

**State Reconstruction in International Law: Conjuring with Political
Independence**

Matthew William Saul

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STATE RECONSTRUCTION IN INTERNATIONAL LAW: CONJURING WITH POLITICAL INDEPENDENCE

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Abstract

State Reconstruction in International Law: Conjuring with Political Independence

This is a study about large-scale international involvement in the reconstruction of a state without an independently effective domestic government. Specifically how the practice in Cambodia, Haiti, Bosnia and Herzegovina, Sierra Leone, Kosovo, East Timor, Afghanistan, and Iraq, relates to the right of the target state and its people to political independence. The international involvement, particularly its legal justification, is analysed from the perspective of the right to political independence and the core UN system values of self-determination of peoples and international peace. From this analysis, an opinion is formed on what explains international acceptance of a practice that struggles to remain consistent with the legal structures and political values of the inter-sovereign relations paradigm of the international system. This is argued to rest on the pursuit of democratic reconstruction. The absence of a legal concept of democracy, in the practice analysed, is the basis for the thesis that: when there is not an independently effective domestic government, there is a need for greater international legal regulation and accountability of those – both the domestic and international actors – that exercise the right to political independence for the purpose of state reconstruction. This is to compensate for the lack of assurance that the process reflects the wishes of the state and its people, which is a threat to the core UN system values of self-determination of peoples and international peace.

Matthew William Saul
School of Law
University of Sheffield

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I set upon doctoral study after a suggestion by Professor Colin Warbrick, while I was studying for my LL.M at Durham in 2003/04, that, in the interests of regulating and holding accountable all those involved, international law ought to have a role in the reconstruction of ineffective states such as Sierra Leone; and that there was a need for investigation into whether international law did in fact have a role and the nature of this role. This was the start of a long journey, and, along with Colin, I have many people to thank.

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Sunderland
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Declaration

I declare that this thesis is my own work and it has not, in whole or in part, previously been presented by me to this or any other university for the conferment of any degree.

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PCIJ

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May 2008

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US v. Wilhelm List and Others (Hostages case), (1949) *Law Reports of Trials of
Major War Criminals VIII*

Abbreviations

<i>AJIL:</i>	<i>American Journal of International Law</i>
AFRC:	Armed Forces Revolutionary Council
APC:	Sierra Leone All Peoples Congress
BiH:	Bosnia and Herzegovina
<i>BYIL:</i>	<i>British Yearbook of International Law</i>
CARICOM:	Caribbean Community and Common Market
CDGK:	Coalition Government of Democratic Kampuchea
CNRT:	National Council of Timorese Resistance
CPA:	Coalition Provisional Authority
CP Agreement:	Liberia Comprehensive Peace Agreement
CSCE:	Conference on Security and Cooperation in Europe
DfID:	UK Department for International Development
DoP:	1993 Declaration of Principles on Interim Self-Government Arrangements
EC:	European Community
ECOMOG:	ECOWAS Cease-fire Monitoring Group
ECOWAS:	Economic Community of West African States
ECtHR:	European Court of Human Rights
<i>EJIL:</i>	<i>European Journal of International Law</i>
<i>EPIL:</i>	<i>Encyclopaedia of Public International Law</i>
EU:	European Union
Fretilin:	Revolutionary Front for an Independent East Timor
FRY:	Federal Republic of Yugoslavia
GA:	United Nations General Assembly
GCIV:	1949 Fourth Geneva Convention
GFAP:	The General Framework Agreement for Peace in Bosnia and Herzegovina
GIC:	Governing Iraqi Council
<i>GYIL:</i>	<i>German Yearbook of International Law</i>
HRC:	Human Rights Committee
ICCPR:	1966 International Covenant on Civil and Political Rights
ICESR: Cultural	1966 International Covenant on Economic, Social and Rights
<i>ICLQ:</i>	<i>International and Comparative Law Quarterly</i>

ICISS:	International Commission on Intervention and State Sovereignty
ICJ:	International Court of Justice
ICTR:	International Criminal Tribunal for Rwanda
ICTY:	International Criminal Tribunal for the Former Yugoslavia
ILC:	International Law Commission
<i>ILM:</i>	<i>International Legal Materials</i>
INTERFET:	International Force in East Timor
ITA:	international territorial administration
<i>ILR:</i>	<i>International Law Reports</i>
ISAF:	NATO International Security Assistance Force in Afghanistan
KFOR:	NATO Kosovo Force
KLA:	Kosovo Liberation Army
<i>LJIL:</i>	<i>Leiden Journal of International Law</i>
<i>LNOJ:</i>	<i>League of Nations Official Journal</i>
NATO:	North Atlantic Treaty Organisation
<i>NYIL:</i>	<i>Netherlands Yearbook of International Law</i>
OAS:	Organisation of American States
OAU:	Organisation of African Unity
OHR:	Office of the High Representative
OPT:	Occupied Palestinian Territories
OSCE:	Organisation for Security and Cooperation in Europe
Oslo II:	1995 Interim Agreement between Israel and the Palestinians
PA:	Palestine Authority
PCIJ:	Permanent Court of International Justice
PIC:	Peace Implementation Council
PLO:	Palestine Liberation Organisation
PRK:	People's Republic of Kampuchea
<i>Recueil des Cours:</i>	<i>Recueil des Cours de l'Académie de la Haye</i>
RIAA:	Reports of International Arbitral Awards
RS:	Republika Srpska
RUF:	Revolutionary United Front
SC:	United Nations Security Council
SCSL:	Special Court for Sierra Leone
SFOR:	NATO-led Stabilisation Force in Bosnia and Herzegovina

SFRY:	Socialist Federal Republic of Yugoslavia
SLLP:	Sierra Leone Peoples Party
SNC:	Supreme National Council
SOC:	State of Cambodia
SRSG: General	Special Representative of the United Nations Secretary-
TAL:	Transitional Administrative Law
UDHR:	1948 Universal Declaration on Human Rights
UDT:	The Timorese Democratic Union
UNAMET:	United Nations Mission in East Timor
UNAMSIL:	United Nations Mission in Sierra Leone
UNMIH:	United Nations Mission in Haiti
UNMIL:	United Nations Mission in Liberia
UNMIK:	United Nations Mission in Kosovo
UNITAF:	United Task Force
UNOSOM I:	UN Operation in Somalia I
UNOSOM II:	UN Operation in Somalia II
UNTAC:	United Nations Transitional Authority in Cambodia
UNTAET:	United Nations Transitional Administration in East Timor
UNYB:	Yearbook of the United Nations
VCLT:	1969 Vienna Convention on the Law of Treaties

Introduction

The right of a state and its people to political independence – understood as the sovereign right of the state to decide on ‘the choice of a political, economic, social and cultural system, and the formulation of foreign policy’,¹ and the right of the people as part of the legal doctrine of self-determination to ‘freely determine their political status and freely pursue their economic, social and cultural development’² – is of fundamental importance for international order.³ This study analyses how large-scale international involvement in the reconstruction of a state, absent an independently effective domestic government, relates to the right of the target state and its people to political independence. The study draws attention to the significance of such practice for the core United Nations (UN) system values of self-determination of peoples and international peace. It also suggests how consistency with these values could be improved by the utilisation of the potential that exists in international law for the pursuit of democracy, which links the practice examined, to be regulated. This introduction explains the rationale of the study, situates the study within the existing literature, identifies the primary research questions, indicates debates in international law for which the findings have implications, clarifies key concepts, explains the structure and approach of the study, and sets out the main thesis of the study.

In recent times, large-scale international involvement in state reconstruction has been a prominent feature of international relations. There are three paradigms through which international involvement has been possible – occupation, administration, and assistance. Subjects of international law – states and international organisations – have been integral to the reconstruction process as belligerent occupiers in Iraq; international administrators in Cambodia, Bosnia and Herzegovina, Kosovo, and East Timor; and as assistants to otherwise ineffective governments in Sierra Leone, Haiti, Afghanistan, Liberia, and Iraq. These examples represent a range of contexts and approaches. Across these examples there is,

¹ GA Res. 2625 (1970) Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States adopted in October 1970 by the UN General Assembly (GA).

² Common Article 1(1), 1966 International Covenant on Civil and Political Rights (ICCPR), 1966 International Covenant on Economic, Social and Cultural Rights, (ICESR).

³ B. R. Roth, ‘The Enduring Significance of State Sovereignty’, (2004) 56 *Florida Law Review* 1017.

though, the common theme of significant changes in the state and civil infrastructure, such as the redesign of the economic system, made possible by international involvement, without anything like an independently effective domestic government to make the reconstruction decisions.

A government's ability to independently exert effective control over its territory, with effective control understood as the ability to preserve public order, is the traditional basis for identifying the agent that embodies the will of a state and its people with respect to their rights and obligations in international law.⁴ Effective control provides an objective basis for international actors to identify the government. Moreover, effective control suggests some meaningful attachment to the state and its people, and entails the potential for obligations to be fulfilled.⁵ Accordingly, when choices about change and development of state and civil infrastructure are not made by an independently effective domestic government, and are only possible because of international involvement, it is not readily apparent that the process is consistent with the right to political independence. Yet, the preservation of political independence is the cornerstone of an international legal system based on the inter-sovereign relations paradigm. Non-interference in the internal affairs of a state is essential in a pluralist international society if the core political values of the UN system of self-determination of peoples and international peace are to be realised. Does the international acceptance of the practice of state reconstruction mean that political independence is no longer of such importance for international order?

The answer to this question appears to be no. Consider, for example, the international hesitancy surrounding the delivery of humanitarian aid to the people of Burma without the blessing of the Burmese government.⁶ Instead, the international acceptance of practice within these paradigms of state reconstruction suggests that somehow those involved have managed to project consistency with the right to political independence or at least the attendant values of self-determination and international peace. This may have been through new law that regulates involvement in the interests of the preservation of political independence. Or the approach to

⁴ See B. R. Roth, *Governmental Illegitimacy in International Law* (1999) 137-42; D. Wippman, 'Treaty-Based Intervention: Who Can Say No?', (1995) 62 *University of Chicago Law Review* 607 at 612 and references therein at note 26.

⁵ See Roth, *loc. cit.*, fn. 4; Wippman, *loc. cit.*, fn. 4.

⁶ See, e.g., S. Mydans, 'UN Relief Supplies Arrive in Myanmar', *International Herald Tribune*, 8 May 2008 available at <<http://www.ihf.com/articles/2008/05/08/asia/09cyclone.2.php>>.

reconstruction may have been understood as accommodating the values at stake by other means, perhaps supplementation of existing law with policy aims that suit these values. In this respect, it needs to be stressed that the risk to international peace is a consequence of risk to self-determination. Thereby addressing self-determination also remedies the concern for international peace caused by neglect of political independence, but the same is not true the other way round.

That the practice has not generally been perceived as a cause for concern in relation to the right to political independence is evidenced by the focus of the literature addressing state reconstruction. The majority of the literature on state reconstruction is about policy and focused on best practice recommendations in the interests of improving the success rates of particular aspects of international engagement.⁷ Policy critiques, which seek to explain why a general approach has been adopted by reference to a normative framework, are less prominent.⁸

Legal literature in relation to state reconstruction is massively diverse but tends to focus on specific aspects of a particular paradigm. There is a flourishing literature on the legal issues that arise in relation to international territorial administration (ITA). Particular themes include the legal status of the territory,⁹ accountability of the international actors – by way of applicability of international human rights and humanitarian law to the relevant international organisations,¹⁰ jurisdiction of the domestic courts,¹¹ the utility of ombudsperson institutions¹² – powers of the Security Council (SC),¹³ models for the reconstruction of the legal system,¹⁴ post-conflict

⁷ See, e.g., S. Chesterman, *You the People: The United Nations, Transitional Administration and State-Building* (2004); R. Caplan, *International Governance of War-Torn Territories – Rule and Reconstruction* (2005).

⁸ See, e.g., R. Paris, *At War's End: Building Peace After Civil Conflict* (2004) D. Chandler, *Empire in Denial: The Politics of State-building* (2006); D. Zaum, *The Sovereignty Paradox: The Norms and Politics of International Statebuilding* (2007).

⁹ See, e.g., B. Knoll, 'UN Imperium: Horizontal and Vertical Transfer of Effective Control and the Concept of Residual Sovereignty in "Internationalised" Territories', (2002) 7 *Austrian Review of International and European Law* 3; C. Stahn and A. Zimmermann, 'Yugoslav Territory, United Nations Trusteeship or Sovereign State? - Reflections on the current and future legal status of Kosovo', (2001) 4 *Nordic Journal of International Law* 423.

¹⁰ See, e.g., T. H. Irmscher, 'The Legal Framework for the Activities of the United Nations Interim Administration Mission in Kosovo: The Charter, Human Rights, and the Law of Occupation', (2001) 44 *GYIL* 353 at 377 - 387; J. Cerone, 'Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo' (2001) 12 *EJIL* 469.

¹¹ See, e.g., R. Wilde, 'International Territorial Administration and Human Rights', in N. D. White and D. Klassen (eds.), *The UN, Human Rights and Post Conflict Situations* (2005) 149; O. Korhonen, 'International Governance in Post-Conflict Situations', (2001) 14 *LJIL* 495.

¹² See, e.g., C. P. M. Waters, 'Nationalising Kosovo's Ombudsperson', (2007) 12 *JCSL* 139.

¹³ See, e.g., M. Matheson, 'United Nations Governance of Postconflict Societies', 95 *AJIL* (2001) 76 at 85; M. Ruffert, 'The Administration of Kosovo and East Timor by the International Community'.

justice,¹⁵ and property disputes.¹⁶ The coalition forces' occupation of Iraq has led to a resurgence in the literature on belligerent occupation. This literature has queried the compatibility of the practice with the law of occupation,¹⁷ pondered the powers of the SC and the extent to which it modified the law of occupation, and considered the relevance of the law of occupation as a framework for transformative reconstruction.¹⁸ In relation to the assistance model, one can find analysis of issues surrounding the deployment and mandate of the international military presences,¹⁹ consideration of the regulatory framework for private military companies,²⁰ suggestions as to the priority that should be given to criminal codes in legal reconstruction,²¹ or treatments of the approach taken to post-conflict justice.²² The implicit message from the body of literature is that a valid legal justification for the international involvement, in the form of state consent and a SC chapter VII resolution, separately or combined, is sufficient to remove concern about the right to political independence.²³ However, given that traditional international legal doctrine requires an independently effective domestic government for embodiment of the rights and obligations of the state and its people in international law, there is good reason to be cautious about accepting these legal justifications as the end of the matter with regards the right to political independence.

In the light of the significance of the preservation of the right to political independence for the UN system, and that traditional international legal doctrine

(2001) 50 *ICLQ* 555; A. Orakhelashvili, 'The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions', (2005) 16 *EJIL* 59.

¹⁴ See, e.g., H. Stromeier, 'Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and in East Timor', (2001) 95 *AJIL* 46.

¹⁵ See, e.g., C. Stahn, 'Justice under Transitional Administration: Contours and Critique of a Paradigm', in H. Fischer and N. Quenivet (eds.), *Post-Conflict Reconstruction: Nation- and/or State-Building* (2005) 149.

¹⁶ See, e.g., L. Von Carlowitz, 'Settling Property Issues in Complex Peace Operations: The CRPC in Bosnia and the HPD/CC in Kosovo', (2004) 17 *LJIL* 599.

¹⁷ See, e.g., K. Kaikobad, 'Problems of Belligerent Occupation: The Scope of Powers Exercised by the Coalition Provisional Authority', (2005) 54 *ICLQ* 253; G. H. Fox, 'The Occupation of Iraq' (2005) 36 *Georgetown Journal of International Law* 195.

¹⁸ See, e.g., A. Roberts, 'Transformative Military Occupation: Applying the Laws of War and Human Rights' (2006) 100 *AJIL* 580; D. Scheffer, 'Future Implications of the Iraq Conflict: Beyond Occupation Law' (2003) 97 *AJIL* 842;

¹⁹ See, e.g., A. Adebajo and D. Keen, 'Sierra Leone' in M. Berdal and S. Economides (eds.), *United Nations Interventionism 1991 – 2004* (2007) 246.

²⁰ See, e.g., S. Chesterman and C. Lehnardt (eds.), *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (2007).

²¹ See, e.g., R. Sannerholm, 'Legal, Judicial and Administrative Reforms in Post-Conflict Societies: Beyond the Rule of Law Template', (2007) 12 *JCSL* 65.

²² See e.g., R. Cryer, 'Post-Conflict Accountability: a matter of Judgement, Practice or Principle?' in N. D. White and D. Klassen (eds.), *The UN, Human Rights and Post Conflict Situations* (2005) 267.

²³ See, though, G. H. Fox, *Humanitarian Occupation* (2008) 177-217.

requires an independent effective domestic government for embodiment of the rights and obligations of the state and its people, the primary research questions of this study can be listed. How does the practice in each of the three paradigms noted relate to the right to political independence of the target state and its people? To the extent that the legal justifications do not sufficiently address the right to political independence, what explains international acceptance of the approach? And, does this involve international legal development?

By answering these questions, the study not only has relevance for international order and the target states and peoples, but also contributes to a number of strands of debate in international law. In particular, the role of international law in the reconstruction of states, the continued relevance of state sovereignty in international law, and the position of democracy in international law. For the purpose of positioning this study in the literature, it is useful to be explicit about how the study relates to these debates.

International law develops in an *ad hoc* manner pursuant to the needs and desires of its subjects. The existing body of international law has been driven, in general terms, by the pursuit of co-existence, co-operation, and, some now argue, integration.²⁴ In the interests of justice, certain international lawyers have started to call for the development of a *jus post bellum* to regulate, in particular, the reconstruction of a state after conflict.²⁵ These calls and associated ideas are tentative, but assume that international law can and should be relevant for the reconstruction process. This study is relevant for the *jus post bellum* project as it identifies the extent to which new law is 'needed' to ensure the core UN system values of self-determination of peoples and international peace. Moreover, if both, or either, state consent and a chapter VII resolution are found to be sufficient in relation to reconciling the process with the right to political independence, this would significantly counsel against international actors 'needing' to create any new law. This is because if consistent with the right to political independence, the implication is that there is not a cause for international concern, or, more specifically, it is an

²⁴ See Z. Capaldo, 'A New Dimension of International Law: The Global Law', (2005) 5 *The Global Community Yearbook of International Law and Jurisprudence* xxiii.

²⁵ See, e.g., C. Stahn, '*Jus ad bellum*', '*jus in bello*' . . . '*jus post bellum*'? -Rethinking the Conception of the Law of Armed Force', (2006) 17 *EJIL* 943; B. Orend, '*Jus Post Bellum*: The Perspective of a Just-War Theorist', (2007) 20 *LJIL* 571; K. Boon, 'Legislative Reform in Post-conflict Zones: *Jus Post Bellum* and the Contemporary Occupant's Law-Making Powers', (2005) 50 *McGill LJ* 285.

internal matter shielded from outside interference in the interest of the preservation of political independence.

The right to political independence is one of the core attributes of a sovereign state in international legal doctrine. A common sign that is pointed to by commentators in relation to the demise of the sovereign state is the ascendancy of international involvement in the reconstruction of states.²⁶ Others point to the practice of state reconstruction as evidence that a liberal international community is evolving, which does not consider itself bound by established international law when it conflicts with the particular values of that community.²⁷ However, those international actors involved in state reconstruction where there is no independently effective domestic government, persist in emphasising that the practice is consistent with the sovereign rights of the target state.²⁸ Accordingly, an investigation into how the right to political independence has in fact been treated in the reconstruction process can help to clarify the extent to which state reconstruction is a challenge to the orthodox view of sovereignty that prioritises the right to political independence.

Since the early 1990s, there has been much debate about the position of democracy in international law. Some, like Wheatley, have concentrated on the emerging consensus on democracy as human right, focusing in particular on the meaning of Article 25 of the International Covenant on Civil and Political Rights (ICCPR).²⁹ Others, like Franck and Fox, by linking the idea of democracy as a human right to the legal doctrine of self-determination and the associated idea of popular sovereignty, have identified implications in the emerging consensus on democracy as a human right for matters of general international law, most noticeably, governmental status.³⁰ In contrast, Marks sees the value of democracy for international law, but is sceptical about whether it is wise to try and enshrine what remains a loose political concept in the form of legal rules. Instead, Marks proposes

²⁶ See, e.g., S. Tierney, 'The Normative Challenge in Forging an International Community', in C. Warbrick and S. Tierney (eds.), *Towards an International Legal Community? The Sovereignty of States and the Sovereignty of International Law* (2006) 1 at 4.

²⁷ See R. Buchan, 'International Community and the Occupation of Iraq', (2007) 12 *JCSL* 37; N. Tsagourias, 'International Community, Recognition of States, and Political Cloning', in C. Warbrick and S. Tierney (eds.), *Towards an International Legal Community? The Sovereignty of States and the Sovereignty of International Law* (2006) 211.

²⁸ See, e.g., SC Res. 1436 (2002) on international involvement in Sierra Leone.

²⁹ S. Wheatley, *Democracy, Minorities and International Law* (2005) 135-150.

³⁰ See, e.g., T. Franck, 'The Emerging Right to Democratic Governance' (1992) 86 *AJIL* 46; G. H. Fox, 'The Right to Political Participation in International Law' (1992) 17 *Yale Journal of International Law* 539.

the development of a principle of 'democratic inclusion', which indicates 'that all should have the right to a say in decision-making which affects them, and that systematic barriers to the exercise of that right should be acknowledged and removed'.³¹ In the normal run of things, the need for governments to be effective in the interests of the efficacy of international law is just one factor that counsels against any development which conditions governmental status on criteria other than effectiveness. In light of this, state reconstruction where there is no effective domestic government is a context in which one might reasonably expect the emerging consensus on democracy as a human right to be utilised. Indeed, one might expect it to be treated as relevant beyond human rights law, perhaps as a set of legal limits and obligations on the competence of a government that is not an independent effective domestic government. The long-standing connection of democracy with the idea of self-determination, particularly prominent in the doctrine of former US President Wilson,³² is further reason to expect the emerging legal concept of democracy to be adopted. This is on the basis that should it appear that political independence has been neglected, a legal approach could help better accommodate the value of self-determination and encourage international acceptance of the wider process of state reconstruction, than if democracy were treated only as a loose political concept. Due to this reasoning, and because the prominent examples of state reconstruction span some twenty years, if a legal concept of democracy has not been utilised, this can be seen as telling in relation to the chances of democracy actually crystallising as an international legal concept.

Before addressing the structure that this study takes to answer the questions set, it is useful to clarify some of the key concepts in the study and provide some comment on the method adopted.

Terms such as capacity building, state building, nation building, peace building, peace implementation, and state reconstruction indicate concepts without a fixed meaning. Moreover, there is the potential for almost complete overlap in respect of the intended meaning. As it is a key theme that runs throughout this study it is particularly important to clarify from the outset the intended meaning of state reconstruction and its relationship with the other related terms.

³¹ S. Marks, *The Riddle of all Constitutions* (2002) 119.

³² M. Pomerance, 'The United States and Self-Determination: Perspectives on the Wilsonian Conception', (1976) 70 *AJIL* 1 at 20; cf. R. A. Miller, 'Self-Determination in International Law and the Demise of Democracy', 41 *Columbia Journal of Transnational Law* (2003) 601.

Peace building is a term used to indicate a broad range of activity in relation to the process of transforming conflict into peace. This can include change and development of state and civil infrastructure.³³ But can also be used to indicate many other forms of international assistance both leading up to and in sustaining peace, for example, humanitarian assistance.³⁴ Peace implementation has a similar embrace to peace building except that it focuses attention more on activity subsequent to a tentative condition of peace.³⁵ Neither of the terms sufficiently focuses attention on what this study is most interested in.

Capacity building is essentially about enhancing the capacity of institutions within a state to function effectively. Accordingly, it encompasses a broad spectrum of international involvement. At one end of the spectrum it can indicate financial aid to a poor but largely effective state, at the other end it can refer to the restructuring of the military in a state without an effective government. As it can accommodate an array of activities, it is a popular term in policy or strategy documents that want to encourage greater international support for weak states as a general matter.³⁶ Because it indicates the activity that makes change and development of state and civil infrastructure possible, explains why it is not the term adopted by this study.

State building indicates sustained efforts at capacity building accompanied by significant change and development of state and civil infrastructure. It is the term adopted by those seeking to convey that it is the international involvement as a continuum that is of interest, not just the fact that there are changes to the state and civil infrastructure.³⁷ Nation building is at times used in place of state building, but

³³ See, e.g., B. Boutros-Ghali, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping*, UN Doc. A/47/277 (1992), p.32, para. 55; B. Boutros-Ghali, *Supplement to An Agenda for Peace*, UN Doc. A/50/60 (1995), para. 49.

³⁴ See, e.g., Management Development and Governance Division of the UNDP, *Governance in Post-Conflict Countries*, (January 2000) p.13; M. W. Doyle, N. Sambanis, *International Peacebuilding: A Theoretical and Quantitative Analysis* (2002); E. M. Cousens, 'Introduction', in E. M. Cousens and C. Kumar (eds.), *Peacebuilding as Politics* (2001).

³⁵ See, e.g., S. L. Woodward, *Economic Priorities for Peace Implementation* (2002); one might also limit peace building to activity once a tentative peace is achieved, see, e.g., R. Paris, *At War's End. Building Peace after Civil Conflict* (2004) 38.

³⁶ See, e.g., UN High-level Panel on Threats, Challenges, and Change, *A More Secure World: Our Shared Responsibility*, UN Doc. A/59/565 (2004) p. 25; 2005 World Summit Outcome, UN. Doc. A/60/L.1 (2005).

³⁷ See, e.g., Chesterman, *op. cit.*, fn. 7; Chandler, *op. cit.*, fn. 8; Zaum, *op. cit.*, fn. 8.

it is better used in reference to the societal aim of fostering a common national identity.³⁸

State reconstruction is the term preferred by this study because it focuses attention on the actual act of change and development of state and civil infrastructure. This is important because it is this aspect of international involvement that most strikingly affects the right to political independence, on the basis that it involves the actual exercise of the competencies reserved for an independently effective domestic government. It is not possible to provide an exact answer to the minimum level of change and development that would touch upon the right of political independence. Rather, this study takes the approach that significant alteration in relation to the reserved areas, noted above, would have an impact and so is worthy of interest. Examples would be the restructuring of the economic system, devolution of governmental power, a change in the state religion, or a change of constitution.³⁹ Moreover, rather than suggesting that the international actors are faced with a blank canvas, the term state reconstruction acknowledges that there is some state and civil infrastructure already in existence. It will, though, become apparent that international efforts at capacity building are an essential accompaniment to state reconstruction. Indeed, this is to the extent that in some instances, particularly in relation to the assistance model of state reconstruction, it is hard to distinguish between the impact that capacity building has on political independence and the actual change and development of state and civil infrastructure which it facilitates.

Terms such as failed or collapsed state are useful hortatory devices, and consequently have been used frequently in recent times to indicate those states that are completely lacking effective governance.⁴⁰ A number of reasons explain why, despite the situations dealt with here potentially falling within the ambit of the failed or collapsed state classification, this study does not adopt the terminology.

The terms indicate political concepts for which there is no fixed meaning.⁴¹ In the literature one can identify a spectrum from, at one end, absolutely no residue of

³⁸ See N. Quenivet, 'Lessons Learned and Applied? Post-Conflict Reconstruction: Nation- or State-Building in Iraq', in H. Fischer and N. Quenivet (eds.), *Post-Conflict Reconstruction: Nation-and/or State-Building* (2005) 9.

³⁹ See, for a general overview of institutional reconstruction, the contributions by J. Chopra, M. Ottaway, and M. Duffield in the special issue on State Failure, Collapse, and Reconstruction of (2002) 33 *Development and Change*.

⁴⁰ See, e.g., the 2002 US National Security Strategy, Section 1.

