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978-0-521-50994-7 - The Role of International Law in Rebuilding Societies after Conflict: Great Expectations

Edited by Brett Bowden, Hilary Charlesworth and Jeremy Farrall

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Introduction

BRETT BOWDEN, HILARY CHARLESWORTH
AND JEREMY FARRALL

In February 2008, on opposite sides of the world, two fledgling states faced decisive moments. In south-east Asia, attempts were made to assassinate both the president and prime minister of Timor-Leste. The prime minister, Xanana Gusmão, narrowly escaped harm. The president, José Ramos-Horta, sustained life-threatening bullet-wounds. The assassination attempts and the political instability of the country called into question Timor-Leste's viability as an independent state. Meanwhile, in south-east Europe, the Kosovo parliament declared independence. This was welcomed warmly by some countries, such as Australia, France, Germany and the United States, which promptly recognised the new state. But others, such as China, Russia and Spain, condemned it. The Russian foreign minister, Sergei Lavrov, claimed that Kosovo's unilateral declaration of independence upset the fabric of international society and that a proposed European Union mission to provide support for Kosovo amounted to a violation of international law. Outbreaks of violence in the Serbian capital Belgrade and along the border between Serbia and Kosovo illustrated the fragility of the new state of Kosovo and cast a cloud over independence festivities.

There is no small irony in the fact that Timor-Leste and Kosovo are struggling for their futures. Although there are many differences between the two countries, both served as late-twentieth-century laboratories for a new wave of experiments in state-building. Both Timor-Leste and Kosovo have been the object of intensive interventions, sanctioned by the United Nations Security Council and implemented by UN transitional administrations, with the aim of enabling local populations to exercise their right to self-determination in the face of domination by a stronger, larger nation. In both situations, the UN assumed temporary control of the affairs of state, in order to encourage the growth of institutions and mechanisms that would enable the Kosovar and Timorese people to govern their own affairs. Both initiatives would have been unthinkable during the cold war, when East-West antipathy prevented

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the UN Security Council from launching such ambitious projects and when the primacy of the principle of sovereignty and the politics of realism dictated that UN-sanctioned interventions into domestic polities were few and far between.

Timor-Leste and Kosovo are not isolated cases. Over the final decade of the twentieth century and the first decade of the twenty-first century, we have witnessed, among others, Afghanistan, Bosnia-Herzegovina, Cambodia, the Democratic Republic of the Congo, Haiti, Iraq, Liberia, Sierra Leone and the Solomon Islands descend into various degrees of conflict and chaos, followed by outsider-led attempts to rehabilitate and rebuild. Despite the general international commitment to the cause of securing, stabilising and restructuring post-conflict societies – even in cases such as Iraq where the initial grounds for intervention were vigorously contested – the various state-building ventures have had limited success. While there have been some positive developments in each of the countries just listed, none is an unqualified success story of external intervention. Each of these post-conflict societies continues to face challenges of legitimacy, governance, security, economic development and general viability.

The precarious situations in newly independent Timor-Leste and Kosovo and other post-conflict environments that have been subject to external interventions in the name of peace-building raise serious questions about the endeavour of (re)building societies after conflict and the role played in that endeavour by the international community and international law. Can interventions that are driven by external actors and controlled by external forces trigger a process of reconstruction that will be acceptable to internal constituencies and appropriate to particular local circumstances? Can post-conflict peace-building deliver on its promise of empowering conflict-weary civilian populations to take control of their own destiny and reach for a new era of peace, stability and prosperity? What role does, can and should international law play in mediating the interactions between external and internal actors in post-conflict interventions?

This book seeks to shed light on the project of post-conflict state-building in general, and on the role that is played in this endeavour by international law in particular. It draws together original essays by scholars and practitioners, who explore from a range of perspectives the role that international law might have to play in rehabilitating societies after conflict. While there is a growing body of literature on many dimensions of post-conflict peace-building, the role of international

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law has tended to attract less attention. An exception to this is the field of transitional justice, which concerns the mechanisms of responsibility and accountability for major human-rights violations committed during periods of conflict.¹

One of the primary aims of this book is to reflect on the role international law plays in societies that have had their fabric – social, political, legal, cultural and religious institutions and infrastructure, as well as individual and collective psyches – torn apart by conflict. The contributions to this volume identify a range of roles: international law can offer the promise of tempering, regulating, legitimating and undermining external interventions in post-conflict societies.

