, the problem of physically obtaining the law, in whichever languages or forms were necessary, would be solved.[7]

However would such an approach be better in terms of success and sustainability?

The use of pre-formulated legal codes raises many questions. Differences in legal culture, resource endowments, and in legal, political and operational realities outside the administrative power's control may prevent legal, socio-cultural and material needs from being met. The result can be a legal model that is ignored, circumvented or perceived as non-legitimate.

The basic question becomes one of priorities. Should the convenience of a bureaucratically simple, over-generalised but efficient approach to law and order take precedence? Or should priority be given to providing a renascent state with a legal order that is consistent with the pre-existing legal culture and that meets legitimate legal, socio-cultural and material needs?

If the latter choice is made, past experience provides some guidelines for how those with law and order responsibilities can approach legal reconstruction in a way that prioritises local needs, while at the same time recognises that administrators must stay within the legal and political confines of UN operations.

(i) Understanding the Population's Judicial Expectations

Legal rehabilitation should begin with the identification of the population's core needs and a consideration of how they can be incorporated into a legal structure. The need for the population to understand key procedural issues and other basic features will apply to most if not all interventions. Other requirements will be situationally specific, stemming from the history, cultural tradition, religiosity and socio-economics of the society in question. In undertaking this identification-realisation process, those constructing the legal model should first consider the legal, socio-cultural and material needs protected by the legal system in place prior to intervention. Particular account should be taken of law's role in society. In societies where the law has been used as a tool of oppression, corruption, violence and discrimination, this experience becomes an unfortunate but entrenched part of a society's legal culture that cannot be quickly or easily erased.

Recent experiences of the American forces in Iraq provide a salient and timely illustration of this idea. Prior to the intervention by American led forces, Sunni Muslims, although an ethnic minority, enjoyed many privileges. Under the Baathists, Sunnis held the majority

7 UNGA footnote 1 [81].

of important military and political positions. They enjoyed many economic advantages and occupied positions of leadership and influence. Eighteen months after the regime change, it is the Sunni Muslims, led by their tribal chiefs (and supported by small numbers of foreign jihadists) who are responsible for insurgent activity of such intensity that there is now a real danger that the country could lapse into a civil war. Had the new regime showed a greater willingness to incorporate elements of the pre-existing political landscape – at least in the short term – this highly inflammatory situation may not have developed.[8]

(ii) Being Realistic About Resources

Those constructing a transitional legal model must consider the socio-economic endowments of the target society. It must be kept in mind that post-conflict societies will not normally have well developed institutional capacity, a modern legal infrastructure, an educated population and a legal profession educated and experienced in international law, legal principles and human rights. Similarly, the legal model developed should be consistent with the level of institutional and infrastructural development and the resources available to the UN mission.

(iii) Balancing Restrictions

Where restrictions prevent a population's needs from being realised, steps should be taken to mitigate the resulting damage. Broad based public information strategies for example, are imperative, but appear to have been de-prioritised in past operations. Above all, new solutions must be found which allow missions to respond to a society's legitimate expectations while staying within the politico-legal boundaries of UN operations. UNTAET could have eliminated some of the economic barriers to the formal resolution of gender crimes by allowing the courts to impose monetary sanctions, hence providing victims with what communities regarded as necessary compensation. UNTAET also could have looked for ways to facilitate official involvement in disputes that would normally have been classified as outside the legal system's jurisdiction, for example by allowing traditional solutions to be registered at Civpol offices or district courts.

Such an approach involves two things which may have been lacking in recent UN transitional administrations. A clear and coherent strategy, sufficient planning time, and ongoing strategic management are primary requirements. Most importantly however, this approach involves a new way of conceptualising transitional legal rehabilitation. Rather than approaching these responsibilities with an expectation that a pre-constructed legal template will be sufficient, and that any resulting deficiencies can be rectified *post factum*, those constructing the legal system should anticipate that the model imported will almost certainly be flawed and will need to be modified during the implementation phase.

III. BEYOND BRAHIMI

This is not to say that UN legal codes have no utility.