⁴¹ In relation to this point see B. Dunlap, 'State Failure and the Use of Force In The Age of Global Terror', (2004) 27 *Boston College International and Comparative Law Review* 453 at 458; T. D.

government, as was classically the case with Somalia, to a state that is plagued by weak institutions but retains control of at least the vast majority of its territory, a category which a large number of states could come under.⁴² Use of the terms therefore invites confusion as to the subject matter, which even a concise definition for the purposes of a particular study might not be able to guard against, especially as even a concise definition still needs to be applied. Such concern is obviously more pertinent for lawyers, interested in identifying legal consequences from a particular factual situation, than political scientists, interested in explanation of the occurrence of the factual situation.⁴³ Thus the use of the terms is most prominently found in political literature.⁴⁴

Another reason for lawyers to avoid the terminology is that the prefix of failed or collapsed can readily be taken to imply that the state is not just empirically distinct from other states, through the lack of an effective government, but also legally distinct.⁴⁵ The major point, in this respect, is the risk of encouragement of a belief that such states do not benefit from the prohibition on intervention in the internal affairs of the state,⁴⁶ which is far from the case. Furthermore, a decision to adopt the terms is not to be taken without good reason because of the potential for reading its use as attributing blame to the state in question and its people.⁴⁷ The main reason

Grant, 'Partition of Failed States: Impediments and Impulses' (2004) 11 *Indiana Journal of Global Studies* 51 at 51.

⁴² Some works address the whole spectrum, see, e.g., S. Chesterman, M. Ignatieff, and R. Thakur (eds.), *Making States Work – State Failure and the Crisis of Governance* (2005) 16.

⁴³ Lawyers using similar definitions to one another, but applying them with varying levels of stringency leading some to have longer lists than others of examples of failed or collapsed states, include: R. Koskenmaeki, 'Legal Implications Resulting from State Failure in Light of the Case of Somali', (2004) 73 *Nordic Journal of International Law* 1; D. Thuer, 'The Failed State and International Law', (1999) 836 *International Review of the Red Cross* 731; G. Kreijen, *State Failure. Sovereignty and Effectiveness* (2004) 96; R. Geiss, 'Failed States – Legal Aspects and Security Implications', (2005) 47 *GYIL* 457; N. L. Wallace-Bruce, 'Of Collapsed, Dysfunctional and Disoriented States: Challenges to International Law', (2000) 47 *Netherlands International Law Review* 57.

⁴⁴ See, e.g., J. G. Gros, 'Towards a Taxonomy of Failed States in the New World Order: Decaying Somalia, Liberia, Rwanda and Haiti' (1996) 17 *Third World Quarterly* 455; G. B. Helman and S. R. Ratner, 'Saving Failed States', (1992-93) *Foreign Policy* 3; I. W. Zartman (ed.), *Collapsed States: The Disintegration and Restoration of Legitimate Authority* (1995); A. Yannis, 'State Collapse and its Implications for Peace-Building and Reconstruction' (2002) 33 *Development and Change* 817.

⁴⁵ See, e.g., J. Yoo, Deputy Assistant Attorney General, US Department of Justice, Office of Legal Counsel, Memorandum re: Application of Treaties and Laws to al Qaeda and Taliban Detainees (9 January 2002) 2, reprinted in K. J. Greenberg and J. L. Dratel (eds.), *Torture Papers: The Road to Abu Gharib* (2005) 38.

⁴⁶ See D. D. Caron, 'If Afghanistan has Failed then Afghanistan is Dead: 'Failed States' and the Inappropriate Substitution of Legal Conclusion for Political Description', in K. J. Greenberg (ed.), *The Torture Debate in America* (2005) 214.

⁴⁷ R. Wilde, 'Representing International Territorial Administration: A Critique of Some Approaches' (2004) 15 *EJIL* 71; R. Wilde, 'The Skewed Responsibility Narrative of the "Failed States" Concept.'

why this study does not adopt the terminology is that it conveys a complete lack of effectiveness in the territory. While this may have been the case at some point in some of the examples addressed, this study is interested in the process of reconstruction, which in order to have any real impact requires that there must be at least a degree of control of the territory. To reiterate, the important point about the examples addressed by this study is that rather than there not being any effectiveness at all, which failed or collapsed state would suggest, is that the process of reconstruction is not administered by an independently effective domestic government.

How to encapsulate the present condition of international affairs is another point that requires clarification. An extensive body of political and, increasingly, legal literature has concerned itself with how to describe the relationships between states.⁴⁸ It seems a number of scholars use international society and international community interchangeably as a reference to the international political space.⁴⁹ The extensive study of these concepts by scholars means that they carry distinct implications. International society identifies states as possessed of a smattering of shared values but values that are neutral in terms of internal constitution.⁵⁰ International community indicates a much greater unity of values likely to rest upon a shared ideology for internal constitution.⁵¹ On these readings of the concepts, to suggest that the international political space is a universal international community would not be accurate, there is, though, clearly greater unity amongst certain groupings of states, such as those in Europe that have formed the European Union. States in Europe have thus been able to create their own extensive European legal regime. EU states, and the EU itself with separate international legal personality,⁵² are still, however, part of international society and must abide by the international law that has been created by international society in pursuit of its shared values.⁵³

(2003) 9 *ILSA JICL* 425; see also B. Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (2003) 142.

⁴⁸ See, for an overview, B. Simma and A. L. Paulus, 'The 'International Community': Facing the Challenge of Globalization', (1998) 9 *EJIL* 266.

⁴⁹ N. Tsagourias, 'The Will of the International Community as a Normative Source of International Law', in I. Dekker and W. Werner (eds.), *Governance and International Legal Theory* (2004) 97 at 101

⁵⁰ Tsagourias, *op. cit.*, fn. 49, pp. 101-102

⁵¹ Tsagourias, *op. cit.*, fn. 49, pp. 102-103.

⁵² See J. Klabbbers, 'Presumptive Personality: The European Union in International Law', in M. Koskenniemi, (ed.), *International Legal Aspects of the EU* (1998) 243.

⁵³ See N. D. White, 'The Ties that Bind: the EU, the UN and International Law', (2006) 37 *NYIL* 57.

The practice of state reconstruction has not been restricted to one particular region where one might be more inclined to identify the relationship between states as an international community. Rather, it has involved states from all parts of the globe, with a host of different world views, at least acquiescing to a practice that does not appear to sit well with the right to political independence. Accordingly, while this study refers to international society, it is well aware that international institutions and international actors often use the term international community as a call to arms for members of international society;⁵⁴ and that international society has more common problems than ever before which require a common response, meaning such calls to arms are increasingly prominent. What, though, are the values of international society and how does this relate to law?

I have already stressed how new law might have been developed to address the values of self-determination of peoples and international peace put at risk by a potential neglect of political independence in the practice of state reconstruction. These I identified as core values of the UN system.⁵⁵ The UN system, a political system with a legal order,⁵⁶ is a creation of international society intended to address common problems. The values enshrined in its constitutive document, the UN Charter, can be seen as the impetus for the law which provides the structural backbone of the inter-sovereign relations paradigm of the international system. This is in the form of those fundamental principles of international law set out in the Friendly Relations Declaration of 1970.⁵⁷ I use the UN system, more specifically the

⁵⁴ See, e.g., 'Secretary General Examines 'Meaning of International Community'', Address to DPI/NGO Conference, Press Release SG/SM/7133, PI/1176, 15 Sept. 1999; *United States Diplomatic and Consular Staff in Tehran*, ICJ Reports 1980, p. 3, at p. 43.

⁵⁵ See UN Charter, Article 1(2); N.D. White, *The United Nations System: Toward International Justice* (2002) 47-72.

⁵⁶ A political system has been identified as existing 'wherever and whenever a group of actors are caught up in nexus of relationships, both conflictual and co-operative, generated by common problems and need to deal with them', R. W. Gregg and M. Barkun (eds), *The United Nations System and its Functions* (1968) at 5-6; that it has a legal order is confirmed by the presence of 'structures and processes for creating and applying law by and within the United Nations system of organisations.' O. Schachter, 'United Nations Legal Order: An Overview', in O. Schachter and C. C. Joyner (eds.), *United Nations Legal Order* (1996) at 1.

⁵⁷ A number of commentators refer to fundamental principles of international law, or similar concepts, often with nuances in the understanding of the concept, see, e.g., A. Cassese, *International Law* (2005) 46; K. Zemanek, 'Basic Principles of UN Charter Law', in R. J. Macdonald and D. M. Johnston (eds.), *Towards World Constitutionalism* (2005) 402; R. A. Kolodkin, 'Fragmentation of International Law? A View from Russia', in R. J. Macdonald and D. M. Johnston (eds.), *Towards World Constitutionalism* (2005) 223; B. Fassbender, 'The Meaning of International Constitutional Law', in R. J. Macdonald and D. M. Johnston (eds.), *Towards World Constitutionalism* (2005) 837 at 843; R. Mullerson, *Ordering Anarchy: International Law in International Society* (2000) 155-164; C. Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century'.

UN Charter, as my reference for the values that have bound the international society of states together in recent times. I operate on the premise that the values of self-determination and international peace still apply. And that therefore international acceptance of the examples of state reconstruction addressed hinges on satisfaction of these values. Of course, should there be international acceptance despite a failure to address these values, this would suggest that these values are no longer of such importance to international society. But, on the other hand, if they remain important, this might, if existing law is inadequate to address the values, have been the impetus for the creation of new law more appropriate for the circumstances of state reconstruction.

Moreover, while I am interested in the political values that underpin the development of law, this does not mean I subscribe to the policy-orientated approach to international law, which counsels that 'trends of past [judicial] decisions are to be interpreted with policy objectives in mind.'⁵⁸ Rather, I see the political values that underpin the existence of the law as a basis for evaluating the present legal position in relation to a given practice, and thinking about how the law might be developed in line with the established sources of international law to better address these values.⁵⁹ My approach to the creation of international law can be described as modern positivism.⁶⁰

Modern positivism understands the law as a set of principles and rules that emanate from a set of accepted sources, distinct from politics or morality.⁶¹ For international law it is those sources listed in Article 38 of the Statute of the International Court of Justice (ICJ).⁶² Positivists identify law by its prescriptive

Receuil des Cours (1999) 23 at 28; G. Schwarzenberger, *A Manual of International Law* (1976) 33-36; I use the concept of fundamental principle to indicate the systemic significance of a legal principle. I see a legal principle as consisting of obligations, albeit in more abstract terms than a legal rule, and also consisting of a basic or general principle, the meta-legal value which reflects the essence of the legal principle and which serves as a directive for construing, applying, and developing new law, and in this sense providing a degree of cohesion in international law.

⁵⁸ R. Higgins, *Problems and Process: International Law and How We Use It* (1994) 6; cf. J. G. Merrills, 'Images and Models in the World Court: The Individual Opinions in the North Sea Continental Shelf Cases', (1978) 41 *Modern Law Review* 638.

⁵⁹ For a similar approach, see White, *op. cit.*, fn. 55, p. 47.

⁶⁰ B. Simma and A. Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: a Positivist View', (1999) 93 *AJIL* 302 at 303 and 306-307.

⁶¹ C. Warbrick, 'English International Legal Theory', in C. Warbrick, and T. Carty (eds.), *Theory and International Law: An Introduction* (1991) 49 at 61.

⁶² ICJ Statute, Article 38 (1) lists: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations:

nature.⁶³ This, for modern positivism at least, does not necessarily mean that there will be only one correct answer to a legal problem. Rather, modern positivism accepts that there is a need for identification, interpretation, and application of the law and thus there can be different answers in different contexts.⁶⁴ This flexibility enables the law to keep pace with developments in society,⁶⁵ such as the trend for international involvement in the reconstruction of states without independently effective domestic governments. This is because rules, which might at first instance appear in complete opposition to a particular practice, can overtime become modified by, for example, interpretation.

To answer the primary research questions noted above, the study is structured into three parts. Part 1 (Chapters 1 – 3) identifies the nature and significance of the problem that the practice of state reconstruction represents from an international legal perspective and develops a conceptual framework for analysis of practice in subsequent parts. Part 2 (Chapters 4 – 5) addresses state reconstruction by foreign governance. Part 3 (Chapters 6 – 7) focuses on what this study conceptualises as the assistance model of state reconstruction. The study is completed with some pages of conclusions.

To illustrate the importance of states having a government with effective control of the territory, and the significance of the right to political independence for the UN system, Chapter 1 addresses why it is that sovereign states continue to exist without anything like an effective government for a prolonged period of time. This identifies the paradox of state reconstruction in international law: international law requires effective governments for its efficacy but in order for international actors to restore effectiveness requires neglect of the right to political independence. Paradoxically, the importance of the preservation of the right to political independence for the UN system explains why an ineffective state remains a sovereign state protected by the principle of non-intervention.

Chapter 2 deals with the relevance of established international law as a means of reconciling international involvement in state reconstruction without an independently effective domestic government with the right to political

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

⁶³ Simma and Paulus, *op. cit.*, fn. 60, p. 307.

⁶⁴ See Warbrick, *loc. cit.*, fn. 61.

⁶⁵ See Simma and Paulus, *op. cit.*, fn. 60, p. 316.

independence. Both a chapter VII resolution and state consent are potential sources of legality for the international involvement. However, neither appears capable of reconciling such involvement with the right to political independence. The applicability of international human rights law offers some reassurance that minimum standards of human welfare will be realised, but this does not address the neglect of political independence that even international involvement based on the consent of an ineffective government and a chapter VII resolution would represent.

Due to the obvious occurrence of state reconstruction without an independently effective domestic government and the international acceptance of such practice, Chapter 3 turns to how the existing international legal justifications might have been built upon to project accommodation of the values of self-determination and international peace which are put at stake by a neglect of political independence. The chapter shows how the pursuit of democracy as a central aim of reconstruction would serve to accommodate both values at stake, and thus would be expected to be an essential part of the explanation for international acceptance of the practice of state reconstruction without an independently effective domestic government. It also sketches out how there is conceptual potential in international law for a legal concept of democracy as a human right linked to the right to self-determination to provide the basis for regulation and accountability of those that arrive in power by democratic means. This would provide better assurances in relation to the value of self-determination, than the promise of the pursuit of democracy as a loose political concept that could easily be set aside. Subsequent parts of the study analyse the practice of reconstruction without an independently effective domestic government in light of the concepts and theories that Part 1 deals with.

Chapter 4 analyses the law of occupation as a framework for state reconstruction by foreign governance in relation to the right to political independence of the target state and its people. While the principle of conservation of the law of occupation reduces the impact on the right to political independence, its application in the other paradigms for state reconstruction would be at the expense of the level of reconstruction that has been commonplace. This is borne out by an examination of practice of reconstruction under the law of occupation that has been in breach of its provisions. A number of factors, including the pursuit of democratic reconstruction, help explain international acceptance of practice of reconstruction in breach of the law of occupation.

Chapter 5 deals with the phenomenon of reconstruction by ITA, in which governance is conducted directly by international actors whose position is legally justified on state consent alone or additionally a chapter VII resolution. Analysis focuses on how the different examples relate to the right to political independence. Although the consensual aspects and domestic involvement in the governance structures project consistency with the right to political independence, these are not sufficient to reconcile the activity with the right to political independence. Again, a number of factors, including the pursuit of democratic reconstruction, help explain the international acceptance of a practice which does not sit well with the right to political independence.

The first chapter of Part 3, Chapter 6, is interested in how the assistance model relates to the right to political independence. With reconstruction administered by a domestic government this model ostensibly appears unremarkable in respect of the right to political independence. When one considers that the government is only in a position to administer the process through the long-term involvement and support of international actors, it becomes clear that this practice also sits uneasily with the right to political independence. As in the other paradigms, democracy again appears as a key factor in the international acceptance of the process.

In light of time and space, Chapter 7 chooses to focus attention on the role of democracy in the reconstruction of Sierra Leone as an indicator of democracy's likely role in the other examples of the assistance model as well as in future efforts; at the time of writing, there are signs that the assistance model will be pursued in Somalia. Both the government of Sierra Leone and the international actors are seen to acknowledge how important democracy is for international acceptance of the process. Still, there is no evidence to suggest that democracy is treated as a legal concept, and certainly not one linked to the right to self-determination that could provide a basis for meaningful regulation and accountability of the democratic excuse in the interests of the value of self-determination.

The 'democratic excuse' is a key finding of the study. It is a reference to democracy as essential for securing international acceptance of a practice that is inconsistent with the right to political independence. Essentially, this is because it promises genuine rule by the people and thereby portrays accommodation of the values of self-determination and international peace that the neglect of political independence puts at risk. The failure to adopt a legal concept of democracy, that

could serve as a basis for regulation and accountability and thereby offer some guarantee in relation to the promise of genuine rule by the people. is argued to undermine the extent to which these values are in fact accommodated. This, consequently, brings into question how sustainable the present approach to state reconstruction is in relation to international order.

The thesis pursued, in broad terms, is that, when there is not an independently effective domestic government, there is a need for greater international legal regulation and accountability of those – both the domestic and international actors – that exercise the right to political independence for the purpose of state reconstruction. This is to compensate for the lack of assurance that the process reflects the wishes of the state and its people, an aspect that threatens the core UN system values of self-determination and international peace.

By indicating the failings of the current approach in relation to the right to political independence and how it could be improved in relation to the attendant values of self-determination and international peace, this study should make international actors realise there is a ‘need’ for new law to ensure that the practice of state reconstruction remains consistent with the legal structures and political values which underpin the inter-sovereign relations paradigm of the international system.

Part One

CONCEPTS AND THEORIES OF STATE RECONSTRUCTION IN INTERNATIONAL LAW

Chapter 1

The Paradox of State Reconstruction

1. Introduction

Traditional international legal doctrine makes the creation of a state in international law dependent on the existence of an effective and independent domestic government.¹ Yet a number of the examples focused on in this study represent sovereign states without such a government. The legal framework which permits such an occurrence is intrinsic to the significant dilemma faced by international actors interested in becoming involved in the reconstruction of an ineffective state. To reveal the nature and source of this dilemma, this chapter asks, why is effective control the central criterion for statehood in international law? And, what is international law's role in the existence of sovereign states without anything like effective government? These questions are answered through a survey of the historical evolution of the state and its associated rights and duties in international law.

It is argued that effective governments are essential in a decentralised legal system if the regime for law enforcement, state responsibility, is to have any meaning. Without an effective government, calls for compliance with the law, or sanctions to coerce compliance, because there is no government with the means to respond, cannot even hope to result in fulfilment of legal obligations. This is argued to explain why international actors are interested in the restoration of effectiveness in ineffective states through reconstruction. On the other hand, though, it is argued that the right to political independence is of crucial importance for the core UN system values of self-determination of people and international peace, because respect for it ensures that ideologically diverse political communities have their own territorial space in which they are free to self-govern. Indeed, the importance of the right to political independence for the international society of states is contended to be at the core of the explanation for the phenomenon of ineffective states. It is therefore argued that large-scale international involvement to reconstruct the state would

¹ See, e.g., D. J. Harris, *Cases and Material on International Law* (2004) 100-101.

contradict the reason why the state remains a state, as well as the core UN system values which underpin its continued existence: the paradox of state reconstruction. This paradoxical situation is contended to have arisen because international law develops on an *ad hoc* 'needs' basis rather than in line with some predefined blueprint for international order. And how it has been addressed in contemporary examples of state reconstruction without an independently effective domestic government is contended to be of importance in achieving international order.

The chapter begins by charting how effective control of territory came to be the core criterion for statehood in international law. This historical backdrop helps to explain why effective control is so significant for the efficacy of international law. The doctrine of statehood in international law is then addressed to indicate the legal mechanisms that make it possible for ineffective states to continue as states despite lacking the core criterion for the creation of a state. Moving on, attention is turned to the rights and duties that are attached to statehood in international law by way of state sovereignty. How these rights and duties have developed over time, in line with the changing priorities of international society, is crucial for explaining how international law has encouraged the existence of ineffective states. The next section addresses the evolution and current standing of the right of all peoples to self-determination in international legal doctrine. This helps to explain the role of self-determination in relation to ineffective states, particularly why such states continue to exist for a prolonged period of time as sovereign states. Subsequent sections set out the paradox that these developments have created for international actors interested in state reconstruction, and assess the adequacy of scholarly theories of state reconstruction in terms of resolving the paradox of state reconstruction. A final section draws together the key points from the chapter and indicates their significance in relation to the study as a whole.

2. The History of Effective Control in International Law

An appreciation of why it is so essential for international law that its basic units, states, have effective control of their territory and population is readily gleaned from considering the historical roots of the modern state based international system.

Evidence of international law – in the sense of a consistency in the pattern of relations and rudimentary regulation between independent political communities –

has been identified in three particular periods of antiquity, in the form of standardised practice in the areas of diplomatic relations, treaty making, and the conduct of war.² The first period from around 1450 B.C to 1250 B.C between the Empires, spanned large territorial areas of Egypt, Babylonia and the Hittite Empire.³ The second from around 600 B.C when the Greek City states developed law for the regulation of relations between themselves and the outside world, in particular the Persian and Carthaginian Empires.⁴ The third is from around the fourth century B.C. between the Roman, Carthaginian, Macedonian Empires and the Kingdoms of the Seleucids and Ptolemics.⁵ These periods each lasted for around two hundred and fifty years.⁶ Commonly those that entered into agreement were those with control of territory, which indicated an ability to fulfil obligations and made it worthwhile for the other party to enter into agreement.

The battle of Pydna and the breakup of Macedonia, around 168 B.C, marked the beginning of the rise of the all powerful Roman Empire.⁷ Once the Roman Empire began to grow in strength, there was far less need for it to accept reciprocal obligations. Instead, because its strength and sophistication meant that territory could readily be brought under its control, it was able to impose law without the need to seek agreement.⁸ This demonstrates the need for a perceived mutual interest if a law-making agreement is to be concluded, and that the likelihood of such a perception is severely diminished when there is great disparity in the strength of potential parties to an agreement.

The Roman Empire, at its height, exerted control over West and Eastern Europe and Northern Africa, with military strength an essential component for securing obedience to Roman Law. The Empire collapsed in the west around 476 A.D;⁹ debate about the reason for its collapse still persists. It seems that a series of factors related to over-stretching of resources, in order to try and maintain the condition of

² S. Neff, 'A Short History of International Law', M. D. Evans (ed.), *International Law* (2006) 29 at 31.

³ See W. G. Grewe (translated by M. Byers), *The Epochs of International Law* (2000) 10; A. Nussbaum, *A Concise History of the Law of Nations* (1954, revised edition) 1-2.

⁴ Grewe, *op. cit.*, fn. 3, p. 10.

⁵ Grewe, *op. cit.*, fn. 3, p. 10 citing Preiser, *Macht und Norm in der Völkerrechtsgeschichte* (1978) 34 and 73.

⁶ See Grewe, *loc. cit.*, fn. 3.

⁷ Grewe, *op. cit.*, fn. 3, p. 10.

⁸ Nussbaum, *op. cit.*, fn. 3, p. 11; the Republic of Rome preceded the Roman Empire, the Republic was subsequent to the Monarchy.

⁹ See A. Goldsworthy, *The Complete Roman Army* (2003)

perpetual conflict, led to the decline and eventual fall of the Empire.¹⁰ With the end of military strength, there was no question of a continued adherence to Roman law. The lack of control and consequent inability to enforce the law signalled the end of the validity of the Roman legal order for the people in the various political communities subjugated to Roman Empire. This indicates how effective control of territory has a Janus face quality in relation to legal authority. It provides both the basis for law to be made between like political communities and for the validity of law promulgated within a political community.

Whereas the Roman Empire relied on military strength to maintain effective control of the territory, it was religion that would eventually fill the authority vacuum left by its collapse. The obedience which religion engendered, as the significance of the Church evolved, led the way out of the dark ages.¹¹ The Church promulgated a comprehensive supranational law known as canon law.¹² Canon law was first concerned with matters spiritual, moral and ecclesiastical, but it went far beyond this in its regulation of the life of individuals and political communities.¹³ In 800 A.D, Pope Leo III restored the Roman Empire in the West. Endorsed with the Christian spirit, the Empire came to be known as the Holy Roman Empire, which encompassed most of Central Europe.¹⁴ It did not include England, France, Castile, Aragon, Portugal, Sweden and Venice.¹⁵ The Pope and the Emperor are said to have 'represented supreme and ultimate authority in the western world'.¹⁶ And an aspect of this authority was that the Emperor, and at times the Pope, accorded the status of king upon other rulers even outside the empire; outsiders who were also subject to the paramount papal authority and with it canon law.¹⁷ In of these developments, it might be thought that legal authority has been detached from effective control of territory; that legal authority comes from a source greater than man. But it is also possible to see religion as a means of galvanising obedience and, from this, effective control of territory; and from this control, legal authority. This latter view is

¹⁰ See B. Ward-Perkins, *The Fall of Rome and the End of Civilization* (2005)

¹¹ Nussbaum, *op. cit.*, fn. 3, p.17.

¹² This was eventually codified in the late middle ages, Nussbaum, *op. cit.*, fn. 3, p. 17

¹³ Nussbaum, *op. cit.*, fn. 3, p. 17

¹⁴ Nussbaum, *op. cit.*, fn. 3, p. 21 notes that this included Burgundy, the Netherlands, northern Italy, and at times Denmark, Hungary and Poland, citing Bryce, *The Holy Roman Empire* (1923, 4th edn.) 182.

¹⁵ Nussbaum, *op. cit.*, fn. 3, p. 23.

¹⁶ Nussbaum, *op. cit.*, fn. 3, p. 21.

¹⁷ Nussbaum, *op. cit.*, fn. 3, p. 19.

supported by subsequent developments in relation to the demise of the legal authority of the Church.

Although the reach of the Emperor and the Popes was great, most particularly with regards those entities within the Empire, at no point did the 'Emperor and Pope exercise a power which extinguished the political autonomy and independence of a particular power.'¹⁸ Thus particularly those entities outside of the Empire were free to enter into agreements with one another. Truces, peace treaties, and alliances were the typical reasons for agreements.¹⁹ This reality of territorial based power, even if not formally the omnipotent controller of a territory and also limited by the prominence of feudalism,²⁰ allowed for a degree of international relations and, with this, law: the foundations of the modern state system.²¹

The history of the modern state system is not susceptible to a precise start date. It is a reference to the emergence of powerful territorial, national or imperial, states, with mature internal structures, much more clearly distinguished from one another than had been the case; a move away from the feudal system, which so hindered exercise of authority over an extended area of territory.²²

Of crucial importance in the lead to the modern state system was the change in thought from uncritical religious obedience, to the development in humanistic, individual, and scientific thought characterised by the Renaissance period of the 1400s.²³ Amidst such conditions, the supremacy of the city-states of Italy withered and the papacy became a secular power,²⁴ no longer the ultimate definer of society's values and standards. The reformation and the religious wars of Europe, which encapsulated the period following the Renaissance, paved the way for the domination of the nation state; the direct rule of those who controlled a state, rather

¹⁸ Grewe, *op. cit.*, fn. 3, p. 12.

¹⁹ Nussbaum, *op. cit.*, fn. 3, p. 23

²⁰ Feudalism refers to a situation in which the mightier, landowners, entered into contracts with the weaker, the worker, whereby the weaker worked obediently to the mightier in return for protection. Hence Lords who ruled over land entered directly into agreements with the Church often missing out any government that might also claim authority over the territory, see L. Wildhaber, 'Sovereignty and International Law', in R. J. Macdonald and D. M. Johnston (eds.), *The Structure and Process of International Law* (1983) 453.

²¹ Grewe, *op. cit.*, fn. 3, p. 10.

²² See Grewe, *op. cit.*, fn. 3, p. 13; Wildhaber, *loc. cit.*, fn. 20.

²³ See W. Friedmann, *The Changing Structure of International Law* (1964) 114-16.