We have borrowed the title of Charles Dickens' famous story, *Great Expectations*, for this book. In the novel, Pip, an orphan, brought up in harsh circumstances, develops expectations of wealth and status which will enable him to live as a gentleman and to marry the elusive Estella. Pip rather cruelly sheds old friendships so that he can pursue his new life. His hopes of wealth and love are however dashed by a series of misfortunes and Pip faces penury, while Estella marries Pip's adversary. These experiences eventually teach Pip humility and the value of loyalty. Dickens' novel explores the forces that create expectations and the way that expectations shape conduct. *Great Expectations* reappears in Lloyd Jones' 2006 novel, *Mister Pip*.² Set in war-torn Bougainville in the 1980s, the story revolves around the effect of the only white man in a remote village, Mr Watts, reading *Great Expectations* aloud to a class of young people. The main character, Matilda, grows to love the book – 'It contained a world that was whole and made sense, unlike ours.'³ She forms a close attachment to Pip and by doing so angers her mother, who sees Dickens' story as undermining local traditions. Matilda is reminded by Mr Watts that Pip's history is a very human one: 'He has been given the opportunity to turn himself into whomever he chooses. He is free to choose. He is even free to make bad choices.'⁴ Mr Watts' identification with the characters in the novel finally results in his brutal killing by Papua New Guinean troops and it leaves Matilda with a great sense of the power of stories and voices.

¹ Ruti G. Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000); Naomi Roht-Arriaza and Javier Mariezcurrena (eds.), *Transitional Justice in the Twenty-First Century: Beyond truth versus justice* (Cambridge: Cambridge University Press, 2006); M. Cherif Bassiouni (ed.), *Post-Conflict Justice* (Ardsey: Transnational Publishers, 2002).

² Lloyd Jones, *Mister Pip* (Melbourne: Text Publishing Company, 2006).

³ *Ibid.*, 58. ⁴ *Ibid.*, 61.

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In the context of state-building, international law can raise great expectations – for example of recognition, order, autonomy and stability. For potential external interveners, international law may be viewed as something that mandates or militates against intervention. For those subjected to intervention, international law may bolster the legitimacy of an intervention, suggesting that it will be held to high international standards. International legal principles promise equality, justice and human rights. Yet these expectations are often dashed.

Not long ago, the idea of intervening in ‘fragile’ or ‘failing’ states, with the aim of nurturing a new polity and rehabilitating state institutions, was regarded with diffidence and sometimes hostility. As a candidate in the 2000 race for the presidency of the United States, George W. Bush criticised the Clinton administration’s interventions in Somalia and Haiti, arguing that American troops should not be used for nation-building.⁵ But by the time of his second inaugural ceremony in 2005, President Bush had moved to describe nation-building as ‘the calling of our time’.⁶ The British foreign secretary, David Miliband, has similarly spoken of a moral imperative to intervene, militarily if necessary, to spread democracy across the globe.⁷ Commitment to the cause is not limited to individual countries or regional blocs; it has been taken up with vigour by key intergovernmental and multilateral institutions. As already noted, it was the UN Security Council that sponsored state-building experiments in Timor-Leste and Kosovo. Major UN instruments also provide broad support for collaborative efforts to rebuild societies after conflict. Indeed, the Millennium Declaration and the World Summit Outcome, adopted in 2000 and 2005 respectively, both endorse the cause of post-conflict peace-building and reconstruction as central to the United Nations’ broader aims and objectives.⁸

Although we use the vocabulary of ‘post-conflict’ in this book, we acknowledge that the very idea of characterising a situation as ‘post-conflict’ is problematic. There is rarely a neat transition from a state of

⁵ See, e.g., George W. Bush’s comments during the Second Presidential Debate, 11 October 2000, available at www.cnn.com/ELECTION/2000/debates/transcripts/u221011.html.

⁶ George W. Bush, ‘President sworn-in to second term’, 20 January 2005 available at www.whitehouse.gov/news/releases/2005/01/20050120-1.html.

⁷ David Miliband, ‘The democratic imperative’ (Paper presented at Aung San Suu Kyi Lecture, University of Oxford, 12 February 2008). For a similar statement in 2006 by the Australian minister for foreign affairs, see Alexander Downer, ‘Australia for freedom’ (2006) 3 *Looking Forward*, 2.