(i) The Immediate Days of Transitional Administration

It will take time for a legal system modelled upon the abovementioned principles to be constructed. During this period, the legal vacuum will have to be filled if a breakdown in law and order is to be avoided. The short-term utilisation of an interim code, such as that described in the Brahimi Report, would have several advantages. Such a legal code would

8 F. Kelly, Radio National Australia, 6 May 2005 6.48am.

be easily and quickly accessible. It would allow for the immediate application and enforcement of the law as a pool of human resources trained in the codes' provisions and procedures would already exist. It would guarantee that the mission was operating within the framework of international law and policy, avoiding situations where local law may not be consistent with international legal and human rights principles.

However, this will not be true for every transitional administration. Where existing law needs little modification to bring it into line with international standards, where it matches the existing legal infrastructure, where it reflects the dominant legal culture, and where adequate numbers of local legal professionals are familiar with existing law, UN justice packages may not be appropriate.

(ii) A Legal Template

Pre-formulated legal codes may also prove to be a valuable resource to those charged with constructing the longer-term transitional legal model. A UN legal code could be used as a template to be modified to reflect the specific needs of the target population and the circumstances of the mission.

(iii) The Laws of Occupation

An international legal code may have even wider potential. For decades the Hague Conventions (1899 and 1907) and the Fourth Geneva Convention (1949) have guided occupying forces in the administration of law and order. However as the international community's attitude towards global conflict management becomes increasingly interventionalist, the flexibility inherent in these guidelines may create an opportunity for hazardous or inappropriate law reform.

If a strict interpretation is adopted, the Laws of Occupation[9] provide occupying forces with a straightforward applicable legal structure. If the occupying force chooses however, the capacity exists for substantive changes to be made to the domestic legal system's operation, or for an ad hoc legal regime to be established.[10]

There are several dangers associated with this flexibility. An occupying force with vested interests in how the legal system operates, or with an aggressive agenda for social change may import measures which are unsuitable or self-serving. Alternatively, an occupying force with little regard for international standards of human rights and legal principles may not bother to import changes at all, choosing instead to uphold a legal system that is incompatible with popular needs, is outdated or inoperative.

It may be argued that this is an appropriate time for the dangers inherent in this flexibility to be curtailed. One means of achieving this would be to replace the Laws of Occupation with an international legal code. Such a code would ensure that certain international legal principles were de rigueur for military occupations. It would also guard against the promulgation of self-serving legal reforms. It would make it easier for occupying forces, who have a genuine desire to uphold a legal regime that conforms to international principles, but are unfamiliar with the domestic law. Lacking the necessary local knowledge, the occupying regime could be expected to have difficulty locating and changing elements of the legal system which are considered inappropriate while simultaneously ensuring that the system retains internal consistency and coherence.

9 Comprising the provisions set out in the Hague Conventions (1899 and 1907) and the Fourth Geneva Convention (1949).

10 While subject to certain guidelines, occupying forces can repeal laws, promulgate new regulations, remove judges from office and even establish judicial forums for trying persons accused of war crimes. The Fourth Geneva Convention (1949) [54, 64–76]; M Kelly Peace Operations: Tackling the Military Legal and Policy Challenges (Australian Government Publishing Service 1997) [537–546].

IV. Conclusion

Experience has shown that when a legal system fails to deliver justice or meet stated needs the

implications can be far reaching. Without an operational or effective legal system, a breakdown in law and order is more likely. Insurgent elements may be reinvigorated and the mission may be hampered by civil unrest or armed insurrection. In such situations humanitarian assistance may not be possible and aid organisations may have to be evacuated. Domestic political imperatives may force the repatriation of much needed military personnel. There could be no better example than the U.S. experience in Iraq. There are also longer-term implications. An ineffective legal system could well be the catalyst for the process which necessitated external intervention to begin all over again.

The principal message of this investigation is that when governing bodies are charged with judicial administrative functions, there is not just one way for this model to be built, nor is there only one form for this model to take. Success and sustainability will be linked to the legal culture of the target population. While the concept of pre-formulated legal codes is salient, the production of a methodological template applicable to all transitional administrations is fraught with difficulty. Although codes have their place, and will probably become more common, their utility will be limited to certain situations. Missions endowed with medium to long-term powers of legal rehabilitation and administration, such as the one in East Timor, are among the least suitable.