²⁴ M. Shaw, *International Law* (2003) 20.

than the rule of religion. 'The pursuit of political power and supremacy became overt.'²⁵

Practical reasons for the move towards the territorial state model stem from its focus on a centralised authority to speak for the peoples of a territory, and include escape from the dictates of the Holy Roman Empire;²⁶ the advantages in terms of social, economic, and military efficiency;²⁷ and the greater assurance that undertakings would be complied with. And while this move can be seen as encompassing a realisation that effective control of territory entailed legal authority within that territory, it would, in fact, take sometime for the explicit link between legal authority and effective control to be made.²⁸

The historical centrality of effective control of territory for both domestic and international legal authority supports the idea that law follows power.²⁹ Kelsen dealt with this idea, more in the interests of the importance of law rather than as a check on power, by identifying effective control of territory as a domestic legal order's *grundnorm*, which explains why a domestic legal order is valid. The domestic *grundnorm* is itself a part of international law,³⁰ which rests on another *grundorm* – something like 'the states ought to behave as they have customarily behaved.'³¹ But if one thinks about how states are able to behave at the international level, because they have effective control of their territory, one sees that effective control of territory is just as important for the efficacy of international law as for domestic law. In terms of enforcing the law in a centralised legal system, such as domestic legal orders, the direct control of the territory permits the executive to function as a check on the use of power by those within its political community. In a decentralised legal system, such as the international legal system, a lack of adherence to the law is approached through the regime of state responsibility, which ultimately seeks to restore the status quo through coercion.³² The fact of effective control over their territory means that there is an entity to be coerced to take action, for example, to police borders in order to stop a flow of migrants into another state. Similarly, it is

²⁵ Shaw, *op. cit.*, fn. 24, p. 20

²⁶ C. Warbrick, 'States and Recognition', in M. Evans (ed.), *International Law* (2006) 221.

²⁷ H. Spruyt, *The Sovereign State and Its Competitors: An Analysis of Systems Change* (1994) 178.

²⁸ This point is returned to in the section on state sovereignty below.

²⁹ See G. Kreijen, *State Failure, Sovereignty and Effectiveness* (2004) 42-52.

³⁰ H. Kelsen, *Principles of International Law* (1967, 2nd ed.) 562-563; see also H. Kelsen, *General Theory of Law and State* (1961) 115-122.

³¹ Kelsen, (1967, 2nd ed), *op. cit.*, fn. 30, p. 564.

³² See, e.g., I. Brownlie, *State Responsibility* (1983).

through a government with effective control of territory that states, as abstract legal institutions, are able to act and thereby create international law.³³

Huber was particularly aware that it is logical for a decentralised international legal system to stay close to factual reality. His approach to international law, developed from studying the history of why states treated international law as binding, was based on the sociological foundations of the law, found in the power of states and the pursuit of co-existence by states. It was most famously expressed in his judgement in the *Island of Palmas* case.³⁴ As arbitrator in the dispute between the US and the Netherlands, Huber reasoned that the effective occupation of the island by the Netherlands created a superior claim to the title than any the US might have had. This was on the basis that in a decentralised legal system territorial sovereignty could not be reduced to an abstract right, there needed to be concrete manifestations if the law was to retain relevance.³⁵ If the US had been granted title, without effective control of the territory, it would not have been able to fulfil the obligations that come with the title. Seen in this light, the further international law moves from factual reality the less efficacious it will become. Likewise, a decrease in the effective control of states will affect the efficacy of international law, as it will reduce states' ability to fulfil obligations and be coerced where they do not. Consequently, considerations of effectiveness have a significant role in the doctrine of international law and, as is now turned to, it makes sense for effective control of territory to be the core criterion for statehood in international law.³⁶

3. Statehood in International Law and the Possibility of Ineffective States

Around the sixteenth century, as noted above, a variety of factors led to the territorial state becoming the dominant form of political organisation. In particular, states preferred to deal with others whose material existence reflected their own, because it brought stronger guarantees that undertakings would be fulfilled. Accordingly, states only acknowledged like entities as states with which they would deal with on the

³³ See, on the international law-making process, I. Brownlie, *Principles of Public International Law* (2003) 3-29.

³⁴ On Huber's approach to international law see 'Symposium: The European Tradition in International Law – Max Huber', (2007) 18 *EJIL* 69-199.

³⁵ *Island Palmas* case (Netherlands v. US) (1928) 2 RIAA 829, reprinted in (1928) 22 *AJIL* 867.

³⁶ On the prominence of the principle of effectiveness in international law, see E. Milano, *Unlawful Territorial Situations in International Law* (2006) 22-23.

same terms as one another.³⁷ States developed rules (international law) to regulate their relationships,³⁸ including rules on what made an entity a state as a matter of law.³⁹

As Crawford has indicated '[a] state is not a fact in the sense that a chair is a fact; it is a fact in the sense in which it may be said a treaty is fact: that is, a legal status attaching to a certain state of affairs by virtue of certain rules'.⁴⁰ It is important to address the legal mechanisms that surround the creation and extinction of states in international law, as they are the source of some contention and how one understands these issues ultimately impacts on how one views the nature and significance of the paradox of state reconstruction.

A. The Criteria for Statehood in International Law

The 1933 Montevideo Convention provides the classic citation on the criteria for statehood.⁴¹ This posits four attributes that an entity must possess to become a state: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States.⁴²

The first two are regarded as self-evident; in combination, Brownlie suggests they are intended to connote a stable community.⁴³ There is no minimum in respect of population or territory size.⁴⁴ Nor is there a need for fixed boundaries.⁴⁵

The requirement of government is commonly treated as meaning effective government by commentators and states alike.⁴⁶ Effective control is about the preservation of public order amongst the population on the territory.⁴⁷ How this came to be the lynchpin of statehood and with it international law has been set out above.⁴⁸ As Warbrick notes, 'it is a relative concept, 'effective enough', not an

³⁷ Warbrick, *op. cit.*, fn. 26, p. 222.

³⁸ On the reason for such rules, see J. L. Brierly, *The Law of Nations* (1962) 56.

³⁹ Warbrick, *op. cit.*, fn. 26, p. 222.

⁴⁰ J. Crawford, *The Creation of States in International Law* (2006) 5.

⁴¹ See T. D. Grant, 'Defining Statehood: The Montevideo Convention and Its Discontents', (1999) 37 *Colum. J. Transnat'l L* 403.

⁴² 1933 Montivideo Convention on Rights and Duties of States, Article 1.

⁴³ I. Brownlie, *Principles of Public International Law* (1998) 71.

⁴⁴ Crawford, *op. cit.*, fn. 40, p. 52 and p. 46.

⁴⁵ Brownlie, *op. cit.*, fn. 43, p. 71.

⁴⁶ See, e.g., Crawford *op. cit.*, fn. 40, pp. 55-61.

⁴⁷ Warbrick, *op. cit.*, fn. 26, p. 233; Crawford, *op. cit.*, fn. 40, p. 59

⁴⁸ See also Grant, *op. cit.*, fn. 41, p. 418.

absolute one',⁴⁹ a more stringent interpretation thus produces an international society that consists of basic units which have the potential to fulfil obligations to each other. This logic also helps to explain why the established rule on identification of the agent of the state is based on deference to the government with effective control.⁵⁰

In relation to the other criterion, as Crawford notes, '[c]apacity to enter into relations with states at the international level is no longer, if it ever was, an exclusive state prerogative'.⁵¹ Moreover, the legal capacity to enter into relations is a consequence of statehood, not a criterion.⁵² It is better, then, to see this criterion as a conflation of the requirement of government – states as abstract legal institutions need an agent to enter into relations – and, what Crawford posits as a fifth requirement, independence – not being subject to the authority of another state that could stop it entering into relations.⁵³ Independence is about being able to actually maintain a separate existence through an effective government while, at the same time, not being formally subject to the authority of another state.⁵⁴ This latter aspect was indicated by the Commission of Jurists in the context of the Aaland Islands' claim to statehood. The Jurists stressed that Finland did not become a state 'until a stable political organisation had been created, and until the public authorities had become strong enough to assert themselves throughout the territory of the State without the assistance of foreign troops.'⁵⁵

The criteria of statehood, as set out, are essentially a reflection of the process that was described above with the emergence of the nation state: with effective control of the territory the fledgling states could maintain a separate existence and breakaway from the authority of the Holy Roman Empire. The criteria denote factual or descriptive sovereignty.⁵⁶ Adherence to these criteria, by prioritising effective control of territory, supports an efficacious international legal system in which states

⁴⁹ Warbrick, *op. cit.*, fn. 26, p. 233.

⁵⁰ See K. Marek, *Identity and Continuity of States in Public International Law* (1968) 59; B. R. Roth, *Governmental Illegitimacy in International Law* (1999) 137-42.

⁵¹ Crawford, *op. cit.*, fn. 40, p. 61.

⁵² Crawford, *op. cit.*, fn. 40, p. 61.

⁵³ Crawford, *op. cit.*, fn. 40, p. 62.

⁵⁴ See *Austro-German Customs Union Case*, Advisory Opinion, PCIJ Series. A/B No.41, 1931, p. 37 at pp. 57-58.

⁵⁵ The Report of the International Committee of Jurists, (1920) *LNOJ Special Supp. No.3*, p.3.

⁵⁶ See S. I. Benn, 'The Uses of Sovereignty', (1995) 3 *Political Studies* 122.

have the potential to fulfil legal obligations.⁵⁷ The complicated relationship between the criteria for statehood and international recognition now turned to, is one reason why reality does not match this ideal.

B. The Role of International Recognition in the Creation of States

There has been much debate about the role of recognition by third states in the creation of states.⁵⁸ The declaratory theory posits statehood as result of the achievement of the material attributes listed above.⁵⁹ The constitutive theory suggests that statehood is only attained through recognition.⁶⁰ Over time, practice has changed.⁶¹

Today, it is increasingly common for the role of recognition in statehood to be presented as a composite of declaration and constitution.⁶² This view arises because the material attributes are a matter of evaluation. Thus when clearly achieved recognition appears more declaratory of status, and when less obviously achieved recognition appears to serve more of a constitutive role. An example of the latter was the impact of international recognition policy in relation to the break-up of the FRY in the early 1990s, where the governments of the newly recognised states struggled to exert effective control over their territory.⁶³ However, while international recognition can clearly be crucial to the process of state creation in circumstances where material attributes are in doubt, it is as evidence of status rather than the source.⁶⁴ For example, in relation to the new states emerging from the break-up of the FRY, pretence of adherence to the criteria of effectiveness was retained.⁶⁵

⁵⁷ See G. Sorensen, 'An Analysis of Contemporary Statehood: Consequences for Conflict and Cooperation', (1997) 23 *Review of International Studies* 253 at 258.

⁵⁸ See I. Brownlie, 'Recognition in Theory and Practice' (1982) 53 *BYIL* 197.

⁵⁹ See, e.g., Brierly, *op. cit.*, fn. 38 p. 139.

⁶⁰ See, e.g., H. Lauterpacht, *Recognition in International Law* (1947) 38-66.

⁶¹ Warbrick, *op. cit.*, fn. 26, p. 224.

⁶² See, e.g., N. Tsagourias, 'International Community, States and Political Cloning', in C. Warbrick and S. Tierney, *Towards an International Legal Community: The Sovereignty of States and the Sovereignty of International Law* (2006) 211 at 222-225; Kreijen, *op. cit.*, fn. 29, p. 17.

⁶³ See R. Caplan, *Europe and the Recognition of New States in Yugoslavia* (2005).

⁶⁴ Crawford, *op. cit.*, fn. 40, p. 27; cf. B. R. Roth, 'The Entity That Dare Not Speak Its Name: Unrecognized Taiwan as a Right-Bearer in the International Legal Order', Wayne State University Law School Legal Studies Research Paper Series No. 07-27 (2007) available at <SSRN: <http://ssrn.com/abstract=1015120>>.

⁶⁵ See, e.g., C. Warbrick, 'Recognition of States: Recent European Practice' in M. Evans (ed.), *Aspects of Statehood and Institutionalism in Contemporary Europe* (1997) 9 at 22, note 58; see also C. Warbrick, 'Recognition of States', 41 *ICLQ* (1992) 473 at 476.

Moreover, the Badinter Commission, set up to advise the European Peace Conference, stressed, on a number of occasions, that recognition was purely declaratory of status.⁶⁶ Furthermore, in relation to decolonisation, where new states were created without what might be regarded as a sufficient degree of effective governance, commentators ponder whether the identification of the colonised people as a self-determination unit lowered the degree of effectiveness required, rather than accord an explicitly constitutive role to recognition.⁶⁷

Undoubtedly, the degree of international recognition, of an entity claiming statehood, affects the likelihood of a judicial institution agreeing with the claim. However, such recognition remains evidence of status, and this point is important in relation to the debate on extinction of ineffective states, turned to below. If it were otherwise, the implication would be that denial of recognition allowed a non-recognising state to act as if the non-recognised state were not a state, with obvious implications for the stability of international relations.⁶⁸

In respect of overwhelming support for the status of an entity as a state, there has been debate about the role that membership of the UN can play. Dugard has argued, in light of the criteria for membership,⁶⁹ that membership of the UN is an act of collective recognition, which means that there is no longer the prospect of a state for some and not for others.⁷⁰ There are problems with this view. Warbrick notes how 'the vote for a member on an application (for or against and subject to any explanation given by the voting state) is evidence of the voting state's position vis-à-vis the applicant's status but it is not, unless the voting state says so, an act of recognition.'⁷¹ Moreover, as Shaw notes, '[p]ractice shows that many of the member states or their governments are not recognised by other member states.'⁷² Membership of the UN, in light of the requirement of Article 4 UN Charter, which

⁶⁶ See, e.g., Opinion 1, Badinter Commission, 29 November 1991, (1993) 92 *ILR* 165.

⁶⁷ Crawford, *op. cit.*, fn. 40, p. 59 and p. 128; see also D. Raic, *Statehood and the Law of Self-Determination* (2002) 364 and 408.

⁶⁸ Crawford, *op. cit.*, fn. 40, pp. 27-28.

⁶⁹ Article 4, UN Charter: '1. Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations. 2. The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.'

⁷⁰ J. Dugard, *Recognition and the United Nations* (1987) 78-80; see also C. Hillgruber, 'The Admission of New States to the International Community', (1998) 9 *EJIL* 491.

⁷¹ Warbrick, *op. cit.*, fn. 26, p. 261.

⁷² Shaw, *op. cit.*, fn. 24, p. 386. Shaw cites the Arab non-recognition of the Israeli state; see also Q. Wright, 'Some Thoughts about Recognition', (1950) 40 *AJIL* 548.

indicates that membership is open to ‘all other peace-loving states’, is clearly, though, ‘powerful evidence of statehood’.⁷³ And certainly its importance as evidence of statehood helps explain why fledgling states instantly look for membership of the UN.

For present purposes, the important point is that international recognition, and membership of certain international organisations, can provide very strong, indeed, overwhelmingly evidence in favour of an entity’s status as a state. This point is sustained even in the face of a clear lack of anything like a government with effective control of the territory. Indeed, international opinion can also operate in the other direction, helping to preclude the creation of a state where an entity appears to satisfy the criteria, the plight of Somaliland is a classic example.⁷⁴ In the context of decolonisation, the right of self-determination might explain a significant lessening in the level of effectiveness required for statehood.⁷⁵ In general, however, the power of international recognition as evidence of status makes it difficult to see the creation of states with little in the way of effective government, outside of the decolonisation setting, as stemming, ultimately, from anything other than the subjective opinion of international actors. Undoubtedly, then, existing states have a significant responsibility for the efficacy of the international legal system in relation to the creation of new states. How does this relate to the continued existence of states lacking a government with effective control of territory?

C. The Extinction of Ineffective States?

The prolonged existence of states without an effective domestic government is a relatively recent phenomenon. A temporary loss of effectiveness as a result of civil war is, though, hardly new. It is sufficient to note, at this stage, that a key development in international law that has encouraged the fact of ineffective states is that previously, if a state was without an effective government for a prolonged period, it was likely that the territory would be annexed by another state that was able to govern it effectively.⁷⁶ Since 1945, however, the territory of an ineffective

⁷³ Shaw, *op. cit.*, fn. 24, p. 387; see also *Admission of a State to the United Nations (Charter Art. 4)*, Advisory Opinion, ICJ Reports 1948, p. 57.

⁷⁴ See Crawford, *op. cit.*, fn. 40, pp. 412 – 415; D. J. Harris, *op. cit.*, fn. 1, p. 155.

⁷⁵ A point returned to below.

⁷⁶ See Lauterpacht, *op. cit.*, fn. 60, p. 351.

state is no longer up for grabs through conquest and annexation. The next two sections outline the developments in the legal doctrines of state sovereignty and self-determination that are central to the fact of ineffective states and their prolonged continuation as legal institutions. First, it is necessary to deal with how the phenomenon of the continuation of ineffective states is possible when a core criterion of statehood is missing. Essentially, this requires a view to be formed on whether it is simply international recognition that sustains a state's status. If it were, then an obvious response to ineffective states, that are problematic for international society, would be to remove recognition of statehood.

In light of the earlier lack of the prolonged existence of states without effective governments, it is common for those who have dealt with the issue of extinction of ineffective states, to be thinking about the absence of such a government for only a temporary period, and, from this focus, to identify a presumption of continuity for statehood. Marek explains this presumption as driven by the practical concern for international stability through the maintenance of international rights and obligations of the state.⁷⁷ Such writers have, however, tended to foresee that more than a temporary period of anarchy would lead to the extinction of the state.⁷⁸ In contrast, Crawford, very recently, but still citing Marek, posits that 'extinction is not effected by more-or-less prolonged anarchy within the state' and cites the lack of doubt that has been 'expressed as to the continuity of states such as Somalia, the Democratic Republic of Congo and Solomon Islands, notwithstanding total or nearly total collapse of internal public order.'⁷⁹ Crawford does not address the justification for the presumption of continuity. And Raic's suggestion that the 'presumption is based on the assumption of a lack of finality of the situation',⁸⁰ does not seem an adequate explanation in light of cases such as Somalia, where the situation persisted for years. A notable exception to the lack of sustained legal enquiry into why states such as Somalia persisted as states is the effort of Kreijen. It is necessary to deal in some detail with Kreijen's approach because how this study differs is fundamental to the nature of the paradox of state reconstruction and, consequently, its significance for the UN system.

⁷⁷ Marek, *op. cit.*, fn. 50, p. 24 and p. 548.

⁷⁸ See, e.g., J. L. Brierly, *The Law of Nations* (1955) 137; Marek, *op. cit.*, fn. 50, p. 188.

⁷⁹ Crawford, *op. cit.*, fn. 40, p. 701, also notes 2 and 3.

⁸⁰ Raic, *op. cit.*, fn. 67, p. 71.

Kreijen's thesis is that the occurrence of state failure in sub-Saharan Africa – 'a lack of capacity pure and simple', 'inability *per se* to uphold a minimum level of normative institutional order that statehood requires', 'overall situation of disorder and anarchy that characterizes state failure'⁸¹ – is a consequence of the shift from statehood based on effective control of territory to statehood based on the legal right of all peoples to self-determination. This study accepts this argument but disagrees with some of Kreijen's reasoning about how it is that statehood continues.

Kreijen accepts that Marek's rationale for the presumption of continuity makes sense in relation to a situation where an ineffective government remains in existence, as then there remains a party to be held responsible for the obligations in international law. When a government is completely absent, so that there is no residue of a government left, Kreijen does not accept Marek's logic behind the presumption, because then there is no government to interact with and be held responsible.⁸² Kreijen later qualifies his distinction by indicating that there is no distinction between a total lack of government and a prolonged situation of nominal government as in recent past of 'Sierra Leone, Liberia, [and] the Democratic Republic of the Congo', in terms of having a government to be held responsible.⁸³

Kreijen does not address that, even where all effectiveness is absent, eventually there should be an effective government, which could be held responsible; meaning the presumption of continuity would still help with the security of international obligations. This would, of course, become less reasonable the longer the situation of ineffectiveness continued. Instead, Kreijen turns away from the presumption of continuity, to the theoretical debate on the withdrawal of recognition from existing states which, as with the creation of states, is about the declaratory and constitutive approaches. Lauterpacht, following a constitutive line of reasoning, argued that:

A state may lose its independence or the necessary degree of cohesion as an organised community; a government may cease to wield effective authority; a recognised belligerent may be utterly defeated. In all these cases the basis of recognition disappears and outside states are entitled and bound to take cognisance of that fact.⁸⁴

Chen, following a declaratory line of reasoning, argued that:

⁸¹ Kreijen, *op. cit.*, fn. 29, p. 96.

⁸² Kreijen, *op. cit.*, fn. 29, pp. 335 – 337.

⁸³ Kreijen, *op. cit.*, fn. 29, 361 – 362.

⁸⁴ Lauterpacht, *op. cit.*, fn. 60, pp. 349 – 50.

A state [...] in possession of the essential requirements of statehood [...] exists and continues to exist, independently of recognition or the 'withdrawal' of recognition. The disappearance of any of all of these requirements terminates the existence of the state.⁸⁵

The fact that a state does not become extinct when it is ineffective for a prolonged period of time, casts doubt upon Chen's approach and leads Kreijen to accept a constitutive role for recognition, albeit recognition that has not been withdrawn.⁸⁶

Kreijen's next effort is to find the reason why recognition has not been withdrawn. It is important to stress, however, that there is no reason why continued status would have to be constituted by recognition; there could just be an extension of the presumption of continuity, perhaps on a different basis than that proposed by Marek. In which case, as with the creation of states noted above, international recognition would serve as evidence of the status, but not the source of the status. The way Kreijen constructs his argument suggests that, when criteria for statehood are lacking, other states could withdraw recognition and with it statehood.⁸⁷ However, if status were dependent on recognition, the route would be there for a state to escape its obligations to the target state through simply removing its recognition. As was noted above in relation to the creation of states, this would result in considerable legal uncertainty.

The reason why recognition is not withdrawn in such circumstances is argued by Kreijen to rest on the emergence of 'the right to self-determination, and the entitlement to independence that rests on it'.⁸⁸ More specifically, states continue to recognise the ineffective state in order to preserve the right to self-determination. Kreijen makes tentative indications that the right to self-determination might prohibit the withdrawal of recognition if it is seen as a substitute for empirical deficiencies – as was suggested above in relation to the creation of states in the context of decolonisation. In this way, it would be a more appropriate basis for the presumption of continuity; arguments based on international stability suffer when one considers the difficulties that ineffective states pose in this respect. But Kreijen is not convinced that the right to self-determination should be a legal basis for insisting that states continue to recognise the ineffective state:

⁸⁵ Ti-Chiang Chen, *The International Law of Recognition* (1951) 259.

⁸⁶ Kreijen, *op. cit.*, fn. 29, p. 355.

⁸⁷ Kreijen, *op. cit.*, fn. 29, p. 355.

⁸⁸ Kreijen, *op. cit.*, fn. 29, p. 355.

It would be a vicious absurdity, however, to insist that an entity that in reality constitutes a *bellum omnia contra omnes* should continue to be recognised as a state for the sake of its population enjoying its freedom external interference or for reasons of satisfying the fundamental right of self-determination in international law.⁸⁹

Kreijen appears to lose sight of the fact that there would be no requirement that states continue with recognition, the right of self-determination as a legal basis for the presumption of continuity would be the source of the status as a state, and recognition would be evidence of this status.

In sum, the efficacy of international law is dependent on states having effective governments. The basic criteria for the creation of states thus prioritise an effective government. However, sufficient international recognition, as evidence of statehood, can facilitate the creation of states that are lacking in effective control. When all effective control is lacking a presumption of continuity operates to preserve statehood. The more of such states there are, the more the efficacy of international law will be affected. Why, then, have the strong not simply conquered the weak? As one might expect to be the case in light of the comments above on how the Roman Empire treated those with less power than themselves.

In reference to states that are lacking in effective control, the extreme end being those completely without an effective domestic government, Jackson, a political scientist, uses the term quasi-state.⁹⁰ This helps to indicate the lack of effectiveness on the territory, but risks implications that such states do not have the same sovereign rights and duties as other states.⁹¹ A similar problem is encountered with terms such as failed state, which represent the extreme end of the quasi-state spectrum.⁹² A warning not to be misled by such terms is important because, as is now turned to, the increased occurrence of the fact of ineffective states can be explained through an exploration of the rights and duties of the state and its people found in the doctrine of state sovereignty and the right of a people to self-

⁸⁹ Kreijen, *op. cit.*, fn. 29, p. 365.

⁹⁰ R. H. Jackson, *Quasi-States: Sovereignty, International Relations and the Third World* (1990) 17.

⁹¹ See W. G. Werner and J. H. De. Wilde, 'The Endurance of Sovereignty', (2001) 7 *European Journal of International Relations* 283 at 300.

⁹² See D. D. Caron, 'If Afghanistan has Failed then Afghanistan is Dead: 'Failed States' and the Inappropriate Substitution of Legal Conclusion for Political Description', in K. J. Greenberg (ed.) *The Torture Debate in America* (2005) 214.

determination, and the developments therein that encapsulate the turn away from power towards ethics in international legal doctrine.⁹³

4. State Sovereignty and the Encouragement of the Fact of Ineffective States

The term sovereignty has a number of different meanings.⁹⁴ Its position in international law, as well as political science, is a subject of some contestation.⁹⁵ As a general matter, for international lawyers, there are essentially two approaches to sovereignty.⁹⁶ Sovereignty in a descriptive or empirical sense refers to the factual condition of independent effective control over a territory, and posits sovereignty as pre-law.⁹⁷ The other approach is sovereignty in a legal sense. Here, sovereignty is constituted by international law, which defines the rights, duties and competences attributable to states under international law.⁹⁸ With the latter approach, some would have it that sovereignty has no meaning independent of the specific rules and principles from which it is abstracted.⁹⁹ This, though, ignores the importance of the general ideas of freedom to act, freedom from the acts of others, and legal equality that state sovereignty as a general principle stands for in relation to international law, and from which the specific rules and principles continue to be derived;¹⁰⁰ ideas which have their roots in sovereignty in an empirical sense.¹⁰¹ Through charting the development of state sovereignty in relation to international law, it can be seen how a changing appreciation of the balance in importance, between the ideas state sovereignty stands for, has been central to the development of a legal framework

⁹³ In recent times, international law has turned ever more to ethical considerations over factual realities, positing anterior criterion that facts must comply with to be invested with legal meaning, see M. Koskenniemi, 'The Wonderful Artificiality of States', 1994 *ASIL Proceedings* 22 at 23-24.

⁹⁴ See Benn, *loc. cit.*, fn. 56.

⁹⁵ See, e.g., L. Henkin, 'International Law: Politics, Values and Functions — General Course on Public International Law' (1989) 216 *Recueil des Cours* 9 at 24-5.

⁹⁶ Legal argument operates along a spectrum in relation to these approaches, M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2006) 301.

⁹⁷ See W. G. Werner, 'Self-Determination and Civil War', (2001) 6 *JCSL* 171 at 180.

⁹⁸ See, e.g., H. Kelsen, 'Sovereignty and International Law', (1960) 48 *Georgetown Law Journal* 627.

⁹⁹ See, e.g., G. Schwarzenberger, E. Brown, *Manual of International Law* (1976) 52.

¹⁰⁰ See W. G. Werner, 'State Sovereignty and International Legal Discourse', in I. Dekker and W. G. Werner (eds.), *Governance and International Legal Theory* (2004) 125 at 147-151; W. G. Werner and J. H. de Wilde, *op. cit.*, fn. 91, p. 297.

¹⁰¹ See B. Fassbender, 'Sovereignty and Constitutionalism in International Law' in N. Walker, (ed.), *Sovereignty in Transition* (2003) 115 at 116-120.

which encourages the fact of ineffective states, but does not provide a convincing explanation for the presumption of continuity.