⁸ GA Res. 55/2 (18 September 2000) United Nations Millennium Declaration, para. 9; GA Res. 60/1 (24 October 2005) 2005 World Summit Outcome, para. 97.

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conflict to a state of peace. Conflicts can persist long after peace agreements are signed, although they may look somewhat different than before. Ultimately, the peace-conflict-peace continuum is complex and delicately calibrated. It contains far more shades of grey than it does black and white. For this reason, some authors prefer to talk in terms of 'conflict cycles' (see Outi Korhonen's chapter) or even of 'conflictual peace-building' (see William Maley's chapter). Others prefer to avoid the term 'post-conflict', describing the types of situations explored in this volume as 'post-colonial' (see Nehal Bhuta's chapter). The phrase 'post-conflict' suggests an overly simple chronology: after conflict comes post-conflict, which is in turn followed by stability. Korhonen overturns assumptions underpinning the notion of what it means for a situation to be classified as 'post-conflict' by exploring Finland as a case study of post-conflict societies even though it has been ninety years since that country's most recent significant domestic conflict. The term 'post-conflict society' further implies that such societies are discrete and separate from societies that are deemed stable or settled – societies free from conflict. The image is one of post-conflict societies being unruly and teetering on the brink of chaos, but also of being tentatively redeemed and underwritten by the positive influence of the international community. They are measured and judged in comparison with the benchmark of the mature, stable, secure liberal democracies of the West. In this respect, the term 'post-conflict' can obscure the complex and shifting identities of the actors involved, representing them either as the nurturers (the mature agents of change) or the nurtured (entities that cannot yet survive without outside assistance). This is an image of post-conflict reconstruction and tutelage that harks back to the era of the League of Nations when colonial possessions were deemed not ready or insufficiently mature for self-government.

One genre of the post-conflict literature is that of the 'beginner's guide' or 'how-to manual' to nation- or state-building.⁹ Such manuals typically present a set of lessons learned from a range of cases. Their mission is to advance universally applicable principles of post-conflict state-building, which can be applied in any given post-conflict scenario. Such approaches are inclined to see state-building as a matter of simple technology, as a set

⁹ See, e.g. James Dobbins, Seth G. Jones, Keith Crane and Beth Cole DeGrasse, *The Beginner's Guide to Nation-Building* (Santa Monica: RAND Corporation, 2007). For the purposes of this introduction, we take state-building and nation-building to mean the same general enterprise.

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of technical skills or capacities, each of which can be acquired, refined and applied no matter what the context (see Nehal Bhuta's chapter). They imply that each post-conflict problem has a logical state-building solution. Approached from this perspective, the task of the state-builder is simply to rummage through their toolbox until they find the most appropriate state-building instrument. Then all that is needed is to follow the step-by-step instructions and the problem is solved. Despite the faith of the beginner's guide in identifying universal solutions for post-conflict problems, these guides rarely envisage much of a role for international law.¹⁰ They tend to have more in common with, and draw heavily on, social-scientific and social-engineering thinking that has prevailed in much of Western thought and planning since the Enlightenment era. Progress narratives of development and modernisation maintain a significant hold over policymaking and implementation: if only *they* could follow in our footsteps and do it more like *us*.

A variant on this approach is to acknowledge that we must be sensitive to context in post-conflict rehabilitation and restructuring, but to search for generally applicable principles and reforms that can be shaped to fit. This approach, which promotes a role for international law in post-conflict rebuilding, was exemplified by UN Secretary-General Kofi Annan. In an August 2004 report on the rule of law and transitional justice in conflict and post-conflict societies, Annan emphasised that the success of post-conflict reconciliation and rehabilitation rested on 'a common basis in international norms and standards'.¹¹ At the same time, he warned against 'one-size-fits-all formulas and the importation of foreign models', advocating instead that peace-building interventions should be based on national assessments, national participation and national needs.¹² Annan's approach holds out the promise of negotiating a harmonious path between the universal and the particular, between external intervention and national sovereignty.

The aim of this book differs from both of these approaches. It does not set out to provide a 'lessons learned' manual for state-builders; nor does it propose a set of international-law principles to be translated into local situations. This volume rather brings together a series of analyses of the

¹⁰ Dobbins et al., *The Beginner's Guide to Nations-Building* contains just one substantive reference to international law: 79.