A. The Origins of State Sovereignty

An inquiry into the historical origins of the empirical understanding of sovereignty is an essential pre-requisite for understanding the present place of sovereignty in international law. This is because, while, amidst the raft of developments in international law and persistent transfer of authority to the international level, the original formulation of empirical state sovereignty may no longer be sustainable, ideas derived from it still hold sway in international legal doctrine, and contestation between legal and empirical understandings of sovereignty continues to define legal argument.¹⁰²

Sovereignty was first systematically analysed by the political theorist Bodin in the sixteenth century.¹⁰³ Particularly motivated by the struggle for authority during the civil war in France, Bodin introduced a new way of thinking about the nature of states. Influenced by changes in other states, Bodin believed that strengthening the French monarchy would be the best way to reduce the tensions between rival authorities within France.¹⁰⁴ Bodin defined a state as ‘a multitude of families and the possessions that they have in common ruled by a supreme power and by reason.’¹⁰⁵ Bodin’s conception was based on the observation of political facts, specifically strong personal monarchy, superior to all rivals, unifying once loosely connected states. In this conception, there must be one supreme power – a sovereign – in a state. Bodin did not see the sovereign, although not bound by his own laws, as above the law. Rather, in the natural law tradition, Bodin derived the legal authority of the sovereign from higher law of God and nature, as well as the *leges imperi*, the fundamental laws of the state – the constitution – that the sovereign does not make, which determine in whom the sovereign power is vested and the limits of its exercise.¹⁰⁶

¹⁰² See Koskenniemi, *loc. cit.*, fn. 96.

¹⁰³ J. Bodin, *Les Six Livres de La Republique* (Paris, 1576); see also T.Meron, ‘The Authority to Make Treaties in the Late Middle Ages’, (1995) 89 *AJIL* 1 at 1.

¹⁰⁴ See Brierly, *op. cit.*, fn. 38, p. 8

¹⁰⁵ Brierly, *op. cit.*, fn. 38, p. 8.

¹⁰⁶ Brierly, *op. cit.*, fn. 38, p. 9

As Brierly notes, this idea of legal limits on the supreme power was problematic as there was no authentic text of the fundamental laws of the state so no way of determining whether rules had been transgressed.¹⁰⁷ As governments strengthened, people became accustomed to thinking of the sovereign not as the strongest ruler by law but as the strongest power in the state, regardless of how the power that had been acquired. It was Hobbes who identified that sovereignty had become an absolute concept based on might rather than any ethical connection with God or nature.¹⁰⁸ Thus from being able to operate over a particular territory and the subjects within its boundaries, a sovereign is cast as the ultimate source of law within the legal order of a state.¹⁰⁹

The peace treaty of Westphalia in 1648, which established the end of the thirty years war, is the focal date which marked the confirmation of the change to the modern understanding of the state and the international system, and the domination of the positivist approach in international law.¹¹⁰ The treaty expressly placed religious matters in the realm of domestic matters. This demonstrated the separation of the domestic and international,¹¹¹ and the dominance of factual power over man's own reason. As the main sources of legal authority, '[a]greements and customs emanating from the states were the essence of the law of nations.'¹¹²

Thus sovereignty, in its original empirical form, signified independent effective government from which legal authority flowed. It is from this and the subsequent practice of sovereign states that the fundamental ideas about state sovereignty in international law came to be understood.¹¹³

B. Sovereignty in International Law

In the *Lotus* case, the Permanent Court of International Justice held that:

¹⁰⁷ Brierly, *op. cit.*, fn. 38, p. 11 and p. 12

¹⁰⁸ T. Hobbes, *Leviathan*, R. Tuck (ed.), (1991) ch. Xvii, 121-9; see also N. K. Tsagourias, *Jurisprudence of International Law* (2000) 26.

¹⁰⁹ See S. Tierney, 'The Normative Challenge in Forging an International Community', in C. Warbrick and S. Tierney (eds.), *Towards an International Legal Community? The Sovereignty of States and the Sovereignty of International Law* (2006) 1 at 1.

¹¹⁰ See L. Gross, 'The Peace of Westphalia 1648-1948' (1948) 42 *AJIL* 20; S. Beaulac, 'The Westphalian Legal Orthodoxy – Myth or Reality?', (2000) 2 *Journal of the History of International Law* 148.

¹¹¹ Neff, *op. cit.*, fn. 2, p. 35.

¹¹² Shaw, *op. cit.*, fn. 24, p. 25.

¹¹³ See Fassbender, *op. cit.*, fn. 101, pp. 116-120.

International law governs relations between independent states. The rules of law binding upon states therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of international law and established in order to regulate the relations between those coexisting independent communities or with a view to the achievement of common aims. *Restrictions upon the independence of states cannot therefore be presumed.*¹¹⁴

This stresses the freedom to act that sovereignty entails. Moreover, it reflects the idea of legal equality being a consequence of sovereignty and the inherent indication of a refusal to acknowledge a superior legal order.¹¹⁵ The importance of this later point for international law was reflected in the reference to the principle of ‘sovereign equality of states’ in the UN Charter rather than just the sovereignty of states.

Huber, in the *Island of Palmas* case, noted that ‘[s]overeignty in the relations between states signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other states, the functions of a state.’¹¹⁶ This reflects the idea that sovereignty entails freedom from the action of others.

These ideas – freedom to act, freedom from the acts of others, legal equality – have been given concrete legal meaning in the form of specific legal rules and principles of international law, such as those related to sovereign immunity.¹¹⁷ Due to the obvious tension between the ideas of freedom to act and freedom from action of another state, it is possible for both parties to international disputes to base competing arguments on sovereignty. It is the specific rules and principles which are used to resolve the matter.¹¹⁸ As will be returned to, the balance of the general ideas in the specific rules and principles has changed over time. Up until the outlawing of the use of force, the balance favoured freedom to act, power over law.

Just as the priority of the general ideas which are traced back to the empirical concept of sovereignty are a source of debate in international legal argument, so too contention about the position of sovereignty in relation to international law has come to provide the potential for international lawyers to mount competing arguments both

¹¹⁴ *Case of the SS "Lotus"*, PCIJ Series A. No 10, 1927, at p. 18 (emphasis added).

¹¹⁵ B. Gilson, *The Conceptual System of Sovereign Equality* (1986) 59.

¹¹⁶ *The Palmas Island case*, *op. cit.*, fn. 35, p. 838 (p. 875 in *AJIL*).

¹¹⁷ See the section on sovereign equality in GA Res. 2625 (1970), Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States.

¹¹⁸ See Koskenniemi, *op. cit.*, fn. 96, pp. 240-272

based on sovereignty; either favouring sovereignty in the empirical sense or in an international legal sense.¹¹⁹

In the empirical sense, legal authority, telling us what the law is, follows from the political fact of sovereignty.¹²⁰ Amidst the proliferation of international law, to accommodate the fact that sovereign states are bound by international law, the idea of sovereignty as representing absolute authority over a territory must be discarded.¹²¹ Instead, it is common for sovereignty to be divided along functional lines, this accepts that international law can apply to the territory of a sovereign state. but state sovereignty retains meaning only because states are bound by international law if they consent and it is states that have the ultimate say on the boundaries of legal jurisdictions.¹²²

In an international legal (normative) sense, sovereignty is a product of international law, which confers the right to make international law. In this sense, sovereignty might be seen as nothing more than the rights, duties and competencies that international law has come to recognize as residing in a state, with the continued use of the term seeming superfluous and confusing.¹²³ This, though, neglects the importance of general ideas, derived originally from observation of empirical sovereignty, which sovereignty stands for in relation to international law.¹²⁴ These remain relevant for the interpretation, application and development of the rights of duties residing in the state, whether one sees the legal basis for the developments of these rights and duties rooted in an empirical understanding of sovereignty or as constituted by international law.¹²⁵

In the normal run of things, states retain effective governments and so it is possible for arguments about sovereignty in an empirical sense to be sustained. When there is no effective domestic government the position of empirical sovereignty appears unsustainable.¹²⁶ In such a context, references to sovereignty, if

¹¹⁹ Koskenniemi, *op. cit.*, fn. 96, pp. 224-240.

¹²⁰ See *loc. cit.*, fn. 108.

¹²¹ See D. Kennedy, 'International Law and the Nineteenth Century: History of an Illusion', (1996) 65 *Nordic Journal of International Law* 385 at 396.

¹²² The tendency of states to cede authority to the international level, along with the increasing reach and strength of international law, makes this explanation ever more questionable, see S. Tierney, *op. cit.*, fn. 109, pp. 1-2.

¹²³ See Koskenniemi, *op. cit.*, fn. 96, p. 231, pp. 246-248.

¹²⁴ A point stressed by Werner, *op. cit.*, fn. 100, p. 150

¹²⁵ It is common for international lawyers to start from this point without addressing the debate about legal authority, see e.g., Crawford, *op. cit.*, fn. 40, p. 32.

¹²⁶ See Werner and Wilde, *op. cit.*, fn. 91, p. 300.

it is to have a meaning beyond the specific rights and duties, must indicate claims, and acknowledgement of the legitimacy of the claims, to the general ideas that sovereignty stands for in international law.¹²⁷ To support such claims recourse to the idea of popular sovereignty, that sovereignty resides in the people not the state,¹²⁸ is a useful device, as it separates sovereignty from effective control, which, of course, when it is absent, is problematic for those claiming sovereignty. What are the developments in the specific rights and duties that reside in a sovereign state, which help to explain the fact of ineffective but still sovereign states?

C. Sovereignty and Ineffective States

There is an inevitable tension and consequent balancing between the ideas of freedom to act and freedom from the acts of other. Up until relatively recently, the right to go to war was seen as ‘the most basic of all the rights of the sovereign state’; it was believed to be fundamental to a state’s sovereignty.¹²⁹ Thus in respect of the use of force, the balance in the law derived from sovereignty favoured the freedom to act. A prohibition on intervention co-existed with the right to use force, but its legal significance was clearly undermined by the legality of the use of force.¹³⁰ In this context, should a state show signs of weakness, it was open to be acquired by another state through conquest, which provided a valid title to territory.¹³¹

The destructiveness of wars in the first half of the twentieth century encouraged moves towards the outlawing of the use of force. Attempts to restrict the use of force were made in the covenant of the League of Nations. This was followed by the General Treaty for the Renunciation of War in 1928 and in 1945 by the UN Charter with its Article 2(4) prohibition on the use of force against the territorial sovereignty or political independence of a state.¹³² With this latter development, the prohibition on the use of force, or, rather, the right to be free from such a use of force, was found to be an attribute of state sovereignty.¹³³ In relation to the existence of ineffective

¹²⁷ See Werner and Wilde, *op. cit.*, fn. 91. p. 302

¹²⁸ See, e.g., B. Roth, ‘Popular Sovereignty: The Elusive Norm’, (1997) 91 *ASIL Proceedings* 363.

¹²⁹ F. H. Hinsley, *Sovereignty* (1986) 230.

¹³⁰ See A. Cassese, *International Law* (2001) 98-99; P. Winfield, ‘The History of Intervention in International Law’, (1922 – 1923) 3 *BYIL* 130.

¹³¹ See I. Brownlie, *International Law and the Use of Force by States* (1991) 14-51.

¹³² See Shaw, *op. cit.*, fn. 24, pp. 1016 – 1018; H. McCoubrey and N. D. White, *International Law and Armed Conflict* (1992).

¹³³ See GA Res. 2625 (1970); Werner, *op. cit.*, fn. 100, p. 155.

states, this development represents the growing dominance of the political value of peace prompting moves to challenge the supremacy of power over law. One result was the illegality of title to territory acquired by force.¹³⁴ If a state became weak, it could no longer be acquired by another state. Accordingly, this policy option for dealing with the threat such states posed for the efficacy of international law was removed.

Another consequence of the prohibition on the use of force was the strengthening of the general prohibition on interference, which had obviously suffered while the balance of opinion favoured the use of force as an attribute of sovereignty.¹³⁵ The principle of non-intervention is often presented as a corollary of state sovereignty that exists in its own right to protect those matters reserved by sovereignty.¹³⁶ As Clapham has noted 'the rule that there should be no interference in state sovereignty simply begs the question: what are the rights and duties associated with sovereignty?'¹³⁷ Without doubt, as the International Court of Justice (ICJ) has emphasized, '[o]ne of these [sovereign rights] is the choice of a political, economic, social and cultural system, and the formulation of foreign policy.'¹³⁸ In other words, the target state's right to political independence.

Although the scope of the prohibition on intervention is not susceptible to a precise standard,¹³⁹ and is ever-decreasing, debate tends to be about intervention from a distance, such as political influence over an existing regime.¹⁴⁰ In terms of the extensive debate about the legality of humanitarian intervention to put an immediate stop to immense human suffering, the general verdict is that it remains wrongful,¹⁴¹

¹³⁴ See Shaw, *op. cit.*, fn. 24, p. 423; Kreijen, *op. cit.*, fn. 29, p. 339; for a detailed history, S. Korman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* (1996) 135.

¹³⁵ See Cassese, *op. cit.*, fn. 130, pp. 98-99.

¹³⁶ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Merits, Judgement, ICJ Reports 1986, p. 14 at p. 108, para. 205.

¹³⁷ A. Clapham, 'National Action Challenged: Sovereignty, Immunity and Universal Jurisdiction before the International Court of Justice', in M. Lattimer and P. Sands (eds.), *Justice for Crimes Against Humanity* (2003) 303 at 313.

¹³⁸ *Nicaragua case*, *op. cit.*, fn. 136, para. 205; see also GA Res. 2625 (1970), in respect of sovereign equality, the declaration indicates that '[e]ach state has the right freely to choose and develop its political, social, economic and cultural systems'.

¹³⁹ See Shaw, *op. cit.*, fn. 24, p. 191; G. Abi-Saab, 'Some Thoughts on the Principle of Non-intervention', in K. Wellens (ed.), *International Law: Theory and Practice* (1998) 228 at 228 - 231.

¹⁴⁰ See, e.g., L. F. Damrosch, 'Politics Across Borders: Non-intervention and Non-forcible Influence over Domestic Affairs', (1989) 83 *AJIL* 1.

¹⁴¹ See, e.g., Simon Chesterman, *Just War or Just Peaces? Humanitarian Intervention and International Law* (2001) 86; Antonio Cassese, 'Ex iniuria ius oritur: Are We Moving Toward

but in extreme circumstances may be excusable.¹⁴² Moreover, it is about putting an immediate end to suffering, not restoring effectiveness on the territory. Large-scale international involvement, of the type necessary to restore effectiveness – a military presence, administration, reconstruction of state and civil infrastructure – is prohibited, intervention to restore effective control on the territory has been ruled out in the interest of international peace.¹⁴³

With both the annexation of ineffective territory and interference to restore effectiveness removed as policy options to respond to the loss of effective control in a sovereign state, one can understand why there would be a tendency for the number of ineffective states to increase. Whereas historically states that became weak would be conquered, international law now addresses such use of power and in so doing allows the weak states to possibly progress to ineffective states. Why, though, the presumption of continuity of statehood in international law, when long-term ineffectiveness of a state has an effect on the efficacy of international law and, arguably, threatens international peace?

Jackson explains the existence of states lacking effectiveness through the concepts of negative sovereignty – the freedom from interference – and positive sovereignty – the ability to act – and related ideas of juridical and empirical statehood. Where effectiveness is lacking, statehood is more juridical than empirical, and negative, rather than positive, sovereignty explains the existence of the state.¹⁴⁴ One difficulty with this means of explanation is that it neglects that states lacking effectiveness are still treated as fully sovereign by international society. They do not have an effective government, but they still have the freedom to act;¹⁴⁵ finding an agent to exercise the freedom to act is another matter and one returned to in Chapter 2. More troublesome for present purposes, this approach implies that the presumption of continuity is a corollary of state sovereignty. The state's right to political independence, which the prohibitions on the use of force, intervention, and annexation are designed to protect

International Legitimation of Forcible Humanitarian Countermeasures in the World Community?', (1999) 10 *EJIL* 23 at 25.

¹⁴² See, e.g., Chesterman, *op. cit.*, fn. 141, p. 236; Cassese, *op. cit.*, fn. 141, p. 25; J. Stromseth, D. Wippman and R. Brooks, *Can Might Make Rights? Building the Rule of Law After Military Interventions* (2006) 39.

¹⁴³ Legal justifications that can preclude wrongfulness, such as state consent and a SC chapter VII resolution, are addressed in Chapter 2 of this study.

¹⁴⁴ Jackson, *op. cit.*, fn. 90, p. 27; see also G. Kreijen, 'The Transformation of Sovereignty and African Independence: No Shortcuts to Statehood', in G. Kreijen (ed.), *State, Sovereignty and International Governance*, (2002) 45 at 92.

¹⁴⁵ See Werner and Wilde, *op. cit.*, fn. 91, p. 302.

(negative sovereignty), is earned through a display of effectiveness and is protected in the interests of international peace. Accordingly, the implication, when one uses the concept of negative sovereignty to explain the existence of states lacking effective control, is that the presumption of continuity is also designed to protect the right of the state to political independence in the interest of international peace. However, this misses the point that the state's right to political independence, which the prohibitions are meant to protect in an effort to deter international conflict, is supposed only to exist because of a display of effective control over the territory. There is, then, little reason why the state's right to political independence should be the basis for the presumption of continuity for states that lack effective control over a prolonged period of time. This is supported by the fact that statehood and the negative sovereignty, which counsels against international interference to restore effectiveness, flow from the presumption of continuity. In such a situation, it would make sense for the presumption of continuity to end. The emergence of the legal right of self-determination, as will now be detailed, provides a much more convincing explanation for the presumption of continuity, and is the final and decisive element in sourcing the paradox of state reconstruction.

5. The Right to Self-Determination as the Explanation for the Continued Existence of Ineffective States

The legal right of all peoples to self-determination is subject to almost as much contestation in international law as state sovereignty.¹⁴⁶ It is possible, though, to find general agreement on its core features and acknowledgement that, in light of the values which underpin it and its history as a political principle, it has the dynamism to effect a significant transformation of the status quo in the international system.

Self-determination was included in the UN Charter as a political postulate promoting that all peoples be given the possibility of self-government.¹⁴⁷ This is what this study refers to as the political value of self-determination. Prior to this, as a

¹⁴⁶ See G. Simpson, 'The Diffusion of Sovereignty: Self-Determination in the Post – Colonial Age', (1996) 32 *Stan.JIL* 255 at 257-58; G. H. Fox, 'Self-Determination in the Post-Cold War Era: a New Internal Focus?', (1995) 16 *Mich. J. Int'l L.* 733.

¹⁴⁷ UN Charter, Article 1 (2): '[The purposes of the UN are] To develop friendly relation among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.'; on the debates leading to its inclusion, see A. Cassese, *Self-Determination of Peoples. A Legal Reappraisal* (1995) 37-43.

political principle, it was utilised in a number of different contexts to justify the possibility of self-government based, in theory at least, on the freely expressed will of the people.¹⁴⁸ These two aspects, the possibility of self-government decided through the freely expressed will of the people, can be seen as the ideas that self-determination as a general principle stands for in international law.¹⁴⁹ Through charting the emergence and development of the international legal right of all peoples to self-determination, its role in relation ineffective states can be seen.

A. The Origins of a Right to Self-Determination

An understanding of the origins of the concept of a right to self-determination is necessary to appreciate how it came to be transformed into a legal right, and how it encourages a reorientation in the focus of international law from effective realities to the will of peoples – an impetus for the reorientation of international law from deference to power towards ethics.

Evidence of self-determination being invoked as a political principle to support policy choices can be found around the time of the French Revolution (1789). The French invoked it as a means of justifying the annexation of territory on the basis that the people wanted it to be annexed, with plebiscites used as evidence when the results suited.¹⁵⁰ Subsequently, in the nineteenth century, supporters of the unification of Italy adopted the idea of all nations having a choice about their status.¹⁵¹ At the start of the twentieth century self-determination came to the forefront of international political debate. Lenin identified the right of a people to choose its political status as relevant in support of liberation of colonies and ethnic or national groups within sovereign states, and in the aftermath of conflict for the allocation of territory.¹⁵² Lenin treated the political principle of self-determination as a strategic tool for the socialist cause; an act of self-determination was to lead to federation, and then the integration of nations within socialist structures.¹⁵³ For Lenin, self-determination in sovereign states was about secession. US President Woodrow Wilson was thinking about self-determination at the same time as Lenin.

¹⁴⁸ See below.

¹⁴⁹ See below.

¹⁵⁰ Cassese, *op. cit.*, fn. 147, pp. 11-13.

¹⁵¹ T. Musgrave, *Self-Determination and National Minorities* (1997) 7

¹⁵² See Cassese, *op. cit.*, fn. 147, pp. 14-19.

¹⁵³ See Cassese, *op. cit.*, fn. 147, pp. 14-19.

Wilson's thinking on self-determination stretched over a number of years and encompassed a number of diverse elements. For present purposes it is sufficient to quote Pomerance who identifies in Wilson's conception of self-determination a 'confusion and fusion of several ideas':

'freedom from "alien" sovereignty ("external self-determination"), freedom to select one's own form of government ("internal self-determination"), a form of continuing self-government (democracy), or the principle of one nation-one state'.¹⁵⁴

The historical range of uses and ideas about self-determination indicate that it is a concept of potential relevance for a significant amount of international law. Governmental status, title to territory, state boundaries, internal infrastructure of states, the prohibition on the use of force, the rules on secession, are just some of the aspects of international law that could be affected by the emphasis on what a people want over the factual status quo which self-determination encourages. Thus the idea of self-determination of peoples holds the potential to radically transform the international system. However, the challenge to effective realities that it represents could significantly affect the efficacy of international law, and this is just one reason for resistance from states to its introduction into international law. Nonetheless, the will of a people is a much more ethically sound basis for law than the effectiveness of the controlling apparatus of a territory. Hence, with even just a slither of international support, the introduction of self-determination into international law was always going to be difficult to resist.

World War II prompted negotiations between China, the USSR, the UK and the US on the creation of a world organisation. A draft Charter arising out of talks at Dumbarton Oaks in 1944 had no explicit mention of self-determination. At the insistence of the USSR, by the time of the 1945 United Nations Conference on International Organisation, an amendment that would become part of Article 1(2) of the UN Charter was included: one of the purposes of the United Nations is to 'develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to

¹⁵⁴ M. Pomerance, 'The United States and Self-Determination: Perspectives on the Wilsonian Conception', (1976) 70 *AJIL* 1 at 20; see also Musgrave, *op. cit.*, fn. 151, pp. 22-24.

strengthen universal peace'.¹⁵⁵ The terminology is also repeated in Article 55, which indicates a number of goals that members pledge, through Article 56, to promote with a view 'to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples'.¹⁵⁶

Some have argued that provisions in Chapters XI and Chapters XIII, on Non-Self-Governing Territories and Trusteeship (NSGTs), indicate that these 'people' had not just a politically endorsed moral entitlement but also a legal right to self-determination at the time when the UN Charter was drafted.¹⁵⁷ In Chapter XI, Article 73 provides that member States which administer NSGTs will 'develop self-government, to take due account of the political aspirations of the peoples'. The term 'peoples' here is a reference to the inhabitants of NSGTs. In Chapter XIII, Article 76 indicates that one objective of the International Trusteeship System is to promote the 'progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned'. The peoples are the inhabitants of Trust Territories. One might argue that the political ideal of self-determination of Article 1(2) included these territories;¹⁵⁸ the use of the terminology of self-government associated with the Wilsonian conception of self-determination would support this. But there is nothing to suggest that it was a legal right to self-determination.¹⁵⁹

The debate that preceded the inclusion of self-determination in the Charter supports that it was a political postulate, a suggestion, rather than a legal requirement, that states 'should grant self-government as much as possible to the communities over which they exercise jurisdiction.'¹⁶⁰ Nonetheless, the endorsement of the importance of the value of self-determination for the UN system, which its

¹⁵⁵ See I. Brownlie, 'An Essay in the History of the Principle of Self-Determination', in C. H. Alexandrowicz (ed.), *Croatian Society Papers 1968, Studies in the History of the Law of Nations* (1968) 90 at 98.

¹⁵⁶ UN Charter, Article 55: 'a. higher standards of living, full employment, and conditions of economic and social progress and development; b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.'

¹⁵⁷ See R. Higgins, *Problems and Process: International Law and How We Use It* (1994) 112.

¹⁵⁸ See H. Quane, 'The United Nations and the Evolving Right to Self-Determination', (1998) 47 *ICLQ* 537 at 545.

¹⁵⁹ See Higgins, *op. cit.*, fn. 157, p. 112.

¹⁶⁰ Cassese, *op. cit.*, fn. 147, p. 42 and p. 43; see also Higgins, *op. cit.*, fn. 157, p. 111.

inclusion in the Charter represented, laid the foundation for its emergence as a legal right. The issue now turned to is how far its conceptual potential to transform international law has been realised, and what this has meant for states – which still remain the basic unit of the international legal system.

B. The Emergence of a Right to Self-Determination in International Law

The fact of debate about whether the understanding of Article 1(2) envisaged secession is one reason for desiring greater certainty about what was meant by the term ‘peoples’.¹⁶¹ Perhaps this influenced Kelsen who equated the term ‘peoples’ with ‘states’ on the basis that ‘friendly relations among nations’ must mean states and that peoples do not have rights under international law; hence the clause in Article 1(2) is just another way of referring to sovereign equality.¹⁶² Kelsen was not suggesting that it meant peoples organized as states, but actually that peoples meant states. As sovereign equality was already a legal concept, Kelsen’s argument contradicts the idea of self-determination being a political ambition, but also, by suggesting that peoples are not separable from the state even in political terms, sweeps away the rationale for the inclusion of the clause to promote the idea of equal rights of peoples. The manner in which the right to self-determination has since emerged in international doctrine supports the argument that people were to be viewed as separate from the state,¹⁶³ although there remains no agreement on how far the meaning of people can stretch beyond the colonial context.¹⁶⁴

(i) Self-determination in the colonial context

A legal form for self-determination was first realised in relation to the termination of colonial rule. GA Resolutions 1514 (14 December 1960) and 1541 (15 December 1960) reflected a consensus amongst states that non-self-governing territories should be allowed to freely choose their international status and how to implement the right

¹⁶¹ See Quane, *op. cit.*, fn. 147, pp. 544-547.

¹⁶² H. Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems* (1951) 52-53.

¹⁶³ See also Quane, *op. cit.*, fn. 158, p. 543.

¹⁶⁴ See K. Knop, *Diversity and Self-Determination in International Law* (2002) 18; R. McCorquodale, ‘Self-Determination: A Human Rights Approach’, (1994) *ICLQ* 857; L. Brilmayer, ‘Secession and Self-Determination: A Territorial Interpretation’, (1991) 16 *Yale Journal of International Law* 177;

of self-determination.¹⁶⁵ The emergence of the legal right was confirmed and summarised in the ICJ's Advisory Opinion on *Namibia* of 1971. The Opinion confirmed that, by virtue of the right to self-determination, all non-self governing territories, as per paragraph 2 of GA Resolution 1514, have a right to 'freely determine their political status and freely pursue their economic, social and cultural development'. And that the options for the exercise of this right of self-determination are: (i) sovereign independent state, (ii) associate with an independent state, (iii) integrate into an independent state.¹⁶⁶ In the Advisory Opinion on *Western Sahara* of 1975,¹⁶⁷ the *Frontier Dispute* case of 1986,¹⁶⁸ and *East Timor* case 1995,¹⁶⁹ the Court confirmed the legal nature of the right in relation to decolonisation. In the latter ICJ case, the court noted that it was a right with the character of *erga omnes*, but that this did not override the requirement of consent to jurisdiction.¹⁷⁰ The Court did not expand upon the intended meaning of the term *erga omnes*, which is generally taken to indicate a right opposable to all.¹⁷¹

The emphasis on decolonisation was based squarely on the external dimension of self-determination, escaping from foreign rule, rather than matters of internal organisation in the newly created state.¹⁷² Moreover, in the words of GA Resolution 1514, '[i]nadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence'.¹⁷³ Consequently, a lack of independent effective control of the territory should not have an effect on the creation of an independent state. This, in the context of decolonisation, appears to have reduced the level of effective government required for the creation of a new state in international law; leading to an increase in the number of weak states. Further, the self-determination reason for granting statehood in the colonial context, the importance that all people be given the possibility of self-government, logically

¹⁶⁵ See Cassese, *op. cit.*, fn. 147, p. 71.