¹¹ UN Doc. S/2004/616 (23 August 2004), The rule of law and transitional justice in conflict and post-conflict societies: Report by the secretary-general, 1.

¹² *Ibid.*

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state-building process, exploring the regular weaknesses or failure of the enterprise and emphasising the particularities of context. There is no easy or natural fit for international law in state-building, but its regulative idea of a universal community¹³ has the potential to influence the course of events in many post-conflict settings.

The chapters are arranged to move from broad, overarching themes to more specific analyses of particular questions, concepts or case studies. The volume begins with explorations of the histories and theories of state-building. In Chapters 1 and 2, Outi Korhonen and Nehal Bhuta analyse the origins of state-building and various associated concepts such as statehood, democracy and good governance. Both authors criticise the assumption that it is possible to refashion foreign societies according to a state-building recipe book. Korhonen describes the 'West-to-Rest transmission belt' and views the state-building enterprise as a 'classic assertion of hegemony and empire'. She, however, contemplates the possibility of strategies of empowerment through state-building through intensive and long-term engagement. Bhuta cautions against taking the West's history and experience and turning it into the measure of all history and all politics. He argues that, while modern state-building is presented as an apolitical technology, it in fact transforms its objects and reinscribes structures of inequality and domination. Peace-building involves building a particular kind of politics, based on an idealised act of Western democracy. In Chapter 3, Peter Danchin studies the occupation and rebuilding of Iraq since 2003 from the perspective of two rival theories of international law: legal formalism, which understands the purpose of international law as eclectic and value-pluralist; and 'instrumental anti-pluralism', which identifies the aim of the international legal system as the construction of a universal regime based on a universally authoritative morality. He shows the complex interaction between these approaches and their contradictory invocation by all sides. All three of these authors draw parallels between the contemporary enterprise of state-building and the historical pursuit of a policy of imperial colonialism.

The remaining chapters discuss particular dimensions of post-conflict intervention. Chapters 4 and 5 explore the promotion of democracy. In Chapter 4, Brett Bowden and Hilary Charlesworth survey attempts at the international level to define and promote democracy. They demonstrate

¹³ Martti Koskenniemi, 'The fate of public international law: Between technique and politics' (2007) 70 *Modern Law Review*, 1–30.

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how international institutions have offered a variety of definitions of democracy, most of which draw heavily on the Western tradition, rendering them unsatisfactory to the many groups directly affected, particularly those emerging from conflict situations. While they are sceptical about the definitions of democracy promoted by international institutions, Bowden and Charlesworth favour an account of democracy based on popular control over public decisions and decision-makers, and equality of respect and voice between citizens in the exercise of that control. In Chapter 5, William Maley explores the relationship between democracy and legitimacy in a particular context – Afghanistan since 2001. In his rich account of the relevant international and national political scenes, he emphasises the significance of legitimacy to democracy. Maley is critical of the international pressure to hold elections in Afghanistan and argues that that country's experiences illustrate the limits of Western democratic theories. He points out that democracy promotion must be understood as a long-haul enterprise, possibly taking centuries rather than years.

Efforts by interveners to strengthen the rule of law form the focus of Chapters 6 and 7. In Chapter 6, Jeremy Farrall examines the UN Security Council's promotion of the rule of law after conflict, describing how the rule of law is transformed from a general, abstract concept into a series of specific institutional markers for implementation on peacekeeping front lines. He argues that the concept of the rule of law seems to lose its power as a political ideal when its vagueness is resolved and it begins to take concrete shape. In Chapter 7, Laura Grenfell explores the UN's efforts to build the rule of law in Timor-Leste, a society where there is strong legal pluralism, in that customary law operates side by side with state law. She is critical of the UN's promotion of a formal, state-based approach to the rule of law in a context where many people had experienced state law as a tool of oppression and thus had greater confidence in traditional, customary forms of law. Grenfell is critical of the imposition of international human-rights standards as part of a rule-of-law package and argues for a more nuanced, inclusive understanding of the rule of law, which embraces customary law.