¹⁶⁶ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, p. 16, at pp. 31-32, paras. 52-53 [hereinafter *Namibia Opinion*].

¹⁶⁷ *Western Sahara*, Advisory Opinion, ICJ Reports 1975, p. 12, at pp. 31 – 33, paras. 54- 59.

¹⁶⁸ *Frontier Dispute* (Burkina Faso v. Mali), ICJ Reports 1986, p. 554, at p. 566, para. 25.

¹⁶⁹ *East Timor (Portugal v. Australia)*, Judgement, ICJ Reports 1995, p. 90, at p. 103, para. 31.

¹⁷⁰ *East Timor* case, *op. cit.*, fn. 169, para. 29; citing *Case of the Monetary Gold Removed from Rome in 1943 (Preliminary Question)*, Judgement, ICJ Reports 1954, p. 19.

¹⁷¹ *Barcelona Traction, Light and Power Company, Limited*, Judgement, ICJ Reports 1970, p. 3, at p. 32; see also J. Klabbbers, 'The Scope of International Law: Erga Omnes Obligations and the Turn to Morality', in M. Tupamäki (ed.), *Liber Amicorum Bengt Broms* (1999) 149.

¹⁷² Cassese, *op. cit.*, fn. 147, p. 74.

¹⁷³ GA Res. 1514 (1960), Article 3.

counsels against the extinction of statehood even when all effectiveness is lost.¹⁷⁴ The development of the right to self-determination beyond the colonial context has enshrined this logic in legal doctrine.

(ii) A legal right to self-determination beyond the colonial context

The opening for ratification of the two UN-sponsored International Covenants on Human Rights of 1966 – International Covenant on Civil and Political Rights, ICCPR; International Covenant on Economic, Social and Cultural Rights, ICESCR – indicated that there was to be a post-colonial role for the legal right of self-determination.¹⁷⁵ Common Article 1 of the two covenants provides:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

Article 1 does not restrict the right to those under colonial or indeed any form of external rule; consequently, there is debate as to who constitute the peoples. Consensus amongst states and commentators, in relation to self-determination beyond external rule, extends to the whole population of an existing state.¹⁷⁶ Other identifiable groups within a state are treated as exercising their right as part of the whole of the population.¹⁷⁷ This understanding of peoples leads self-determination to mean something different than in the colonial context. Rather than being about a one-off choice of political status of a territory, it is a continuing right related to the

¹⁷⁴ See C. Warbrick, 'States and Recognition in International Law', in M. D. Evans (ed.), *International Law* (2003) 205 at 228.

¹⁷⁵ Both in force 1976.

¹⁷⁶ R. Mullerson, *International Law. Rights and Politics: Developments in Eastern Europe and the CIS* (1994) 90-91; Higgins, *op. cit.*, fn. 157, p. 104.

¹⁷⁷ See Opinion 2, Badinter Commission, 11 January 1992, (1993) 92 *ILR* 167; see, though, the reasoning of the Supreme Court of Canada in *Reference re. Secession of Quebec*, (1998) 11 DLR (4th) 385 (SCC) para. 138.

internal running of the state.¹⁷⁸ Article 1 (para. 1) gives the people of the state the right to ‘freely determine their political status and freely pursue their economic, social and cultural development’. These elements were framed in an abstract form on the basis that any attempt to list the aspects covered would be incomplete.¹⁷⁹ In an existing state it can be read as the right of a people to freely decide on the change and development of state and civil infrastructure, the people’s right to political independence. This provides obvious support for the prohibition on the interference in the internal affairs of the state, which, as noted above, is based on the sovereign right to decide.¹⁸⁰ The exclusion of external actors from change and development of state and civil infrastructure might be seen as a form of external self-determination,¹⁸¹ but the rights themselves are about internal self-determination.

Under the Covenants, by Article 1(2), governments are required to exploit a territory’s natural resources so as to benefit the people. This is difficult to assess apart from in extreme situations when it is clear that the government is using resources to the benefit of a few, or has handed control to another state or organisation without guarantees that the people will be the primary beneficiaries.¹⁸² Article 1(3) can be seen as a duty to grant ‘peoples of dependent territories (non-self-governing and trust territories) the right to freely decide on their territorial status’.¹⁸³

Concurrent with the development of self-determination in the Human Rights Covenants has been the development of the customary legal principle of self-determination. The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States (GA Res. 2625) was adopted by the GA, on the 25th anniversary of the UN Charter, in 1970. It is an elaboration of the rights and duties imposed by the UN Charter. It was adopted without a vote. The general view, confirmed by frequent reference to it by the ICJ, is that the principles it dealt with reflected customary international law.¹⁸⁴ The ‘principle of equal rights and self-determination of peoples’ is treated, in the Declaration, as an element of the rights and duties imposed by the Charter – confirming how the political principle in

¹⁷⁸ Cassese, *op. cit.*, fn. 147, p. 54; see also Knop, *op. cit.*, fn. 164, p. 19, note 57.

¹⁷⁹ See Quane, *op. cit.*, fn. 158, p. 560

¹⁸⁰ See Cassese, *op. cit.*, fn. 158, p. 55; B. Conforti, ‘The Principle of Non-intervention’, in M. Bedjaoui (ed.), *International Law: Achievements and Prospects* (1991) 467.

¹⁸¹ See Cassese, *op. cit.*, fn. 147, p. 55.

¹⁸² Cassese, *op. cit.*, fn. 147, p. 56.

¹⁸³ Cassese, *op. cit.*, fn. 147, p. 57.

¹⁸⁴ See Quane, *op. cit.*, fn. 158, p. 563.

Article 1 (2) had developed a legal meaning.¹⁸⁵ Moreover, the inclusion of the principle in the Declaration reflects that, as well as being a human right, it is also considered a fundamental principle of international law with important structural significance for the inter-sovereign relations paradigm of the international legal system.¹⁸⁶ As a fundamental principle it operates when there is a need for interpretation, application, or development of new law in relation to a particular practice.¹⁸⁷ Cassese reads the general principle of self-determination or, in his terms, the ‘quintessence of self-determination’, as ‘the need to pay respect to freely expressed will of the people.’¹⁸⁸ In light of its history as a political principle and the debate surrounding its inclusion in the UN Charter, it is reasonable to provide a clearer definition: where matters related to the possibility of self-government arise, there is the need to pay respect to freely expressed will of the people.

The Declaration (GA Res. 2625) acknowledges in its 1st paragraph on self-determination that:

By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every state has the duty to respect this right in accordance with the provisions of the Charter.

This is in line with the formulation found in Article 1 of the Human Rights Covenants, and supports that the population of an existing state have a right to self-determination that prohibits external intervention.

At this stage, in the interests of clarity, it is useful to address the relevance of the doctrine of *jus cogens*. This instructs that, at least, ‘a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.’¹⁸⁹ This is to protect the values and interests that are fundamentally important to all of international society, or in the words of the VCLT, ‘the international community of

¹⁸⁵ See J. F. Gareau, ‘Shouting at the Wall: Self-Determination and the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory’, (2005) 18 *LJIL* 489 at 500.

¹⁸⁶ See R. Mullerson, *Ordering Anarchy in International Society* (2000) 166; also C. Drew, ‘The East Timor Story: International Law on Trial’, (2001) 12 *EJIL* 651 at 663.

¹⁸⁷ See R. A. Kolodkin, ‘Fragmentation of International Law? A View from Russia’, in R. J. Macdonald and D. M. Johnston (eds.), *Towards World Constitutionalism* (2005) 223.

¹⁸⁸ Cassese borrows from the judgement of the *Western Sahara* case to identify the ‘quintessence of self-determination’, as the ‘the need to pay respect to freely expressed will of the people’ Cassese. *op. cit.*, fn. 147, p. 128; *Western Sahara*, *op. cit.*, fn. 167, p. 32, para. 55; see also J. Crawford, ‘Book Review: *Self-Determination of Peoples. A Legal Reappraisal*’, (1996) 90 *AJIL* 331 at 331.

¹⁸⁹ 1969 Vienna Convention on the Law of Treaties (VCLT), Article 53.

states as a whole',¹⁹⁰ and it does so by preventing a state from entering into a contract to achieve what it could not do unilaterally. The role of *jus cogens* beyond the law treaties is a work in progress.¹⁹¹ Which law has the status of *jus cogens* is also a subject of considerable uncertainty.¹⁹² There is no authoritative list. Given the implications that attach to identification of a norm as *jus cogens* one would expect a particularly high standard of state practice and *opino juris* before a rule was accepted as peremptory.¹⁹³ The legal principle of a right of all peoples to self-determination has been identified by an increasing number of scholars as a norm of *jus cogens*.¹⁹⁴ Once one starts thinking of the right to self-determination as applicable beyond the colonial context, however, such an idea becomes much more unlikely. This is due to the potential significance of the status of *jus cogens* and the uncertainty that surrounds the substance of the right of self-determination. Thus this study leaves aside consideration of the impact that identifying the right to self-determination as a norm of *jus cogens* status might have.¹⁹⁵

Similarly, debate about the extent to which the right to self-determination in the Covenants is co-extensive with the right in customary international law, or the related issue of how far the conceptual potential for the internal right to self-determination to develop meaning beyond 'keep out', are not present concerns.¹⁹⁶ It suffices to note that, in light of the political origins of the concept, there is debate about the further legal meaning of a right to self-determination, and that the Human Rights Committee (HRC) has indicated that, where there is uncertainty about the meaning of Article 1, it seeks guidance from the Declaration on Friendly Relations.¹⁹⁷ This latter point suggests that at least by 1996, when the Committee indicated this in its General Comment on Article 1, there was a strong basis for an argument that the customary and covenant law were co-extensive.

C. Self-Determination and Ineffective States

¹⁹⁰ VCLT, Article 53; see also *Prosecutor v. Anto Furundzija*, No. IT-95-17/1-T10, Trial Chamber. Judgment, 10 December 1998, paras. 155-157; J. Frowein, 'Jus Cogens', (1984) 7 *EPIL* 329.

¹⁹¹ For an account of the implications of *jus cogens* throughout international law, see A. Orakhelashvili, *Peremptory Norms in International Law* (2006).

¹⁹² See D. Shelton, 'Normative Hierarchy in International Law', (2006) *AJIL* 291 at 303.

¹⁹³ A point emphasized by reference to acceptance by 'the international community of states as a whole' in VCLT, Article 53.

¹⁹⁴ See, e.g., M. Shaw, *Title to Territory in Africa* (1986) 91; Cassese, *op. cit.*, fn. 147, pp. 171-172.

¹⁹⁵ A point is returned to in the conclusions of this study.

¹⁹⁶ See discussion in Chapter 3.

¹⁹⁷ General Comment 12 (1996), para. 7.

As a legal principle beyond the colonial context, as has been set out, much remains to be resolved about the right to self-determination. There is, however, a core of accepted legal meaning, which grants the population of the state as a whole the right to 'freely determine their political status and freely pursue their economic, social and cultural development'.¹⁹⁸ This overlaps with the sovereign attribute of the 'right to freely to choose and develop its political, social, economic and cultural systems'.¹⁹⁹ Accordingly, the prohibitions on forcible annexation or intervention that protect the political independence of a state also protect the right of the state's people to self-determination. In light of this, in the normal run of things, there is arguably not yet much to distinguish the rights of the state from the rights of the people.

However, unlike the right of the state to political independence, which it acquires through a display of effective control of the territory, the right of the people to political independence exists because of the fact that they are a people. The importance of self-determination as a value in its own right for the UN system has been identified by the HRC: 'its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights'.²⁰⁰ Seen in this light, self-determination provides an ethical justification for statehood and helps legitimise sovereignty.²⁰¹ Accordingly, when effective control of a territory is lost for a prolonged period of time, the right of the people to political independence provides the best explanation for the presumption of continuity of the ineffective state. To extinguish the state simply because of a prolonged lack of effectiveness would, like intervention in the internal affairs of the state,²⁰² be to violate the right of the people to self-determination. Hence the value of self-determination overlaps with international peace in terms of encouragement of the fact of ineffective states. But self-determination is the better

¹⁹⁸ Common Article 1(2) of the Human Rights Covenants.

¹⁹⁹ GA Res. 2625 (1970).

²⁰⁰ General Comment 12 (1996), para. 1.

²⁰¹ See M. Koskenniemi, 'National Self-Determination Today: Problems of Legal Theory and Practice', (1994) 43 *ICLQ* 241 at 245.

²⁰² A number of commentators have identified how the right of the people to self-determination is the best explanation for the continued deference to state sovereignty when it comes to matters of intervention, see, e.g., C. Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century', (1999) 281 *Receuil des Cours* 9 at 165; Mullerson, *op. cit.*, fn. 176, pp. 90 - 91.

explanation for the presumption of continuity. How, then, does one explain the relationship between the right of self-determination and state sovereignty?

The thesis of self-determination as sovereignty in abeyance, as argued by Berman, is that self-determination is a doctrine which operates when, as a consequence of exceptional circumstances, state sovereignty is in question. Such circumstances are found in the context of the *Aland Islands* opinion, where Finland in 1917, recently liberated from Russia, was not yet considered to be a definitively constituted state, and the state of flux meant that a guiding principle other than sovereignty had to be looked for to determine whether the Aland Islands as part of Finland were free to secede and become part of Sweden. The League of Nations appointed two Commissions to investigate different aspects. In one report, the report of the Jurists, it was found that the principle of self-determination may be taken into account during a period of transition when an entity is trying to become established as a state; meaning that the people of the Islands should have a voice, if a not a right to secede, in the search for a compromise solution.²⁰³ The other Commission, the Committee of Rapporteurs, found Finland to be a continuation of the autonomous State of Finland, hence a definitively constituted state for which the question of the Aland Islands was a matter of domestic jurisdiction.²⁰⁴

As Werner has noted, the abeyance thesis also works well in relation to the exceptional circumstance of colonial domination. It 'nicely captures the role and function of self-determination: the right of self-determination was used to suspend the normal functioning of international law in order to create new sovereign states for the colonized people.'²⁰⁵ However, in other exceptional circumstances, such as civil war, sovereignty is not lost. Rather state sovereignty and self-determination of peoples can be, and have been, called upon interchangeably to explain the prohibition on non-intervention.²⁰⁶ If one were to apply the thesis of sovereignty in abeyance to situations of a prolonged lack of effectiveness then it would not be an issue of sovereignty, only self-determination of people. In practice, however, there is no suggestion of ineffective states becoming only self-determination units, they remain sovereign states.

²⁰³ Report of the International Committee of Jurists, *op. cit.*, fn. 55, pp. 5 – 6.

²⁰⁴ Report of the Committee of Rapporteurs, 16 April 1921: LN Council Doc. B7/21/68/106 [VII], 22-

3.

²⁰⁵ Werner, *op. cit.*, fn. 97, p. 190.

²⁰⁶ Werner, *op. cit.*, fn. 97, p. 190.

Another means of indicating the relationship between state sovereignty and self-determination is through the concept of popular sovereignty. Noted above, this identifies sovereignty not with the state but with the people of the state.²⁰⁷ It has long been used as a rhetorical device to legitimise governmental authority as something granted by the people, rather than obtained through a display or threat of force.²⁰⁸ Certainly one might feel that it is more accurate for certain forms of government to identify themselves as the embodiment of the will of the people than others. However, it is just as easy for a military dictatorship as it is for a democracy to include reference to the will of the people as the basis for governmental authority in the state's constitution.²⁰⁹ The concept is so easily exploited because the means for identification of the will of the people remains a contested one in international law.²¹⁰ This means that potential interventionists might seek to employ it as a justification for intervention, identifying the intervention as in the interests of the will of the people and thereby not restrained by the principle of non-intervention.²¹¹ At the same time, incumbent governments might use their purported embodiment of the will of the people as a means of galvanising international support to resist an unwanted external intervention.

The emergence of the legal right to self-determination gives the concept of popular sovereignty some legal bite. However, as things stand, one can only be confident that it stretches so far as to reinforce the right of the political community of a state to be free from external interference. This means that invoking popular sovereignty as a basis for intervention can be seen as disingenuous, given that as far as established international legal doctrine is concerned popular sovereignty signifies 'keep out'.

By identifying state sovereignty as the vehicle for the exercise of the right to self-determination, whether terming it popular sovereignty or not, this legitimises sovereignty.²¹² It also introduces a framework to transform the nature of the international legal doctrine associated with statehood. This is because, if one accepts the right to self-determination as the basis of state sovereignty, developments in the

²⁰⁷ See, e.g., M. W. Reisman, 'Sovereignty and Human Rights in Contemporary International Law' (1990) 84 *AJIL* 866 at 867.

²⁰⁸ See Roth, *op. cit.*, fn. 128, p. 370.

²⁰⁹ See Roth, *op. cit.*, fn. 50, p. 38.

²¹⁰ Roth, *op. cit.*, fn. 128, p. 370.

²¹¹ See Reisman, *loc. cit.*, fn. 207.

²¹² Koskenniemi, *op. cit.*, fn. 201, p. 245.

former do not clash with state sovereignty because they are part of it. Thus it would be hard to resist argument that any agreement on further meaning for self-determination as a legal right would take priority over any pre-existing inconsistent law. If, for example, it were agreed that the right to self-determination required a government be of a certain form, to enter into agreements with a government without credentials based on such a form would be a violation of the right to self-determination, and would be expected, in light of the significance of the right to self-determination, to make any inconsistent rules of international law ineffectual. In light of such implications, the difficulty in gaining agreement amongst states on the meaning of the right to self-determination is understandable. This is further aggravated by the fact that states are not always consistent in their application of the right to self-determination.²¹³ It is, though, important to keep this understanding of the relationship between the right to self-determination and state sovereignty in mind, as it is returned to in Chapter 3 as a potential means of responding to the paradox of state reconstruction; which it is hoped has become apparent.

6. The Paradox of State Reconstruction: Nature and Significance

The paradox of state reconstruction has arisen because of the way that international law develops on a 'needs' basis rather than in a holistic manner. Initially, states felt that there was a need to provide legal protection for their rights to political independence in the interests of international peace. To not prohibit the use of force, interference in the internal affairs of a state, and annexation through an illegal use of force, could have been good in some respects for the efficacy of international law. It would have continued with the tradition of law following power and ensured effective states. But the legality of the use of force encouraged power to be used in a manner that could spark war and lead to immense human suffering. The consequent change in the law, however, means that weak states are able to persist and in some cases become ineffective with little prospect of being conquered.

²¹³ See, e.g., the acknowledgement by the UK that: 'self-determination is a concept which can be convenient for certain Governments on some occasions and inconvenient when it runs counter to their untrammelled exercise of arbitrary power. This is not, however, a reason to set it aside; on the contrary, such situations require that the principle be asserted with greater conviction.' Statement by UK Permanent Representative to UN (Sir John Thomson) to the Special Committee of 24. 2 Sept. 1983 A/AC.109/PV.1238, UKMIL (1983) 54 *BYIL* 405.

With a growing awareness of the importance of all peoples having the possibility of self-government in a world committed to human rights, a need to acknowledge and seek to implement the right of all peoples to self-determination arose. The implications attached to this concept have made it difficult to reach agreement on its legal meaning beyond the colonial context. It is, though, agreed that all peoples, in the sense of a population of a state as whole, possess a right to political independence. In the normal run of things, there is little to distinguish this right from the state's right to political independence. Thus it serves to cement in international legal doctrine the importance for the UN system, amidst an ideologically plural international society, that political communities have a territorial space in which they are free to self-determine,²¹⁴ in the sense of a freedom to decide on the change and development of state and civil infrastructure without external interference. However, unlike the right of the state to political independence, the right of the people has not been granted because of a display of effective control. Instead, the right is granted because of the existence of the people as a people. So not only does the right to self-determination interchangeably underpin the legal protection afforded the state's right to political independence, but it also provides a more ethically and logically convincing explanation for the prolonged continuation of ineffective states than the right of the state alone to political independence. This, though, creates a significant paradox.

The continued existence of states without effective government leads to human suffering,²¹⁵ and has been identified as a source of security threats for international society.²¹⁶ The response of international law to such breaches of international legal obligations is the state responsibility regime. This, however, relies on the existence of a government that can be coerced into compliance. Accordingly, in the interests of human well-being, international security, and the efficacy of international law, other states are interested in restoring effectiveness through a military presence and reconstruction of the state and civil infrastructure; activity which, leaving any potential legal justifications until Chapter 2, contradicts the right to political independence of the target state and its people.

²¹⁴ See B. R. Roth, 'The Enduring Significance of State Sovereignty', (2004) 56 *Florida Law Review* 1017; even Reisman concedes the importance of this point for international order, M. W. Reisman, *Why Regime Change Is (Almost Always) a Bad Idea*, (2004) 98 *AJIL* 516 at 516-17.

²¹⁵ G. Kreijen, *op. cit.*, fn. 29, p. 87.

²¹⁶ UN High-level Panel on Threats, Challenges, and Change, *A More Secure World: Our Shared Responsibility*, UN Doc. A/59/565 (2004), p. 25.

7. Retention of Sovereignty and International State Reconstruction?

A number of commentators have speculated about how to engage with ineffective states to restore effectiveness on the territory in light of the retention of sovereignty by these states, which counsels against such activity. By addressing some of these ideas it is further seen how the restoration of effectiveness, through large-scale international involvement in the reconstruction process, appears irreconcilable with the right to political independence of the target state and its people.

Helman and Ratner were among the first to suggest means of addressing a lack of effectiveness through international involvement. When the state was weak but not absolutely lacking in effectiveness they suggested that the government delegate some authority to the UN, which could assist with governance for a period of time. For instances of a complete lack of effectiveness Helman and Ratner suggested the resurrection of the UN trusteeship system.²¹⁷

The Trusteeship System replaced the League of Nations Mandates System, which regulated the administration of the colonial possessions of enemy states following the end of World War 1.²¹⁸ The trusteeship system potentially applied to all colonies and dependencies but mainly affected the former League Mandates.²¹⁹ Under it, territories were administered by a foreign power, until such time as they could fulfil their destiny, which was independence.²²⁰ A UN Trusteeship Council monitored events: '[t]he Councils basic responsibilities were to consider reports from the administering power, to accept petitions from inhabitants, and to provide for periodic visits.'²²¹ Article 77 UN Charter describes to whom the trusteeship system shall apply.²²² Article 78 crucially limits its use: '[t]he trusteeship system shall not apply

²¹⁷ G. B. Helman and S. R. Ratner, 'Saving Failed States', (1992-3) 89 *Foreign Policy* 3 at 13.

²¹⁸ See S. Chesterman, *You the People: The United Nations, Transitional Administration, and State Building* (2004) 38.

²¹⁹ Chesterman, *op. cit.*, fn. 218, p. 38.

²²⁰ See, M. J. Matheson, 'United Nations Governance of Post-Conflict Societies', (2001) 95 *AJIL* 76 at 76.

²²¹ Chesterman, *op. cit.*, fn. 218, p. 39.

²²² UN Charter, Article 77: '1. The trusteeship system shall apply to such territories in the following categories as may be place there under by means of trusteeship agreements: (a) territories now held under mandate; (b) territories which may be detached from enemy States as a result of the Second World War; (c) territories voluntarily placed under the system by states responsible for their administration.'

to territories which have become Members of the United Nations, relationship among which shall be based on respect for the principle of sovereign equality’.

Helman and Ratner thus propose amending the Charter so that willing states can choose trusteeship as an option.²²³ Trusteeship as envisioned under the Charter arguably removes so much of the attributes of sovereignty that it could spell extinction of statehood.²²⁴ Moreover, even if such amendment of the Charter were possible, who would agree on behalf of the state and its people to such a radical circumvention of the right to decide? Essentially, what this suggestion boils down to in relation to the paradox, in light of the magnitude of authority that is transferred to the trustee, without a specific time limit or mechanism for it to end, is finding some government with the legal capacity to represent the state and its people so that it can sign the certificate extinguishing the existence of the ineffective state.

Kreijen also identifies trusteeship as the best approach for restoring effectiveness in states suffering from an absolute lack of it. Rather than search for consent, Kreijen reasoned that as it is unreasonable to expect consent to be obtained from a state without an effective domestic government, the only way a trusteeship could be established would be to extinguish statehood and with it ‘the sovereign prerogatives that imply its consent’, or, more specifically, the right to decide.²²⁵ For Kreijen this would be possible by removing recognition from the ineffective state. As noted above, this supposes that recognition is the source of statehood, when in fact it is better explained by the right to self-determination which once accepted cannot simply be removed at the whim of other states. This point is supported by Gordon who, far from advocating trusteeship, writing in response to Helman and Ratner, reasons that even if a government could be found and was so inclined to consent to trusteeship, the legal principle of self-determination might render it illegal to introduce trusteeship unless the choice could be seen as emanating directly from the people.²²⁶ In contrast to Helman and Ratner, then, Kreijen implicitly suggests getting the international actors to impose the extinction of the ineffective state.

An alternative approach to the extinction of the ineffective state is the reinterpretation of its sovereignty. Schermers has suggested that while ineffective

²²³ Helman and Ratner, *op. cit.*, fn. 217, p. 6.

²²⁴ See R. Gordon, ‘Some Legal Problems with Trusteeship’, (1995) 28 *Cornell International Law Journal* 301 at 345-346; also see discussion in Chapter 2 of this study.

²²⁵ Kreijen, *op. cit.*, fn. 29, p. 377.

²²⁶ Gordon, *op. cit.*, fn. 224, p. 323; see also R. Gordon, ‘Saving Failed States: Sometimes a Neocolonialist Notion’, (1997) 12 *American University Journal of International Law and Policy* 904.

states have no apparent sovereignty, rather than being lost completely, it has been passed to the UN (World Community).²²⁷ This suggestion seems to transfer the right to decide on change and development, when there is a lack of effectiveness, while retaining the shell of statehood so the right to decide can be transferred back when there is effectiveness.

A similar consequence appears to stem from the re-characterisation of sovereignty as responsibility by the Canadian commissioned International Commission on Intervention and State Sovereignty (ICISS).²²⁸ ICISS argues that sovereignty should be re-characterised, with control as the basis of sovereignty replaced by responsibility. This was supported by the idea that states are accepted into the UN as ‘responsible members of the community of nations’ and the strengthening of human rights norms and the concept of human security that make a state responsible to its people.²²⁹ Such reasoning leads to the responsibility to protect, which is cast as an emerging guiding principle, and supports intervention to prevent human catastrophe through a duty to react, alongside duties to prevent and rebuild following intervention.²³⁰ In relation to the proposed duty of international actors to rebuild, there is no mention of the rights of the state and the people to decide. Interestingly, the Report does refer to the right to self-determination, but briefly, as a basis for a refashioning of sovereignty as responsibility – that permits, in certain circumstances, international involvement – rather than as limiting the involvement in the interests of the people’s right to political independence.²³¹

Krasner is slightly more aware of the right to decide, he proposes:

shared sovereignty, arrangements under which individuals chosen by international organisations, powerful States, or ad hoc entities would share authority with nationals over some aspects of domestic sovereignty would be a useful addition to the policy repertoire. Ideally, shared sovereignty would be legitimated by a contract between national authorities and an external agent.²³²

²²⁷ H. Schermers, ‘Different Aspects of Sovereignty’, in G. Kreijen, (ed.), *State, Sovereignty and International Governance*, (2002) 185 at 191.

²²⁸ The Responsibility to Protect, Report of the International Commission on Intervention and State Sovereignty (ICISS), December 2001, available at: <<http://www.iciss.ca/report2-en.asp#sovereignty>>.

²²⁹ ICISS, *op. cit.*, fn. 228, p.13.

²³⁰ ICISS, *op. cit.*, fn. 228, p. 17.

²³¹ *Ibid.*

²³² See, S. D. Krasner, ‘Sharing Sovereignty: New Institutions for Collapsed and Failing States’, (2004) 29 *International Security* 85 at 88; see similar suggestions made by R. O. Keohane, ‘Political Authority after Intervention: Gradiations of Sovereignty’, in J. L. Holzgrefe and R. O. Keohane, (eds.), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (2003) 234.

Krasner makes an attempt to accommodate the right to decide: '[b]ased on contracts they would not involve a direct assault on sovereignty norms'.²³³ But in the absence of an independent effective government such contracts could hardly be seen as giving any meaningful protection to the right to decide, not least because how would the local actors dependent on the international actors resist the desires of the latter when it came to reconstruction?²³⁴

Ratner, in another work, sees difficulty in deciding which groups to obtain consent from, and identifies the intersection with the debate on humanitarian intervention – intervention without consent, which does not address political independence.²³⁵ Ratner appreciates that there is a difficulty reconciling this approach with understandings of sovereignty that prioritise political independence. In response, Ratner suggests the international assumption of control should be seen as a means of enhancing sovereignty in the sense of the factual side of sovereignty, and, with sovereignty seen as popular sovereignty, as a means of furthering sovereignty in the sense of giving the people (eventually) the ability to exercise the continuing right of self-determination.²³⁶ This is a good example of how the various meanings attributed to the concept of sovereignty can be used to deflect attention from the right to political independence. The right to political independence as the cornerstone of international order is crucially, however, not one that can be easily elided.

The ideas addressed, all, in one way or another, seek to facilitate international involvement through removing the right to decide. Collectively, they miss the point that, rather than encouraging its abandonment, the right to self-determination reinforces the ethical strength of the state's right to political independence. It is the importance of the right to political independence for the UN system and the commitment of states to the values that underpin its legal protection, which encourage one to believe that such options will not be pursued.

8. Conclusion

²³³ Krasner, *op. cit.*, fn. 232, p. 119.

²³⁴ The idea of consent to international involvement is addressed in Chapter 2.

²³⁵ S. R. Ratner, 'The United Nations in Cambodia: A Model for Resolution of Internal Conflicts?', in L. F. Damrosch (ed.), *Enforcing Restraint: Collective Intervention in Internal Conflicts* (1993) 241 at 265.

²³⁶ Ratner, *op. cit.*, fn. 235, p. 267.

This chapter has addressed the importance of effective control of territory for international law. It has been shown that effective control is essential for efficacy of the law. Without a government with effective control, enforcement mechanisms found in the doctrine of state responsibility become meaningless. An ineffective government, if one exists, is not able to respond to the human suffering and security threats found in ineffective states. This explains why international actors would be interested in restoring short-term effectiveness, through an international military presence, and seeking to encourage long-term effectiveness, through reconstruction of the state and civil infrastructure.

This chapter has also, however, addressed what it is that has encouraged the fact of ineffective states and explains the continued existence of such states for a prolonged period of time. Both are down to developments in international law which prioritise the right of the state and its people to political independence driven by concern for core UN system values of self-determination of peoples and international peace. The guarantee of a territorial space for the political community in a state to self-govern is something that is important in its own right – all peoples should have the right to self-determination – as well as essential for international peace in a pluralist international society. International involvement in state reconstruction, without considering the relevance of state consent (considered in the next chapter), impinges upon the right to political independence. The state itself only has the right to political independence found in the doctrine of state sovereignty as a result of a display of effective control on the territory. Thus if this were the only right to political independence at the stake, one might more readily accept that international reconstruction should be prioritised over political independence as being better overall for international peace. However, the right to self-determination gives meaning to the old rhetoric of popular sovereignty and provides a much more ethically sound right to political independence. A point reflected in the fact of the prolonged continuation of states without effective governments.

Simply removing or refashioning sovereignty, in contrast to most of the literature which has considered this matter, does not, in light of the right to self-determination, appear to be an option. Therefore those international actors interested in state reconstruction are faced with a troubling paradox: the explanation for the continuation of statehood is the same as the explanation for why intervention for the purpose of reconstruction is prohibited. How, then, can there be large-scale

international involvement in the reconstruction of an ineffective state in a manner that is consistent with the right to political independence? The next chapter deals with the relevance of established international law as a means of reconciling international involvement in state reconstruction without an independently effective domestic government with the right to political independence.

Chapter 2

The Legality of State Reconstruction

1. Introduction

Chapter 1 has identified the paradox of state reconstruction. This is a reference to the idea that large-scale international involvement to restore effectiveness in an ineffective state, through a military presence and facilitation of the reconstruction of the state and civil infrastructure, risks contradicting the reason for the continuation of the target state as a state: the importance of the right to political independence for the core values of the UN system of self-determination of peoples and international peace. Consequently, this chapter asks, does established international law provide an answer that can reconcile the large-scale international involvement, necessary to restore effective control on a long-term basis, with the right of the target state and its people to political independence? Further, if not political independence, what about the attendant values of self-determination and international peace? The latter question is important because if state reconstruction neglected political independence, but was still able to accommodate the values of self-determination and international peace, which explain the legal protection afforded political independence in the normal run of things, this, it is premised, would encourage international acceptance of the practice.

The chapter concentrates on how the most appropriate legal justifications, state consent and a SC chapter VII resolution, would position the international involvement in relation to the right to political independence of the target state and its people and the attendant values, and the extent to which the applicability of international human rights law could compensate for any shortcomings.

The chapter argues that established international law provides the possibility of the preclusion of wrongfulness through, separately or combined, state consent and a chapter VII resolution. The possibility of state consent, however, relies on the power of international recognition, as evidence of the status of a government in an international legal sense, to override the requirement of traditional international legal doctrine that legal status is dependent on a display of independent effective control.

And international recognition, because of its subjectivity, is argued to offer no guarantees about the attachment of the government to the will of the state or its people, thus significantly reducing the extent to which state consent reconciles practice with political independence and consequently with the value of self-determination. With regards a chapter VII resolution, it is argued that this provides legality because member states of the UN have waived the right to complain about an infringement of the right to political independence under this heading. It is further contended that a chapter VII resolution, because it represents the apex of the UN collective security system, indicates that the practice is in the interest of international peace. Crucially, this is not seen to have any positive bearing for the value of self-determination. Accordingly, legality does not entail consistency with the right to political independence or the value of self-determination and, as a consequence, also not international peace.

The applicability of international human rights law is argued to offer some reassurance that minimum standards of human welfare will be realised during the process, but does not offer reassurance in respect of the values of self-determination or international peace. Central to this latter point is the fact that international human rights law has been designed for implementation by a government that is accepted as an embodiment of the will of the state and its people. Thus the provisions are broadly worded, leaving significant discretion with little scope for meaningful accountability. And, most acutely for present purposes, international human rights law does not directly address the subject of change and development of state and civil infrastructure, a matter where, in the normal run of things, governmental discretion is prized.

The chapter begins by addressing how a chapter VII resolution positions authorised activity in relation to the right of political independence of a target state. It then considers the competence and likelihood of the SC to authorise an international military presence and state reconstruction under a chapter VII resolution. Next, the chapter addresses how state consent positions activity in relation to the right to political independence, and, when there is no independently effective domestic government, the possibility of a valid source of state consent. Subsequent segments consider whether valid state consent would be possible in relation to an international military presence and international involvement in the reconstruction of the state. The penultimate section, referring to a situation where

reconstruction is not administered by an independently effective domestic government, considers the regulation and accountability that international human rights law would provide.

2. UN SC Chapter VII Resolution

The introduction of an international military presence to secure short-term effectiveness, and some form of internationally assisted administration of the state to allow for reconstruction of the state and civil infrastructure in the interests of long term independent effectiveness, would, in its discrete parts and as a whole, violate the right to political independence of the target state and its people.¹ A range of legal justifications can preclude wrongfulness in international law.² The International Law Commission's (ILC) Articles on State Responsibility include six such justifications: consent, self-defence, countermeasures, force majeure, distress, and necessity.³ Whether they eliminate wrongfulness or act as an excuse for wrongfulness varies in relation to the justification at stake,⁴ and is a point to be borne in mind when considering the relationship with the right to political independence. The list does not include a chapter VII resolution of the UN SC, the focus of the Commission on state responsibility to the exclusion of issues related to international organisations is one explanation for this. Article 59 of the ILC's Articles does, though, indicate that the articles are without prejudice to the Charter of the United Nations, the law of the UN Charter is thus to be seen as a *lex specialis* in relation to the general law contained in the Articles.⁵

The central questions of this section and the next section, which deals with state consent, are: is it possible to preclude the wrongfulness of the international involvement for state reconstruction? Would this reconcile the practice with the right of political independence? And, to what extent does it accommodate the values of

¹ See the relevant discussion in Chapter 1.

² See A. Abass, 'Consent Precluding State Responsibility: A Critical Analysis', 53 *ICLQ* (2004) 211 at 211.

³ In the order listed, these are found in Articles 20, 21, 22, 23, 24, and 25, of the 2001 ILC's Articles on Responsibility of States for Internationally Wrongful Acts.

⁴ See R. Rosenstock, 'The ILC and State Responsibility', (2002) 96 *AJIL* 792 at 794; cf. V. Lowe, 'Precluding Wrongfulness or Responsibility: A Plea for Excuses', (1999) 10 *EJIL* 405.

⁵ H. Duffy, *The War on Terror and the Framework of International Law* (2005) 60, note 72.

international peace and self-determination that would be put at stake with a neglect of political independence?

A chapter VII resolution justification for international involvement in state reconstruction is addressed first because, as it can originate separately from any contemporary input from the target state, one would expect it to be less consistent with the right to political independence than state consent.

A. Chapter VII Resolutions and Political Independence

A corollary of the sovereignty and equality of states is that international legal obligations (customary law and treaties) are dependent 'on the consent of the obligor'.⁶ Member States, in an exercise of their sovereignty in 1945, through a multilateral treaty, created and endowed the United Nations with separate international legal personality.⁷ For the most part, the interaction of the United Nations with Member States is dependent on contemporaneous consent. This is made clear by Article 2(7) of the Charter which provides that:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

The last clause indicates the exception to the rule. Member States, in the aftermath of World War II, decided that the UN SC should be given the power, in the pursuit of international peace and security, to create superior legal obligations and authorise activity that would otherwise, without contemporary consent, be wrongful.⁸ Thus the creation of the United Nations introduced a compulsory element into the otherwise voluntary set of relationships between states.⁹

⁶ I. Brownlie, *Principles of Public International Law* (6th edn., 2003) 287.

⁷ *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, p. 174, at p. 179.

⁸ The obligations created for states by chapter VII resolutions are, by virtue of Article 103, superior to other treaty obligations, there is scope for debate about the relationship with customary international law, particularly peremptory norms, see A. Orakhelashvili, 'The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions', (2005) 16 *EJIL* 59 at 67; on the provisions which provide the binding nature of SC chapter VII resolutions, see below.

⁹ See, on the voluntary nature of international law, *Case of the SS 'Wimbledon'*, PCIJ Series A. No. 1, 1923, at 25; and *Case of the SS 'Lotus'*, PCIJ Series A. No. 10, 1927, at p. 18; see also J. G. Merrills, *Anatomy of International Law* (1981) 1-17.

Querying how a chapter VII resolution sits in relation to the right of a target state and its people to political independence, is not to question whether sovereignty might prevent certain action being taken under chapter VII; as has been raised by defence counsel as a challenge to the legality of the chapter VII created criminal tribunals for Rwanda and the former Yugoslavia.¹⁰ Rather, the focus here is on whether the legality that flows from a chapter VII resolution also entails consistency with the right of political independence.

One possible argument is that the original act of consent to the UN Charter, as a sovereign act, reconciles the chapter VII activity undertaken with the right to political independence of the target state.¹¹ This begs the question, to what did they consent? The substantive limits on the authority of the SC are returned to below. More pressingly, for the action of the SC under chapter VII to reconcile the activity with the right to political independence, the member states would have had to have consented to the SC acting as the agent of their right to political independence.¹² This is because, if the SC is not seen as the agent, any decisions it makes which affect political independence must be seen as an infringement of the right to political independence, coming as they do from a foreign entity. After all, the essence of the right to political independence is that it is for the state and its people to decide on the change and development of state and civil infrastructure.

It could be argued that the SC, when it acts under chapter VII, was intended to be treated as the agent of the target state's right to political independence, with its decisions to be understood as an exercise of the right to political independence rather than infringement, on the basis that the SC was created by the member states to act on behalf of member states. But the relevant clause in Article 24(1)¹³ could also merely be an indication that whatever the SC does, it is for the general good, not self-serving. Alongside the presumption that international organisations do not

¹⁰ *Prosecutor v. Tadic*, Decision on the Defence Motion on Jurisdiction, Case No. IT-94-I-T, T.Ch. II, 10 August 1995, at para. 2, and paras. 41-44; *Prosecutor v. Kanyabashi*, Decision on the Defence Motion on Jurisdiction, Case No. ICTR 96-15-T, T.Ch. II, 18 June 1997, at paras. 13-16.

¹¹ For discussion of implied consent as a basis for chapter VII resolutions overriding peremptory norms, see G. H. Fox, *Humanitarian Occupation* (2008) 214 – 216.

¹² On the concept of agency in international law, see A. Sereni, 'Agency in International Law', (1940) 34 *AJIL* 638; D. Sarooshi, *International Organisations and their Exercise of Sovereign Powers* (2005) 33-53.

¹³ UN Charter, Article 24 (1): 'In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.'

operate as agents for member states, because, it is strongly presumed, that the existence of an international organisation is a result of member states wanting to create something completely separate from their own personality,¹⁴ another strong reason for not subscribing to the agent approach is found in Article 2(7).

Article 2(7) stresses that the UN is not, in general, permitted to interfere in the internal affairs of a Member State, or in other words, to violate the right to political independence. If Member States had intended the SC to be the agent for their rights, it would have been logical for this to be included in the subsequent clause that explains how chapter VII relates to this rule. But, instead of marking chapter VII as consistent with the right to political independence, chapter VII is marked out as separate from the domestic jurisdiction principle, 'this principle shall not prejudice the application of enforcement measures under Chapter VII'. This suggests that chapter VII is to be seen as an accepted infringement rather than an exercise of political independence.¹⁵ Thus member states have, in creating the SC with its chapter VII mechanism, consented to the possibility of an infringement of the right to political independence in the interests of international peace. Or, in other words, they have waived the right to remedy for the infringement. Only, though, to the extent that the activity can be legally justified under chapter VII, which depends on how one understands the powers of the SC.

The current arrangements in the SC, where only 15 UN Member States sit and get a vote and where only 9 concurring votes including the votes of the 5 permanent members are required for a decision to be made under chapter VII, give the vast majority of states little input in decisions which might affect their political independence.¹⁶ Were it to be understood as the agent of the Member State, the SC which already starts to appear omnipotent, would be even more so. As its acts would have the endorsement of being consistent with political independence, the need for sensitivity to the right of the political independence, turned to below, would be significantly dampened. Presently, then, no matter how much within the powers of the SC under chapter VII a particular activity is felt to be, the resolution, on its own, will not improve the relationship of the authorised involvement with the right to political independence. It is to the issue of whether international involvement

¹⁴ See Sarooshi, *op. cit.*, fn. 12, p. 43.

¹⁵ Cf. M. Matheson, 'United Nations Governance of Post-Conflict Societies', 95 *AJIL* (2001) 76 at 84.

¹⁶ See UN Charter, Chapter V.

necessary to make the state effective would be in the powers of the SC that attention is now turned.

B. Military Intervention under Chapter VII

Logic dictates that the first element of an international response to an ineffective state is the restoration of short-term effectiveness through an international military presence. The nature of the international military presence depends on the circumstances that explain the lack of effectiveness, in the sense of a lack of public order. It may be that civil conflict is raging in the state and the international military presence is needed to enforce peace through engaging in the war. Alternatively, it may be that hostilities have ended, perhaps through international enforcement, but an international military presence remains vital for keeping the peace in a volatile situation – providing order in a state with no functioning security infrastructure of its own. In UN terminology, the first would be peace enforcement and the second peacekeeping; the line between the two can at times be blurred.¹⁷ Would it be within the power of the UN SC to authorise such activity under chapter VII?

Article 24(1) of the UN Charter confers primary responsibility for the maintenance of international peace and security upon the SC. The powers of the SC are found in chapters VI and VII, as well as chapter XII,¹⁸ of the Charter. Chapter VI is about the pacific settlement of disputes by non-binding recommendatory measures. Chapter VII introduces the binding enforcement element. It is for the SC by virtue of Article 39 to:

determine the existence of any threat to the peace, breach of the peace, or act of aggression and [the SC] shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Article 41 provides for non-forcible measures to be taken in order to give effect to the decisions of the SC in relation to circumstances identified in Article 39, which in accordance with Article 25 and 48(1) are understood to be binding on all Member

¹⁷ See H. McCoubrey and N. D. White, *Blue Helmets: Legal Regulation of United Nations Military Operations* (1996) 11.

¹⁸ Chapter XII is about the role of the SC in the trusteeship system.

States.¹⁹ If Article 41 action proves, or is deemed, inadequate, forcible action may be authorised in accordance with Article 42 to maintain or restore international peace and security. Article 42 provides:

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

Hence military enforcement action to address a threat to peace is explicitly envisaged.

Indeed, in the original collective security scheme, by virtue of Article 43, the SC was to have armed forces made available to it through special agreements made by Member States.²⁰ Such agreements, however, 'were not arrived at because the unity of the wartime Allies [that permitted the creation of the UN] soon collapsed into bitter ideological struggle between East and West.'²¹ Despite the lack of such standby forces, the SC has still, on numerous occasions, decided on the use of military measures under Articles 39 and 42. In the absence of an inextricable link between Articles 42 and 43, as McCoubrey and White note, 'it would appear acceptable for the SC to use the power granted to it in Article 42 without the mechanisms that were designed to make the imposition of military coercion a practical option.'²² Thus, when making use of its Article 42 power, the SC has authorised *ad hoc* 'coalitions of the willing' to commence military enforcement operations in pursuit of objectives laid down by the SC. This approach raises a number of legal, military, and political issues, such as the degree to which the SC must retain control over the forces.²³ The important point, for present purposes, is that a military enforcement response is within the powers of the SC, albeit dependent on finding that there has been a threat to peace, breach of the peace, or act of aggression, and sufficient agreement amongst the SC.

¹⁹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, p. 16, at para. 116 [hereinafter *Namibia case*].

²⁰ UN Charter, Article 43.

²¹ McCoubrey and White, *op. cit.*, fn. 17, p. 12.

²² McCoubrey and White, *op. cit.*, fn. 17, p. 13.

²³ See G. Wilson, 'The Legal, Military and Political Consequences of the 'Coalition of the Willing' Approach to UN Military Enforcement Action', (2007) 12 *JCSL* 295.

Military enforcement achieves its objectives by force of arms against the will of those that it seeks to coerce.²⁴ In contrast, peacekeeping has been defined as:

an operation involving military personnel, but without enforcement powers, undertaken by the United Nations to help maintain or restore international peace and security in areas of conflict. These operations are voluntary and are based on consent and co-operation.²⁵

UN peacekeeping refers to an *ad hoc* multinational force under UN command.²⁶ There is no express provision in the UN Charter providing a basis for UN peacekeeping. A resolution of, most commonly, the SC, but also the GA, can establish peacekeeping operations.²⁷ Debate persists about which articles may serve as the basis for peacekeeping.²⁸ In relation to the SC, depending on the nature of the role accorded the peacekeeping forces, the basis might be more properly seen as a power derived from chapter VI, Article 36(1) linked to pacific settlement, or chapter VII, Article 40 linked to overseeing provisional measures.²⁹ In either case, even when the provisional measures are mandatory under chapter VII, the actual legal basis for the presence of the peacekeeping mission in the host state remains consensual.³⁰ Could the presence of a peacekeeping mission be authorised under chapter VII without consent?

In the *Certain Expenses* case, an advisory opinion requested by the GA on the issue of financing GA established peacekeeping, the ICJ emphasised that peacekeeping operations are not enforcement actions.³¹ Some have thus argued that Articles 41 and 42 could not be the basis for the establishment of peacekeeping operations, on the basis that these articles deal with enforcement actions.³² However, there is wide discretion under Articles 41 and 42 for the SC to choose the appropriate

²⁴ See McCoubrey and White, *op. cit.*, fn. 17, p. 18.

²⁵ *The Blue Helmets: A Review of United Nations Peacekeeping* (1990, 2nd edn.) (UN Publication) 4.

²⁶ See McCoubrey and White, *op. cit.*, fn. 17, Chapter 7 (Command Structures and Responsibilities).

²⁷ See *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)*, Advisory Opinion, ICJ Reports 1962, p. 151, for the ICJ, the theory of implied powers, linked to a review of the aims, purposes and powers of each organ, provides the basis upon which UN organs can establish peacekeeping operations, pp. 163-168; on the theory of implied powers, see N. D. White, *The Law of International Organisations* (2005) 111-133.

²⁸ See A. Orakhelashvili, 'The Legal Basis of the United Nations Peacekeeping Operations', (2003) 23 *Virginia Journal of International Law* 485.

²⁹ See McCoubrey and White, *op. cit.*, fn. 17, pp. 50-51.

³⁰ McCoubrey and White, *op. cit.*, fn. 17, p. 51.

³¹ *Certain Expenses*, *op. cit.*, fn. 27, p. 166 and p. 171.

³² See, e.g., D. Ciobanu, 'The Power of the Security Council to Organise Peace-Keeping Operations', in A. Cassese (ed.), *United Nations Peacekeeping: Legal Essays* (1978) 15 at 18.

measures.³³ Accordingly, there is no reason why something that at least looked like peacekeeping could not be established. If there were also consent from the target state, there appears no reason why these articles could not serve as the basis for the establishment of an actual peacekeeping mission. Under Article 41 the use of force is excluded as an enforcement option, and thereby there would be a need for state consent to remove the force aspect and bring the action within this Article. If there were not state consent, particularly given the centrality of consent to the common definition of peacekeeping, the action would be better seen as enforcement action under Article 42. This is so, even if the conflict had ended and the military operation was merely maintaining the peace that it had achieved through force, because it would still be seen as forceful enforcement. Thus, while something like the peacekeeping function could come under chapter VII, without consent, it would not be peacekeeping in the normal sense.

It is, then, possible for both roles that can be performed by the international military presence, enforcing order and keeping order, to be legally justified under a chapter VII resolution, without the need for any contemporary consent of the target state. In enforcing the peace, however, the UN will likely have to take sides,³⁴ and even just the fact of an international military presence keeping order would affect how the future of the political community of the target state proceeds, thus there is a clear infringement of the right to political independence. That such an infringement would occur was foreseen by those signing the UN Charter, and the provision for such military deployment in the Charter represents a view that, in certain circumstances, an infringement of the right to political independence is justified in response to a threat to international peace. Still, the fact of chapter VII does nothing to address the value of self-determination. Moreover, the more the action taken under chapter VII becomes removed from what could reasonably be envisaged as within the powers of the SC, the more any infringement of political independence itself starts to become a threat to international peace. And, of course, the same military action taken outside of the chapter VII framework would be more troublesome for the value of international peace because it would be much more likely to be perceived as self-interested, rather than in the interests of international peace. The

³³ See Orakhelashvili, *op. cit.*, fn. 28, pp. 492-495.

³⁴ See McCoubrey and White, *op. cit.*, fn. 17, p. 19.

extent to which a consensual basis would address such concern is addressed below in Section 3.

C. State Reconstruction under Chapter VII

Once there is a degree of effectiveness in the target state, albeit short-term from an international military presence, the next step, in the pursuit of long term independent effectiveness, is state reconstruction: change and development of state and civil infrastructure to encourage the normal functioning of the state. While only possible following military intervention, the reconstruction aspect represents a more direct contravention of the right to political independence than military intervention. This is because it permanently affects the right to decide, whereas the military intervention has an effect on the exercise of the right to political independence but does not itself involve the actual exercise of the right. Moreover, reconstruction rests on a more distant link to international peace and security than the actual restoration of order in a state through a military presence. Thus there is reason to think that state reconstruction would not have been included in the powers of the SC by the Member States that signed the UN Charter.

In fact, neither Article 41 nor 42 provide an exhaustive list of action that is permissible under chapter VII.³⁵ And what ‘may be necessary to maintain or restore international peace and security’, a general limit that Article 42 places on the type of action, is hardly susceptible to definition. Accordingly, the vagueness of key articles and the significance of the powers granted have provoked considerable debate about the limits of the powers of the SC under chapter VII. The debate encompasses what constitutes a threat to international peace, and whether the SC faces substantive legal limits as to what it can authorise and therefore make binding on states.³⁶ How does state reconstruction figure in such debate?

Chapter VII action is dependent on a determination of ‘the existence of any threat to the peace, breach of the peace or act of aggression’ by the SC. As Shaw notes, ‘[t]hreat to the peace is the broadest category provided for in Article 39 and the one

³⁵ *Prosecutor v. Tadic*, Appeal on Jurisdiction, No.IT-94-AR72, paras. 32-38, 2 October 1995, reprinted in (1996) 35 *ILM* 32.

³⁶ See D. Akande, ‘Are there Limits to the Power of the Security Council?’, (2007) 5 *Journal of International Law and Policy* 2-11.

least susceptible to precise definition.³⁷ Accordingly, it is this category that is used to reconcile a chapter VII response to an internal matter, such as civil conflict, with the idea that the UN is about international peace and security.³⁸ In the search for limits to the concept, an obvious potential source is international law. Matheson is at one end of the spectrum of the debate, and seems to be of the view that, in the pursuit of what is necessary for the restoration and maintenance of international peace and security, the SC is essentially unbound by international law. Thus 'permanent change in some aspect of the status, boundaries, political structure, or legal system of a territory within a state' would be within its power.³⁹ Others, such as Akande, believe that there are discernible legal limits to be found in the purposes and principles of the UN, which the SC is obliged to act in accordance with under Article 24(1) of the Charter, as well as from general international law, international human rights law, and peremptory norms.⁴⁰

While the debate on whether there are legal limits to the powers of the SC remains inconclusive, political considerations dominate what little mention of international law occurs in the debates at the SC prior to the adoption of chapter VII resolutions.⁴¹ In light of this, it is hard to avoid the conclusion that how far the category of a threat to the peace can be stretched is dependent on how far is politically acceptable amongst the membership, rather than there being a substantive limit that remains to be reached.⁴² This view supports the idea that there is a possibility that the SC might seek to pursue the reconstruction of state and civil infrastructure of a target state that has suffered from ineffectiveness for a prolonged period of time as a necessary response to a threat to international peace.

However, the preservation of the right to political independence is a core feature of the UN system, which one would not expect to be easily disregarded even by the SC. This is reflected in the trend amongst scholars, those who have address the issue of legal limits, to mark out the limit as at least the exercise of the right to decide.

³⁷ M. Shaw, *International Law* (2003) 1120.

³⁸ See, e.g., SC. Res. 794 (1992) 'the magnitude of the human tragedy caused by the [internal] conflict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance, constitutes a threat to international peace and security'.

³⁹ Matheson, *op. cit.*, fn. 15, p. 85.

⁴⁰ D. Akande, 'The International Court of Justice and the Security Council: Is there Room for Judicial Control of Decisions of the Political Organs of the United Nations?', (1997) 46 *ICLQ* 309 at 317-325.

⁴¹ See Fox, *op. cit.*, fn. 11, p. 204.

⁴² See, e.g., International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Research, Bibliography, Background* (2001) 159: 'no theoretical limits to the ever-widening interpretation of international peace and security.'