Chapters 8 to 11 examine the way that various aspects of international law can affect post-conflict states. In Chapter 8, Helen Durham explores the role of treaty ratification in rebuilding societies after conflict, using the example of international humanitarian-law treaties. She argues that, although treaty ratification in post-conflict states can be undertaken

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for purely symbolic purposes, it can also allow states emerging from conflict to review their domestic policies and regulations in a creative and positive way. In Chapter 9, Annemarie Devereux explores the UN's reluctance to accept institutional responsibility for human-rights violations. She analyses the current legal framework governing the UN's relationship with human rights, particularly the extent to which the UN can be held accountable for human-rights violations by its staff. Devereux proposes steps that might be taken to increase UN accountability. In Chapter 10, Amy Maguire examines the role played by international law in protecting women's security after conflict. Drawing upon interviews with women in post-conflict societies, Maguire argues that legal efforts achieve the best outcomes for women when they are driven by women's direct participation in peace-building and respond to women's demands for social transformation. She advocates a 'gendered security' approach, which would empower women to participate in, and indeed drive, the process of transforming their post-conflict societies. In Chapter 11, Phil Clark explores the role of, and challenges confronting, the pursuit of international criminal justice in the African Great Lakes region. Clark warns that the International Criminal Tribunal for Rwanda in the Rwandan case, and the International Criminal Court in the Democratic Republic of the Congo and Uganda, are struggling to fulfil their mandates due to a failure to navigate relations with domestic governments, judicial institutions and local populations effectively.

John Braithwaite's concluding chapter argues that international law should be conceived as one thread in a complex fabric of peace-building techniques. He distances himself from the thoroughgoing critical analyses of the role of international law offered by Korhonen and Bhuta's chapters and suggests a more optimistic account of the discipline. For Braithwaite, while international law can be destructive in some contexts, as illustrated in Phil Clark's account of the work of international criminal tribunals in the Great Lakes region, it can be highly effective if used in concert with other strategies, such as identifying local strategies of restorative justice, education and eradicating poverty. This entails a humble and collaborative approach to state-building, and one based above all on evidence of what works, rather than one based on an overarching theory of politics.

Many of the contributors draw on particular case studies as the basis for their investigations: from Afghanistan to Africa's Great Lakes region, and from Timor-Leste to the Balkans. Geographically, the chapters in

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this volume cover troubled zones across the world, encompassing Africa, Asia and the Pacific, Europe and the Middle East. Some contributions focus on one specific case study (Korhonen on Finland; Maley on Afghanistan; Danchin on Iraq; Grenfell on Timor-Leste). Others survey multiple case studies (Clark on Rwanda, the Democratic Republic of the Congo and Uganda; Maguire on Northern Ireland, Lebanon and South Africa). Yet others touch upon a range of case studies, without making them the prime focus of discussion (Bhuta on colonial India; Farrall on Haiti and Liberia; Devereux on Kosovo). Some concentrate on specific issues or questions, whereas others represent broader surveys of international actions and arenas of debate. What is striking is that all the case studies of post-conflict societies suggest major problems with the enterprise of state-building and point to the general disillusionment of affected populations.

The contributions in this volume take a range of attitudes to international law. Some explain how international law can shape domestic developments in post-conflict societies. One way this occurs is through declarations that national laws must not violate international human-rights norms and standards, as promulgated by UN transitional administrations in Kosovo and Timor-Leste. Another method is to encourage fledgling post-conflict governments to sign and ratify international treaties or protocols. Laura Grenfell, Helen Durham and Amy Maguire in particular explore the ramifications of such attempts to introduce international norms into the local domain, with Durham and Maguire more optimistic than Grenfell about the transformative possibilities of such actions. Maguire suggests that international law can provide useful frameworks for rehabilitation and restructuring, at least partly because it is seen as a source of law external to the parties in conflict with one another. Nehal Bhuta and Laura Grenfell, by contrast, question the relevance of international legal standards in post-conflict situations.

This volume emphasises the unpredictability of interactions between competing legal frameworks in post-conflict environments. Post-conflict situations are often characterised by a vacuum of legitimate authority, including formal legal authority, which can be both a cause and a symptom of conflict. A variety of alternative legal frameworks can compete to fill this vacuum, including state, customary, religious and international law. International law can provide another layer of legal recourse for outsiders and local authorities to negotiate in searching for the appropriate balance. In some instances international law may empower local actors to exercise their rights. In others, it might undermine the broader human-rights project