Alvarez is of the view that ‘the Council must respect some essential core of sovereignty so that targeted states are not deprived of their right to statehood, including the right to self-preservation and to manage and govern their territory’.⁴³ Similarly, Gill finds, ‘[t]he UN – including the Security Council – cannot by means of invoking the enforcement provisions of the Charter, impose a particular form of government upon a majority or significant segment of a population of any state or non-self governing territory’.⁴⁴ Furthermore, Judge Fitzmaurice, in the *Namibia* case at the ICJ, has commented that ‘[e]ven when acting under Chapter VII of the Charter itself, the Security Council has no power to abrogate or alter territorial rights, whether of sovereignty or administration’.⁴⁵ This scholarly trend and the importance of the preservation of political independence for the UN system, encourages one to query whether the SC would feel it was within its powers to authorise state reconstruction; an activity which requires a greatly stretched reading of the concept of a threat to international peace, and which could risk becoming a threat to the peace through the degree of its inconsistency with political independence.

This reading is supported by the argument that for the sake of its own legitimacy, even if not legality, there are certain international legal principles of such fundamental importance that the SC, even under chapter VII, should adhere to;⁴⁶ the consequence of neglect being an increased risk that the broader membership would not implement the decision, thus undermining the authority of the SC.⁴⁷ There is also the need to secure agreement amongst the members of the SC on what is necessary and proportionate. Here, the compromises involved are likely to severely limit the level of involvement that would be authorised in relation to the reconstruction of a state. Further, particularly China has been reluctant to support certain uses of chapter VII enforcement powers without contemporaneous consent of the relevant state.⁴⁸

It is apparent, then, that a chapter VII resolution could provide a legal justification for an international military presence to restore effectiveness short term, and for

⁴³ J. E. Alvarez, ‘Judging the Security Council’, (1996) 90 *AJIL* at 17.

⁴⁴ T. D. Gill, ‘Legal and Some Political Limitations on the Power of the U.N. Security Council to Exercise its Enforcement Powers Under Chapter VII of the Charter’, (1995) 26 *NYIL* 33 at 75.

⁴⁵ *Namibia case, op. cit.*, fn. 19, p. 294 para. 115.

⁴⁶ See N. D. White, ‘The Will and Authority of the Security Council after Iraq’, (2004) 17 *LJIL* 645 at 672.

⁴⁷ White, *op. cit.*, fn. 46, p.650 and p.655; T. M. Franck, *Fairness in International Law and Institutions* (1995) 26.

⁴⁸ See, e.g., D. Kritsiotis, ‘Security Council Resolution 1101 (1997) and the Multi-national Protection Force of Operation Alba in Albania’, (1999) 12 *LJIL* 511 at 528-529.

efforts at state reconstruction to restore effectiveness long-term. Such a resolution, however, would not operate to reconcile the activity with the right to political independence. Rather, the legal justification stems from the fact that member states, in signing the UN Charter, waive their right, when political independence is infringed under chapter VII, to invoke the state responsibility regime; a concession driven by the interest all states have in international peace and security. Chapter VII activity is thus readily projected as in the interests of international peace, but this has no positive bearing for the value of self-determination. The reconstruction aspect, if only chapter VII authorised, would be much more dubious as an activity that could be said to be necessary to respond to threat to international peace, and could less clearly be said to be included in what the member states consented to, in terms of the permissible degree of infringement of the right to political independence when they signed the UN Charter. One would therefore not expect state reconstruction to be authorised, at least not without some other means of seeking to reconcile the activity with the right to political independence, such as state consent, considered next.

3. State Consent

State consent is the other legal justification that has the potential to preclude the wrongfulness of international involvement in state reconstruction. It does not necessarily follow, however, that state consent is a legal justification that reconciles the practice with the right to political independence. It is therefore important to consider how state consent positions the relevant activity in relation to the right to political independence of the target state and its people, as well as whether the fact of ineffectiveness on behalf of a government affects the validity of consent.

A. State Consent and Political Independence (when the Government is Ineffective)

It is an established point of international law that state consent can serve as a legal justification for otherwise wrongful activity in international law.⁴⁹ There is, though, some uncertainty about how it is that consent to intervention functions to preclude

⁴⁹ 2001 ILC Articles on State Responsibility, Article 20; see also J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2001) 164.

the wrongfulness of an activity that appears to infringe the right to political independence. Ago suggested that, in the case of intervention, consent suspends the normal operation of the rules.⁵⁰ Alternatively, Wippman suggests that the lack of consent is central to the definition of wrongful intervention.⁵¹ If one starts from the basis that inherent in state sovereignty is a freedom to contract away parts of that same sovereignty,⁵² and the level of contracting out must be within reason if the state wants to remain a state,⁵³ Wippman's suggestion appears to better encapsulate how state consent relates to the right to political independence. This is because consent is the vehicle for contracting out the exercise of sovereign rights, such as those that an unlawful intervention affects, and this means that the intervener is to be seen as an agent for the exercise of the sovereign right,⁵⁴ unless otherwise indicated,⁵⁵ rather than an infringement of the exercise of the right. In contrast, Ago's suggestion implies that the intervention remains a wrongful one that infringes the right to political independence, but one that is excused because the right to complain has been waived.

The choice that depicts the lack of consent as central to the definition of the wrongfulness of intervention, is further supported by the fact that if a state consents to have another state conduct activity on its territory other states are not permitted to interfere with that activity. In this respect, to suggest that state consent just suspends the normal operation of the rules on state responsibility while an infringement of political independence remains, does not encapsulate how the consent serves to transform the activity it into an internal affair of the host state. The ultimate point, in relation to intervention, is that valid state consent projects that there is consistency with the right to political independence, on the basis that one agent, the government, has passed its competence in relation to the right to decide on to another agent, the international actor – an actor which must operate within the confines of the consent

⁵⁰ R. Ago, Eighth Report on State Responsibility, UN Doc. A/CN.4/318 (1979) and Add. 1-4 Yearbook of the International Law Commission (1979) 31 – 32.

⁵¹ D. Wippman, 'Military Intervention, Regional Organization, and Host State Consent', (1996) 7 *Duke J. Comp. & Int'l L.* 209 at 210; see, making a similar point, A. V. Thomas and A. J. Thomas, *Non intervention – The Law and its Import in the Americas* (1956) at 91.

⁵² *Wimbledon case*, *op. cit.*, fn. 9, p. 25;

⁵³ B. Roth, 'The Illegality of Pro-Democratic Invasion Pacts', in G. Fox and B. Roth (eds.), *Democratic Governance in International Law* (2000) 328 at 330.

⁵⁴ On the concept of agency in international law, see Sarooshi, *op. cit.*, fn. 12, pp. 33-42.

⁵⁵ In the light of this, it is important to remember the argument from above that, through signing the UN Charter, the UN member states waived (contracted away) the sovereign right to complain about a violation of the right to political independence in relation to action taken under chapter VII, rather than consenting to the SC acting as the agent.

given. This, though, raises the question of who can serve as the agent of the right of the state and its people to political independence so as to provide valid state consent?

The validity of consent is dependent on the rules in international law for the expression of the will of the state.⁵⁶ States are abstract legal institutions; an agent is needed for the exercise of legal personality. For the most part, international law identifies the government as the sole agent of the state.⁵⁷ Traditional international legal doctrine identifies a government on the basis of effective control of the state.⁵⁸ This provides an objective basis for international actors to identify the government, moreover, effective control suggests some meaningful attachment to the state, and it entails the potential for obligations to be fulfilled.⁵⁹

'People' is nearly as much as an abstraction as the state.⁶⁰ In respect of the right of the people as the population of the state as a whole to self-determination, effective control is also the traditional basis for identification of the agent of the people. This is because the ability to exert effective control suggests acquiescence of the people and, however unsatisfactory, is as far as consensus has stretched in an ideologically pluralistic international society.⁶¹

The relative nature of the effective control test, 'effective enough', means that provided a government has a modicum of independent effective control of the state, it is possible to argue that it retains the credentials to be treated as the agent of the state and its people.⁶² Accordingly, on the basis that there is a lack of an objective basis for identification of the agent of the target state and its people, which one might logically assume would be necessary if consent was not to be opened up to abuse by those interested in involvement, state consent might be expected to be excluded as a possible legal justification for international involvement in the reconstruction of a state where all semblance of effective control is absent. Do the rules on valid state consent address such a situation?

⁵⁶ Crawford, *op. cit.*, fn. 49, p. 164.

⁵⁷ J. Crawford, *The Creation of States in International Law* (2006) 33-4.

⁵⁸ *Tinoco Arbitration (Great Britain and Costa Rica)* (1923) 1 RIAA. 375; see also J. Crawford, 'Democracy in International Law', (2003) 64 *BYIL* 113 at 119.

⁵⁹ See B. R. Roth, *Governmental Illegitimacy in International Law* (1999) 137 - 42; D. Wippman, 'Treaty-Based Intervention: Who Can Say No?', 62 *University of Chicago Law Review* (1995) 607 at 612 and references therein at note 26.

⁶⁰ Roth, *op. cit.*, fn. 59, p. 430.

⁶¹ Roth, *op. cit.*, fn. 59, p. 419.

⁶² For criticism of effective control test as not free from subjectivity in its application, see M. Aristodemou, 'Choice and Evasion in Judicial Recognition of Governments: Lessons from Somalia', (1994) 5 *EJIL* 532.

Different factors that can affect the validity of consent include coercion, either of the representatives of the state or the state itself, as well as the competence of those purporting to act on behalf of the state.⁶³ The basic rules on competence are found in Article 7 of the VCLT. Essentially, Article 7 lists the relevant positions in government that are presumptively able to provide consent.⁶⁴ There is no suggestion of a lack of governmental effectiveness making a difference to the validity of the consent, possession of status as the government in the sense of international law appears sufficient.⁶⁵

To possess governmental status in the sense of international law, the general rule is that recognition is declaratory, and that status, as was decided in the *Tinoco Claims Arbitration*,⁶⁶ is based on effective control of the territory.⁶⁷ However, as with statehood, international recognition serves as evidence of status. Importantly, those states that no longer adopt the policy of recognising governments do occasionally still use it to support the position of favoured governments.⁶⁸ And, by indicating the position of other states in relation to a particular government, the occurrence of diplomatic relations serves a similar role to recognition.⁶⁹ International recognition has therefore continued as a means of helping to preserve or establish the status of governments struggling for effective control.⁷⁰

International recognition is a matter of discretion for the recognising state. Consequently, where a government's status in an international legal sense rests largely on the fact of international recognition, it is hardly conceptually consistent to

⁶³ See Abass, *op. cit.*, fn. 2, p. 214.

⁶⁴ 1969 VCLT, Article 7 (2a) 'Heads of State, Heads of Government and Ministers of Foreign Affairs'.

⁶⁵ See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Preliminary Objections, Judgement, ICJ Reports 1996, p. 595, at pp. 621-2; while some commentators use 'legitimate government' to indicate a government that meets the criteria for governmental status in international law, this is easily confused with the use of the term 'legitimate' to suggest political or moral approval. Accordingly, this article avoids the term 'legitimate' in relation to governmental status; support for this approach is found in S. Talmon, 'Who is a Legitimate Government in Exile? Towards Normative Criteria for Governmental Legitimacy in International Law', in G. S. Goodwin-Gill and S. Talmon (eds.), *The Reality of International Law: Essays in Honour of Ian Brownlie* (1999) 499 at 537.

⁶⁶ *Tinoco Arbitration*, *op. cit.*, fn. 58.

⁶⁷ M. J. Peterson, *Recognition of Governments: Legal Doctrine and State Practice, 1815-1995* (1997) 37 and 49.

⁶⁸ See Peterson, *op. cit.*, fn. 67, p. 182; C. Warbrick, 'States and Recognition in International Law', in M. Evans (ed.), *International Law* (2006) 256.

⁶⁹ See Crawford, *op. cit.*, fn. 57, p. 152; S. Talmon, *Recognition of Governments in International Law* (1998) 5-7; in this respect, the UK were keen to present its dealings with the Taliban, when the latter exercised a degree of effective control in Afghanistan, as not inter-governmental, see UKMIL 72 BYIL (2001) p. 578.

⁷⁰ See, e.g., *Genocide case*, *op. cit.*, fn. 65, p. 622.

view this government as the agent of the rights of the state and its people. One might accept that such a government, out of practical necessity, can represent the state and its people in relation to matters that do not have a significant effect on the political independence of the state and its people; such as the signing of a postal treaty. Yet, one should still question whether status that is dependent on international recognition should be sufficient for a government to be competent to provide valid consent to a process which will have a significant impact on the right to political independence, given the significance of this right for the values of self-determination and international peace.⁷¹ Thus the next two segments address whether an ineffective government could provide valid consent to an international military presence and international involvement in the state reconstruction process. In the following discussion, the voluntary nature of consent is assumed, if coercion was identified this would serve to invalidate consent.⁷²

B. Consent to Military Intervention (when the Government is Ineffective)

Is consent from an ineffective government a possible legal justification for an international military presence? Further, how does the fact of consent in light of a lack of independent effectiveness position the military presence in relation to the right to political independence?

In terms of enforcing order, there has in the past been some debate about whether a still internationally recognised but increasingly ineffective government, in the context of a civil war, could offer valid consent to international military intervention to assist it.⁷³ This was underpinned by a concern for the protection of the right of the state and its people to political independence, the agent of these rights being uncertain in a time of civil war when effective control was in doubt.⁷⁴ Despite the strong conceptual logic of the purported rule, its strength has always suffered. This is primarily because of the ease by which those accused of violating it can claim there

⁷¹ This reasoning finds support in comments from Wippman, *op. cit.*, fn. 59, pp. 666 – 667; see also L. Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation of the Government', (1985) 56 *BYIL* 189 at 200.

⁷² See Article 51 and Article 52 of the 1969 VCLT.

⁷³ See Doswald-Beck, *op. cit.*, fn. 71; A. Tanca, *Foreign Armed Intervention in Internal Conflict* (1993); D. Acevedo 'The Haitian Crisis and the OAS Response: A Test of Effectiveness in Protecting Democracy', in L. Damrosch (ed.), *Enforcing Restraint – Collective Intervention in Internal Conflicts* (1993) 119 at 139.

⁷⁴ Doswald-Beck, *op. cit.*, fn. 71, pp. 200-211.

had already been external assistance for the other side, which can justify further involvement on the basis of collective self-defence.⁷⁵ Today, whether the rule exists in relation to civil war,⁷⁶ or military assistance to an ineffective government in general,⁷⁷ is highly doubtful. This is particularly so in light of the recent example of the international recognition of the formed-in-exile government of Somalia and the toleration of Ethiopia's intervention in Somalia at the request of that government, against contestants who controlled far more of the population and territory.⁷⁸

It would, then, be possible for an ineffective government to provide valid consent to an international military intervention to enforce order in its state. Without effective control there would be no objective basis for identification of the government as the agent of the rights of the state and its people. The validity of the consent and the relationship of consensual activity and political independence would signify that the activity was consistent with the right to political independence. However, in reality it could be that a government with little support from the people is put in control of the state, which would severely affect the process for exercising the right to political independence. If this occurred within the framework of a chapter VII resolution one might be reassured in terms of the threat to international peace as it would reduce the perception of self-interest, but this would not improve matters in relation to the value of self-determination.

Peacekeeping, in line with common definition, only exists where there is consent.⁷⁹ Military intervention without a consensual basis is thus enforcement action. If enforcement occurs without a chapter VII resolution, international responsibility is incurred. Along with consent, the other basic principles which define peacekeeping and distinguish it from an enforcement action are neutrality/impartiality and the use of force in self-defence.⁸⁰ These principles were identified by the UN Secretary, following the first UN Peacekeeping Operation,

⁷⁵ Wippman, *op. cit.*, fn. 51, p. 220; see also Tanca, *op. cit.*, fn. 73, p. 92; T. J. Farer, 'A Paradigm of Legitimate Intervention', in L. F. Damrosch (ed.), *Enforcing Restraint: Collective Intervention in Internal Conflicts* (1993) 316 at 319.

⁷⁶ C. J. Le Mon, 'Unilateral Intervention by Invitation in Civil Wars: The Effective Control Test Tested', (2003) 35 *NYU Journal of International Law and Politics* 741 at 741.

⁷⁷ Institut De Droit International, 10th commission: Present Problems of the Use of Force in International Law, D. Sub-group on Intervention by Invitation, Rapporteur G. Hafner (2007) p. 263.

⁷⁸ See discussion in Chapter 6.

⁷⁹ *Certain Expenses case*, *op. cit.*, fn. 27, p.165

⁸⁰ See N. Tsagourias, 'Consent, Neutrality/Impartiality and the Use of Force in Peacekeeping: Their Constitutional Dimension', (2003) 11 *JCSL* 465.

UNEF,⁸¹ in 1958, and are continuously reiterated. Consent means the operation has to be wanted by the target state. It provides a legal basis for the presence, but also allows the operation to achieve its aims through co-operation rather than confrontation.⁸² Impartiality refers to the actual conduct of the operation, and means it must hold no prejudices towards participants in a conflict and should not influence the course of events.⁸³ 'Neutrality is about the apolitical character of the operation that facilitates those involved in the crisis to give their assent, confident that they are not compromising their respective positions.'⁸⁴ Use of force only in self-defence indicates that the military presence is about supervision and a visible deterrent rather than enforcement action aimed at affecting the distribution of power.⁸⁵ While these principles offer a potential reason, in contrast with peace enforcement, not treating peacekeeping as offensive to the target state's sovereignty, or, more specifically, as an infringement of the right to political independence.⁸⁶ Still, the ideals that the principles represent are easier to live up to in certain circumstances than others. In intra-state conflict, if only the government consents to the peacekeeping military presence there is greater likelihood of there having to be enforcement. And even if there is additionally the consent of the different factions that have been fighting, there is still the issue of whether that consent actually reflects a source of control over those that have been fighting.⁸⁷

Regardless of its ideals, however, when consent comes from an ineffective government, there are still reasons to be concerned about the relationship of peacekeeping with political independence.

Were the government to retain some degree of effectiveness, one would treat consent as making peacekeeping an exercise of the right to political independence. However, where the government lacks all independent effectiveness even before the deployment of peacekeepers, such as where a government has been put in place

⁸¹ UNEF: Summary Study of the Experience Derived from the Establishment and Operation of the Force: Report of the Secretary-General, UN GAOR, Thirteenth Session, Annex 1, Agenda Item 65, UN doc. A/3943 (1958), 9.

⁸² See Tsagourias, *op. cit.*, fn. 80, p. 481; consent is also a factor in relation to the composition of the peacekeeping force, A. Di Blasé, 'The Role of the Host State's Consent with Regards to Non-Coercive Actions by the United Nations', in A. Cassese (ed.), *United Nations Peacekeeping: Legal Essays* (1978) 55 at 58-69.

⁸³ Tsagourias, *op. cit.*, fn. 80, p. 478.

⁸⁴ Tsagourias, *op. cit.*, fn. 80, p. 478.

⁸⁵ P. F. Diehl, *International Peacekeeping* (1994) 7.

⁸⁶ See, e.g., McCoubrey and White, *op. cit.*, fn. 17, p. 84; N. D. White, *Keeping the Peace* (1992) 204.

⁸⁷ McCoubrey and White, *op. cit.*, fn. 17, p. 85.

through peace enforcement, it is hard to accept that the government would be able to continue in authority without the peacekeeping force. In such a context, peacekeeping permits a government that could not otherwise exercise the rights to decide, to do so. Thus peacekeeping also affects the exercise of the right to political independence, albeit more discreetly than peace enforcement.⁸⁸

In terms of ensuring the peace holds, there are clear practical benefits from seeking the consent of all the parties to a conflict for deployment of a peacekeeping force.⁸⁹ Although international legal doctrine does not require it,⁹⁰ one might still think that this would cure the affect on the right to political independence by ensuring that the political community of the state was adequately represented.⁹¹ One is, certainly, easily convinced that the consent of various groups struggling for effective control of a state is more representative than the consent of one group, the government. However, it remains the case that there is no consent from a government that because of its independent effective control can be accepted as embodying the state and its people's right to political independence. Instead, without any alternative to the effective control rule, it is a matter of discretion for the international actors as to which groups within the state are engaged with; groups that even between them might still struggle to exercise effective control of the state without an international military presence. Moreover, because international legal doctrine only requires the consent of the government, should the consent of one of the other groups engaged with be withdrawn, this would not result in wrongfulness, despite the further reduction in consistency with the right to political independence that this would represent.

When restoring or keeping order come within a chapter VII resolution, there is a reassurance that the interests of international peace are being served, because such activity is readily seen as consistent with the collective security system that states sign up to with the UN Charter. When occurring outside of chapter VII, only on the legal basis of consent, the international military presence to bring order is less securely in the interest of international peace. Nonetheless, valid consent is clearly

⁸⁸ See further discussion in Chapter 6.

⁸⁹ C. Gray, 'Host- State consent and United Nations Peacekeeping in Yugoslavia' (1996) 7 *Duke J. Comp. & Int'l L.* 241 at 245.

⁹⁰ Gray, *op. cit.*, fn. 89, p. 245.

⁹¹ See Wippman, *op. cit.*, fn. 51, pp.224-234; cf. G. Nolte, 'Restoring Peace by Regional Action: International Legal Aspects of the Liberian Conflict', (1993) 53 *Zeitschrift Fur Auslandsches Offentliches Recht und Volkkerrecht* 603 at 623-625.

possible, and, in its favour, it at least projects greater consistency than an intervention without any effort to find consensual basis. The level of international recognition the supported government has received is of obvious importance for the validity of consent. Based on the worthiness of a government in the eyes of international actors,⁹² the degree of international recognition does not improve matters with the right to political independence, and consequently the value of self-determination. Greater international recognition does, though, reduce the chances of the activity sparking international conflict as result of third states seeking to uphold the right to political independence of the target state.

C. Consent to State Reconstruction (when the Government is Ineffective)

The international military presence, that provides the short-term effectiveness, will at some point have to leave. State reconstruction, understood as change and development of the state and civil infrastructure, is seen as a key element in the policy approach that is required if long-term effectiveness is to be ensured. It reflects the fact that the existing state infrastructure is not seen as adequate to support prolonged effectiveness. The short-term effectiveness ensures conditions where change can be introduced. All aspects of the state can be included, especially those at the heart of the right to political independence, such as the form of government, the economy, and security infrastructure. Could an ineffective government consent to an international actor administering this reconstruction?

Whereas there has been debate about the competence of an ineffective government to invite military intervention to support it, there has been little attention given to whether the same government could consent to an international actor administering the reconstruction. An obvious reason is that such a government would not be inclined to contract out such authority. It is, though, still important to enquire into whether it would be legally valid for it to do so, not only because its occurrence is not implausible, but also because if it lacked the competence to contract out, this would be an obvious reason to question its own authority to administer reconstruction when effectiveness is dependent on an international military presence. However, in the latter respect, in the light of the discussion above, it is difficult to

⁹² See Tanca, *op. cit.*, fn. 73, p. 139.

imagine that a lack of independent effectiveness would be fatal for the legal validity of consent. This is despite the contrast in consistency, with the right to political independence, between a government with independent effective control and one dependent on an international military presence for effective control. Thus an otherwise ineffective government could administer the reconstruction process itself. Nonetheless, limits on what can be consented to by way of international involvement in the reconstruction process could still exist, not least because issues related to the continuation of state are introduced when sovereign rights are contracted out.

As the government is treated as the embodiment of the right to political independence it is possible for it to contract all of the right to decide, all of its sovereignty, away.⁹³ However, in so doing, the state would cease to exist as a sovereign state, the territory and its political community would become part of whatever entity the right to political independence was contracted to. What, then, is the extent of what can be consented to while retaining status as a sovereign state?

International law itself exists because of a willingness of states to use their power to limit their power in the interests of co-existence and co-operation.⁹⁴ The entry into a legal obligation is not itself a reduction of sovereignty.⁹⁵ What matters is the substance of the obligation. To date, even the most invasive limitations that states have created for themselves, such as those resulting from membership of the European Union, do not affect the existence of the state as a state. As Lauterpacht has noted, '[t]he State remains a sovereign State in international law and continues to be able to guide its future destiny within the limits that it has itself accepted.'⁹⁶ Thus while the discretion of states is bounded by international law there is still a need for autonomous decision-making, hence there is still meaning in the right to political independence as the right to make those decisions free from interference.⁹⁷ If a state's discretion in its decision making is given away, despite any pretence that sovereign statehood is retained, one would struggle to accept that the state continued as a sovereign state. Roth gives the example that 'a sovereign State cannot exist which privileges foreign States to use force within it to impose a will other than that

⁹³ R. Jennings, 'Sovereignty and International Law' in G. Kreijen (ed.), *State, Sovereignty, and International Governance* (2002) 27 at 36.

⁹⁴ See W. Friedmann, *The Changing Structure of International Law* (1964).

⁹⁵ See *Wimbledon case*, op. cit., fn. 9, p. 25.

⁹⁶ E. Lauterpacht, 'Sovereignty-Myth or Reality', (1997) 73 *International Affairs* 137.

⁹⁷ See B. R. Roth, 'The Enduring Significance of State Sovereignty', (2004) 56 *Florida Law Review* 1017.

of the political community as manifest at that time.⁹⁸ Accordingly, if a government was to consent to have another entity exercise the right to political independence completely one would expect that state to cease to exist as such; the irreducible core of sovereignty would be lost.⁹⁹ How much discretion could be given up before there is no core left would be a hard point to judge and one dependent on the circumstances; one for which international recognition would serve as evidence.¹⁰⁰ Indeed, the significance of international recognition as evidence of statehood might, of course, help sustain the continuation of statehood even when there is clearly no discretion left.

In the normal run of things, where the consent to an international exercise of right to political independence came from an effective government, giving away the right to political independence could be reconciled with the right to political independence, even though it would spell the end of it. Where the consent was from an otherwise ineffective government it would not be consistent with the right to political independence, because of the lack of attachment of the government that consented with the will of the state and its people. And, were it to occur, the direct contravention of the right to political independence would be much more likely to instigate international conflict than the consent to an international military presence, which, while affecting the exercise of political independence, does not have such a direct impact and is more readily justified in the interest of international peace. In contrast, the administration of reconstruction by an otherwise ineffective domestic government assisted by international involvement will help project the process as more consistent with political independence and the attendant values, than external administration. This is because an element of local ownership is retained, and this will also help avoid suggestions that sovereignty has been lost to the international actors.

In sum, effective control is the established route for identifying the agent of the rights of the target state and its people, this serves the interests of the efficacy of international law, but also stops abuse and neglect of the rights of the state and its people through exploitation of the consent mechanism. Without effective control, state consent is possible depending on international recognition. But, because of the

⁹⁸ Roth, *op. cit.*, fn. 53, p. 331.

⁹⁹ See Roth, *op. cit.*, fn. 53, p. 330.

¹⁰⁰ See also *Case Concerning Rights of Nationals of United States of America in Morocco*, ICJ Reports 1952. p. 176 at p. 185 and p. 188.

inherent subjectivity of international recognition and the complete imbalance in bargaining position that it creates between the domestic government and international actors, such consent would not reconcile the activity with political independence. It would, though, project greater consistency with the right to political independence and accordingly the value of self-determination, than non-consensual intervention. Thus one would expect it to be utilised where possible.

In the light of the analysis of these legal justifications, one can predict how the process would be likely to proceed to best ensure consistency with political independence. A consensual basis for international military and reconstruction focused involvement, perhaps complimented by chapter VII to address any doubts about the legal validity of the consent, with reconstruction administered by a domestic government, has claim to be more consistent than a chapter VII based international administration. The concern with even the more consistent approach, however, is that it would place in authority a government that still, because of a lack of independent effectiveness, falls short in terms of consistency with the right to political independence, and so puts at stake the values of self-determination and international peace. If, though, there were a basis for international legal regulation and accountability of those involved designed to protect the value of self-determination, and with it international peace, one would be less concerned about the exploitation of the under-developed rules on the expression of the will the state and the people to preclude wrongfulness of the large scale international involvement in state reconstruction.

4. International Human Rights Law and Political Independence

However international involvement in the reconstruction process might proceed, be it with an ineffective domestic government or international actors administering the process, the legal justifications addressed above would not reconcile the activity with the right to political independence. This is because a government without independent effective domestic control, which provides objective evidence of the attachment of the government to the will of the state and its people, would be treated as the embodiment of the right to political independence. The concern with this is that it put at risks the values of self-determination and international peace, which explain the legal protection that political independence is afforded in the normal run

of things. Some appropriate means of regulation and accountability of the process could serve to reassure that the governance is in the interests of the people, not self-interest, and thus potentially help address the values of self-determination and international peace. In this respect, the fact that '[international] [h]uman rights law is revolutionary because it purports to regulate the behaviour of a sovereign within its own territory',¹⁰¹ calls for some consideration of the relevance of this body of law. Specifically, the universality of human rights law and its purported aim make it necessary to consider the relevance of international human rights law as a framework for regulation and accountability of state reconstruction.

The emergence of international human rights law can be attributed to a collective feeling amongst the international society of states that people as individuals, and collectively, matter.¹⁰² The first significant attempt to lay down the rights that all people possess was the GA's 1948 Universal Declaration on Human Rights (UDHR). Certain parts of which, through state practice, reflect customary international law and this would 'certainly include the prohibition of torture, genocide and slavery and the principle of non-discrimination'.¹⁰³ The Declaration led, eventually, in 1966, to the creation of the two universal UN sponsored international covenants, which split those rights found in the Declaration, refined them, and added new ones. Since then, the number of human rights instruments, focusing on a particular set of rights or region, has continued to grow.¹⁰⁴

In broad terms, the law is designed to ensure that minimum standards of human welfare are reached, thus it impacts on all aspects of running a state. And it is states, or more specifically governments that are charged with ensuring that human rights are respected, protected, and fulfilled.¹⁰⁵ In relation to the state reconstruction context, then, if all involved adhere to international law human rights law, this helps to ensure that minimum standards of human welfare are maintained. Would, though, the law apply?

¹⁰¹ A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005) 254.

¹⁰² See L. Sohn, 'The New International Law: Protection of the Rights of Individuals Rather than States', (1982) 32 *American University Law Review* 1; T. Buergenthal, 'The Normative and Institutional Evolution of International Human Rights', (1997) 19 *Human Rights Quarterly* 703.

¹⁰³ Shaw, *op. cit.*, fn. 37, p. 257.

¹⁰⁴ See, e.g., 2006 Convention on the Rights of Persons with Disabilities; 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

¹⁰⁵ M. Nowak, *Introduction to the International Human Rights Regime* (2003) 49-51.

Considerable attention has been given to whether international human rights law applies to the extra-territorial activity of a state party.¹⁰⁶ The high-water mark for the moment is found in the European Court of Human Rights (ECtHR) *Bankovic* case, relating to a complaint about a NATO bombing campaign in Belgrade on 23 April 1999.¹⁰⁷ Here, the ECtHR dealt with the meaning of ‘within its jurisdiction’, which is the key term for application of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (Article 1) and also the ICCPR (‘within its territory and subject to its jurisdiction’, Article 2(I)). It found that effective control of an area outside of its national territory, whether lawful or unlawful, was the key point which engaged the obligations of the state party.¹⁰⁸ As a consequence, should a third state come into control of a formerly ineffective state, one would expect human rights obligations to apply. The extent to which the same is true for an international organisation is less clear, in light of human rights law being addressed to states not international organisations.¹⁰⁹ There is also debate about the attribution of conduct in UN authorised peace operations, either to troop contributing states or the UN, which has decisive implications for applicability and accountability of international human rights law.¹¹⁰ The present concern, however, is with compensating for neglect of the right to political independence, which the international involvement in the reconstruction would represent, by addressing the values of self-determination and international peace. How does the nature and substance of international human rights law relate to this concern?

The existence of human rights can be read as a curtailment of the exercise of political independence, in the sense of constraint on the pursuit of political ends.

¹⁰⁶ See M. Kamminga and F. Coomans (eds.), *The Extra-Territorial Application of Human Rights Treaties* (2004).

¹⁰⁷ *Bankovic and Others v Belgium and 16 other NATO States* (No. 52207/99), ECtHR 12 December 2001, (2002) 41 *ILM* 517.

¹⁰⁸ *Bankovic*, *op. cit.*, fn. 107, paras. 70-71.

¹⁰⁹ See N. D. White, ‘The Ties that Bind: the EU, the UN and International Law’, in (2006) 37 *NYIL* 57 at 79-80; J. Cerone, ‘Reasonable Measures in Unreasonable Circumstance: a Legal Responsibility Framework for Human Rights Violations in Post-Conflict Territories under UN Administration’, in N. D. White and D. Klassen, (eds.) *The UN, Human Rights and Post-Conflict Situations* (2005) 42; G. Verdirame, ‘UN Accountability for Human Rights Violations in Post-Conflict Situations’, in N. D. White and D. Klassen, (eds.) *The UN, Human Rights and Post-Conflict Situations* (2005) 81; on the utility of international human rights law for individuals, see R. Mullerson, ‘Human Rights and the Individual as Subject of International Law: A Soviet View’, (1990) 1 *EJIL* 33.

¹¹⁰ See the recent ECtHR’s (in)admissibility decisions in App. No. 71412/01 *Agim Behrami and Bekir Behrami v. France*, and App. No. 78166/01 *Ruzhdi Saramati v. France, Germany and Norway*, Grand Chamber decision of 2 May 2007; cf. K. M. Larsen, ‘Attribution of Conduct in Peace Operations: The ‘Ultimate Authority and Control’ Test’, (2008) 19 *EJIL* 509.

However, human rights posit ends to be achieved, ends which are often ambiguously phrased and, when it comes to implementation, favour state discretion. This weak nature stems from disagreements about ideas of international justice amongst international society. Such persistent disagreement is why sovereignty, in terms of respect for another states political independence, is so important for order in international society. Sovereignty provides a space for political communities to pursue their own interpretation of human rights free from direct interference, apart from in extreme circumstance when the bounds which international law has set, such as the prohibition on apartheid,¹¹¹ are over-stepped; bounds which reflect definite points of convergence in the disparate set of values that define international society's approach to internal constitution.¹¹² This, then, explains a reluctance of other states to question human rights in other states or to protest at some states abysmal records of reporting on human rights.¹¹³ Of course, in terms of rationale for international involvement in ineffective states, if there is not an effective government, there is not even the possibility of cajoling compliance.

The implementation and exercise of human rights requires an agent that can make the political decisions and has the capacity to implement them. The implementation of human rights by a foreign entity, in the normal run of things, is thus subject to consent.¹¹⁴ As implementation reflects an act of self-determination, the agent should be considered the embodiment of the right of self-determination. In this respect, '[o]ne could go so far as to say that sovereignty, as the consummation of the self-determination of peoples, is not only itself a human right, but indeed-in light of common Article 1 of the human rights Covenants-the first human right (in the sense of providing a foundation for, not morally outweighing, other human rights)'.¹¹⁵ This understanding finds support in the Human Rights Committee's comment on the right to self-determination, 'its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights'.¹¹⁶ The point being that, without self-determination,

¹¹¹ See 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid; 1965 International Convention on the Elimination of All Forms of Racial Discrimination, Art. 3; SC Res. 288 (1970).

¹¹² See Roth, *op. cit.*, fn. 97, pp. 1049-1050

¹¹³ On reluctance of states to submit reports or criticise other states, see N. D. White, *The UN System: Towards International Justice* (2002) 240.

¹¹⁴ Roth, *op. cit.*, fn. 97, p. 1034

¹¹⁵ Roth, *op. cit.*, fn. 97, p. 1042

¹¹⁶ General Comment 12, para. 1 (1996), this quote is also cited in Chapter 1 of this study.

the relative worth of the other rights is reduced, as it is an outsider that tells the people how to enjoy them. In the context of state reconstruction without an independently effective domestic government, there is no such agent, the people are not in a position to exercise self-determination, and so, while human rights adherence can reassure about humane treatment, this does not cure neglect of political independence. For example, by pursuing those human rights that relate to political organisation, such as Article 25 ICCPR, in the reconstruction of a state, the international actors would be imposing their understanding of the human right on the political community.

Furthermore, human rights do not serve as a limit on reconstruction. Rather they are a bare minimum standard. Thus adherence to human rights does not stop complete overhaul of the state in contravention of political independence.

In sum, human rights instruments are designed, both in contents and implementation, with discretion for governments in mind. This stems from the presumption that the government is the embodiment of the will of the state and its people. Where the government is not independently effective, this presumption is rebutted, but still international human rights law continues to defer to the government. One thus struggles to see the applicability of international human rights law as compensating for a neglect of political independence.

7. Conclusion

This chapter has addressed how the established legal answers for large-scale international involvement in state reconstruction, when there is not an independent effective domestic government, relate to political independence and the attendant core UN system values of self-determination and international peace.

A chapter VII resolution has been argued to be a possible legal justification for the international military presence and the international involvement with the administration of state reconstruction. However, it was argued that a chapter VII resolution has its legalising ability because member states waived the right to complain about an infringement of the right to political independence. Thus it does not reconcile the activity with the right to political independence. For activity clearly within the remit of chapter VII, such as the deployment of an international military presence, the fact of a resolution is a reassurance in terms of the value of

international peace; it says nothing, however, about the value of self-determination. State reconstruction is less clearly within the ambit of the powers of the SC under chapter VII, this, and the fact of the importance of the right to political independence for the UN system, led to the suggestion that such activity would not be authorised without the additional legal justification of state consent, which could help project consistency with the right to political independence.

State consent precludes wrongfulness, as the lack of it is central to definition of unlawful intervention in international law. Accordingly, state consent, subject to the limits of the agreement, is to be seen as making the international actors agents of the target state's and its people's right to political independence. This produces consistency with the right to political independence and thus the value of self-determination. However, a source of valid state consent, when there is no independently effective domestic government, is only possible through the power of international recognition as evidence of governmental status in an international legal sense. Despite the subjectivity of international recognition being a compelling reason why such a government should not be able to consent to large-scale international involvement, it remains a possibility in international legal doctrine.

There is, then, by chapter VII and state consent, separately or combined, scope for the preclusion of wrongfulness of an activity which is far from consistent with the right to political independence.

Given the importance of the right to political independence and the attendant values for the UN system, one would not expect these legal justifications alone to be sufficient to explain the international acceptance of the practice. One would expect further attempts to accommodate the values of self-determination and international peace. International human rights law offers regulation and accountability, but it does so on the assumption that the government is the embodiment of the will of the state and its people. Thus it is overly deferential to governmental discretion, both in terms of the level of regulation and the means for accountability, to be of comfort in relation to the values of self-determination and international peace. If, however, there was an acknowledgement of the failings of a non-independently effective domestic government, this might be the impetus for parts of international human rights law to be interpreted with greater specificity and with a greater willingness to challenge authority that acts with a disregard for them. The conceptual potential for this to

occur in a manner that addresses the values of self-determination and international peace, and the likelihood of such an occurrence, is turned to in the next chapter.

Chapter 3

The Potential Role of Democracy in State Reconstruction

1. Introduction

Chapter 1 has indicated how large-scale international involvement for the purpose of the reconstruction of a state, appears incompatible with the right to political independence. The proposed approaches to international involvement in state reconstruction, addressed at the end of Chapter 1, all essentially advocated the abandonment of the right to political independence, apparently seeing no way for such involvement and its retention. This, though, neglects the importance of political independence for the UN system, particularly in respect of the values of self-determination of peoples and international peace. Chapter 2 has pointed out that the legal justifications of state consent and a chapter VII resolution, separately or combined, could preclude wrongfulness, but, when there is not an independently effective domestic government, would not reconcile the activity with the right to political independence. And while state consent would project a degree of consistency with the right to political independence, and a chapter VII resolution would offer some reassurances in respect of international peace. This would still seem to fall short of a comprehensive explanation for international acceptance, primarily because of a failure to sufficiently address the value of self-determination. Thus, given the importance of the values of self-determination and international peace for the UN system, one would expect the practice of state reconstruction to involve the pursuit of aims that better accommodate these values and, consequently, engender international acceptance.

The pursuit of democracy is a central feature of contemporary efforts at state reconstruction. Moreover, democracy is readily associated with the values of self-determination and international peace. There is, then, a strong likelihood that democracy is a vital element for the international acceptance of a practice that is not expected to sit well with the right to political independence. Hence this chapter is interested in the details surrounding how the pursuit of democracy would accommodate the values at stake. Specifically, in light of substantial debate about the

position of democracy in international law, the chapter asks, what difference does the pursuit of democracy as a political or as a legal concept make in terms of accommodation of the values at stake?

The chapter argues that because democracy suggests genuine rule by the people, its pursuit would help project the international involvement as necessary for the realisation of self-determination. It is contended that this, in itself, would help address the threat to international peace stemming from a neglect of political independence, and that accommodation of the value of international peace would also be supported by democracy's other apparent, discrete, benefits for international peace. In this latter respect, it is argued that the flexibility of democracy as a political concept would be useful for potential peacemaking tasks, which might require an approach to democracy that struggles to be seen as consistent with a strive for the democratic ideal. Crucially, however, if democracy is treated only as a political concept, it is reasoned that the lack of scope for regulation and accountability would be to the detriment of the value of self-determination.

There is, though, an emerging consensus on democracy as a legal concept, which is more than just the right to take part in elections. It includes both aspects of procedure for identification of the government and substantive standards of governmental conduct, and this it is argued could provide a basis for regulation of governance during the reconstruction process. To make most effective use of this emerging consensus on democracy as a legal concept, in the sense of accommodating the values of self-determination and international peace, it is argued that it should be linked to the legal right to self-determination where there is no effective domestic government. This, it is argued, in light of self-determination as the basis of sovereignty, with reasonable exceptions in the interest of international peace, would provide a basis for meaningful regulation and accountability of the pursuit of democracy. It is predicted, however, that if there is a possibility of gaining at least the toleration of wider international society without the development of regulation and accountability, the 'need' for the development of new law will not arise.

The chapter begins by considering how simply making the pursuit of democracy, loosely defined as a political concept, a central aim of the reconstruction process, would potentially accommodate the values put at stake by a neglect of political independence – self-determination of peoples and international peace. It then

addresses the extent to which it is possible to identify a consensus on the meaning of democracy as an international legal concept, and considers what impact this would have on the values of self-determination and international peace. A penultimate section considers the relationship between democracy and the legal right of all peoples to self-determination. This demonstrates the potential for meaningful regulation and accountability of the pursuit of democracy in the interests of self-determination and international peace.

2. Democracy, Self-Determination, and International Peace

A. Democracy and the Value of Self-Determination

Both the concepts of democracy and self-determination of peoples have long histories. Democracy derives from the classical Greek form of citizen self-government known as *demokratia* meaning ‘rule by the people’.¹ It was indicated in Chapter 1 how self-determination as a political value stands for giving all people the possibility of self-government, but does this mean democratic government?

Walt van Praag, so as to forge a strong – ‘even inseparable’ – link between self-determination and democracy, posits that democracy is about the right to choose ones leaders so it must also include the right to choose whether those leaders are from the same people and territory. This means, for Walt van Praag, that the origins of democracy are synonymous with that of self-determination, and hence the latter stretches back to ‘the first stirrings of democracy in classical Greece’.² However, the first stirrings of self-determination as a political principle are generally traced back to around the time of the French Revolution (1789). And it was not until US President Wilson took an interest, at the start of the Twentieth Century, that one finds democracy clearly merged with a political principle of self-determination. Prior to Wilson’s interest, ideas about self-determination as a political principle tended to centre on the right of the people to choose their political status free from external interference, with democracy a form of government that could be chosen rather than

¹ S. Marks and A. Clapham, *International Human Rights Lexicon* (2005) 62.

² M. C. van Walt van Praag, ‘Self-Determination in a World of Conflict – a Source of Instability or Instrument of Peace?’, in T. D. Gill and W. P. Heere (eds.), *Reflections on Principles and Practice of International Law* (2000) 265 at 266; see also U. Umzurike, *Self-Determination in International Law* (1972) 4-5.

an essential part of self-determination.³ Thus the nature and context of Wilson's understanding of self-determination is of particular interest for determining the extent to which the value of self-determination supposes a democratic form of government.

Wilson's thinking on self-determination stretched over a number of years and encompassed a number of diverse elements. To begin with, Wilson talked only in terms of 'self-government', and the cognate 'consent of the governed', rather than expressly of self-determination. The meaning of self-government, as Pomerance notes, 'had for him an imprecise dual connotation':

On the one hand, it implied the right of a population to select its own form of government, yet, on the other hand, it also strongly suggested that self-government must be a *continuing* process and must therefore be synonymous with the *democratic* form of governance.⁴

This reflected a logical advancement of the idea that the authority of a government comes from the will of the people – popular sovereignty. In the sense that, if authority of a government comes from the will of the people, this should entail that the people have a right to choose the form of the government.⁵

Self-determination is said to have entered Wilson's vocabulary on 11 February 1918.⁶ Self-determination appears to have been used as something of an umbrella term, with Wilson introducing new dimensions when faced with political situations that required it. This was mostly in the context of the First World War, with arguments of self-determination used to justify a particular position.⁷ The importance of democracy in relation to peace further confirmed Wilson's thinking of self-determination and democracy as fused in the concept of 'self-government'. As such, Wilson considered that the German people could not be held responsible, as they were not 'self-governed'.⁸ Moreover, for Wilson, the League of Nations was to be composed of 'self-governing nations', identified on the basis of governments

³ See T. Musgrave, *Self-Determination and National Minorities* (1997) 2.

⁴ M. Pomerance, 'The United States and Self-Determination: Perspectives on the Wilsonian Conception', (1976) 70 *AJIL* 1 at 17 note 80.

⁵ See A. Cassese, *Self-Determination of Peoples. A Legal Reappraisal* (1995) 19.

⁶ Pomerance, *op. cit.*, fn. 4, p. 2.

⁷ See Pomerance, *op. cit.*, fn. 4, p. 18.

⁸ Pomerance, *op. cit.*, fn. 4, p. 19.

‘controlled by the will and vote’ of their people, as it was such governments that could be trusted to preserve peace in the world.⁹

Looking over Wilson’s pre-war, war, and post-war thoughts on self-determination, Pomerance identifies in Wilson’s conception of self-determination a ‘confusion and fusion of several ideas’:

freedom from "alien" sovereignty ("external self-determination"), freedom to select one's own form of government ("internal self-determination"), a form of continuing self-government (democracy), or the principle of one nation-one state¹⁰

A constant theme running through these disparate strands of Wilson’s conception is ‘belief in the democratic ideal as a desideratum worth attaining for its own sake and as a means to achieve the ultimate goal of universal peace.’¹¹

Support for the view that self-determination was not at the time understood in legal terms but rather as a political postulate, subscribed to when convenient, is seen in the lack of insistence from the Allies, in the aftermath of World War I, that new states be democratic.¹² Did, though, the inextricable connection between democracy and self-determination, found in Wilson’s concept, continue with the inclusion of self-determination in the UN Charter?

During World War II, the Allies adopted a number of policy documents, on matters related to the end of the conflict, in which external and internal aspects of self-determination featured prominently.¹³ The 1941 Atlantic Charter, between President Roosevelt and Churchill, indicated a ‘desire to see no territorial changes that do not accord with the freely expressed wishes of the peoples concerned’, and expressed a willingness to ‘respect the right of all peoples to choose the form of government under which they live’.¹⁴ Churchill, however, was keen to stress that it was in the context of the end of the war, rather than generally, that this was to be relevant. And, while it implies going through a democratic process to find the will of

⁹ Pomerance, *op. cit.*, fn. 4, p. 20.

¹⁰ Pomerance, *op. cit.*, fn. 4, p. 20.

¹¹ Pomerance, *op. cit.*, fn. 4, p. 20.

¹² Cassese, *op. cit.*, fn. 5, p. 26.

¹³ See I. Brownlie, ‘An Essay in the History of the Principle of Self-Determination’, in C. H. Alexandrowicz (ed.), *Croatian Society Papers 1968, Studies in the History of the Law of Nations* (1968) 90 at 96-98.

¹⁴ Reprinted in J. A. S. Grenville, *The Major International Treaties: 1914 – 1973 – A History and Guide with Texts* (1974) 198.

the people, it does not indicate that the form of government chosen must be itself democratic.

World War II, as noted in Chapter 1, prompted negotiations between China, the USSR, the UK and the US on the creation of a new world organisation. Article 1(2) of the UN Charter provides that one of the purposes of the United Nations is to ‘develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace’. As there is no explicit meaning ascribed to self-determination in the Charter, one must look to the preparatory work for evidence of how the political ambition was understood by those agreeing to the Charter. There was much debate about the inclusion of Article 1(2) at San Francisco, with fears that it would prompt claims of a right to secession,¹⁵ or be manipulated as a basis for military interventions prominent concerns.¹⁶ Amidst considerable debate it was presented, by the Rapporteur, as acceptable on the basis that, amongst other things, it conformed to the purposes of the Charter as a right to self-government not secession,¹⁷ and that ‘an essential element of the principle is free and genuine expression of the popular will of the people, which avoids cases of the alleged expression of the popular will, such as those used for their own ends by Germany and Italy in later years’.¹⁸ In relation to form of government, Cassese finds that the preparatory work confirms that the latter point just referenced ‘was only intended to stress that where a people is afforded the right to express its views, it must truly be free to do so’, thus confirming that there was no consensus on a particular form of government that was to be required when the term was included in the UN Charter.¹⁹

Moreover, in relation to the rationale for the inclusion of reference to self-determination, Cassese concludes from the debates that the understanding of self-determination included in the Charter was rooted in the idea of equal rights of peoples, and as such was considered valuable to the extent that it helped promote

¹⁵ See, e.g., comments from Colombia, First Committee of the First Commission of the San Francisco Conference, 14 – 15 May and 1 and 11 June, 1945, Microfilm Minutes, Library of the Palais des Nations, Geneva, [hereinafter Debates] at p. 20, 15 May, cited by Cassese, *op. cit.*, fn. 5, pp. 39–40.

¹⁶ See, e.g., comments from Egypt, Debates, *op. cit.*, fn. 15, p. 22, 14 May 1945.

¹⁷ See Cassese, *op. cit.*, fn. 5, p. 40; cf. H. Quane, ‘The United Nations and the Evolving Right to Self-Determination’, (1998) 47 *ICLQ* 537 at 547.

¹⁸ UNICO, Vol. VI, (1945) 455, cited by Cassese, *op. cit.*, fn. 5, p. 40.

¹⁹ A. Cassese, Political Self-Determination – Old Concepts and New Developments’, in A. Cassese (ed.), *UN Law – Fundamental Rights: Two Topics in International Law* (1979) 139; see also Cassese, *op. cit.*, fn. 5, p. 42.

friendly relations among states. It was not considered to have a significance independent of the pursuit of peace, and could thus be set aside if conflict loomed.²⁰ The emergence of self-determination as a fundamental principle of international law indicates a change of consensus on this last point. The way the legal norm has developed indicates that the value of self-determination is important for its own sake.²¹ It would thus no longer be an internationally acceptable practice for the value of self-determination to be simply set aside if conflict loomed. The important point, here, is that at the creation of the UN Charter, agreement was reached that self-determination stood for the importance of self-government not that this required a democratic government.

The Wilsonian understanding did not form the basis for the inclusion of self-determination in the UN Charter. It does, though, arguably, represent a logical extension of giving people the possibility of self-government. If it is to be self-government, the government must be the one the people want; it must represent the will of the people. Democracy, which, by way of its historical origins, promises genuine rule by the people, is naturally thought of as a form of government that ensures government represents the will of the people.²² As this logic has taken hold, most states in the world that base governmental authority on the will of the people, popular sovereignty, now have some aspect in the structure of governance that can be termed democratic. Moreover, testament to the continuing significance of the Wilsonian conception of self-determination is found in the fact that some scholars, who strive to encourage an international legal right to democracy, cite the Wilsonian conception of self-determination to support this cause.²³

It is, then, apparent that large-scale international involvement in state reconstruction that seeks to accommodate the value of self-determination, should pursue a democratic form of government. In so doing, while not curing the infringement of the right to political independence, the involvement can be cast as facilitating the realisation of self-determination. This is because, in the absence of an independently effective domestic government, the involvement is creating the form of government most readily acknowledged as the method for extrapolating the will

²⁰ Cassese, *op. cit.*, fn. 5, p. 43.

²¹ See Chapter 1 of this study.

²² Cf. R. A. Miller, 'Self-Determination in International Law and the Demise of Democracy'. (2003) 41 *Columbia Journal of Transnational Law* (2003) 601 at 611.

²³ See, e.g., T. Franck, 'The Emerging Right to Democratic Governance' (1992) 86 *AJIL* 46 at 53; cf. Miller, *op. cit.*, fn. 22, p. 633.

of the people for the purpose of the exercise of self-determination. Further, this has obvious implications, now turned to, for the threat that the neglect of the right to political independence poses for international peace.

B. Democracy and International Peace

The association of democratic government with international peace also has a long history. The oldest association is found in the idea that democratic states do not wage war against one another. Kant famously speculated about how perpetual peace might be achieved.²⁴ A key component was that every state should have a 'republican' constitution.²⁵ This is commonly understood as indicating democratic government.²⁶ The theory was that making government accountable would counteract aggressive tendencies of monarchies, because there would be a need for greater concern about the welfare of the citizens. Doyle's empirical study of 1983, looking at international wars since 1817, provided some confirmation of Kant's idea. Doyle identified that democratic states remained at peace with one another, while going to war with non-democratic states that also fought amongst themselves.²⁷ The reasons for this predisposition continue to be a source of debate.²⁸ One might query whether such states would remain peaceful amongst themselves were there not non-democratic states to go to war with.²⁹ Or one might see that there is something intrinsically peaceful about a democratic state, which means, when disputes arise with a like state, there is a common trust that the dispute will be settled peacefully.³⁰

If adding another member to the 'zone of peace' was the only benefit for international peace from the pursuit of democracy in state reconstruction, the potential of democracy to make up for the threat to international peace posed by a neglect of political independence would hardly be mentionable. It is, after all, somewhat contradictory to try and excuse the neglect of political independence

²⁴ I. Kant, 'Perpetual Peace' (1795), in H. Reiss (ed.), *Kant's Political Writings*, (1991) (trans. H. Nisbet) 93.

²⁵ Kant, *op. cit.*, fn. 24, p. 99.

²⁶ See, e.g., Franck, *op. cit.*, fn. 23, p. 88.

²⁷ M. Doyle, 'Kant, Liberal Legacies and Foreign Affairs', (1983) 12 *Philosophy and Public Affairs* 205 at 223 and 235; see also A-M. Slaughter, 'International Law in a World of Liberal States' (1995) 6 *EJIL* 50.

²⁸ S. Marks, *The Riddle of all Constitutions* (2002) 37.

²⁹ M. Koskenniemi, 'Intolerant Democracies: a Reaction', (1996) 37 *Harvard International Law Journal* 231 at 234.

³⁰ R. Buchan, 'International Community and the Occupation of Iraq', (2007) 12 *JCSL* 37 at 52.

which risks sparking international conflict, on the basis of the pursuit of a form a government that will not go to war. Neither the people of the target state nor interested third states would be reassured with an explanation that there is no need to be agitated by the imposition of a governmental form if this rests only on the fact that it is a form that will not go to war with other states that have the same form.³¹

Another, more pertinent, association of democracy with international peace relates to the peacemaking process within the target state. Democracy has a long history within the peacemaking process after internal-conflict.³² At a basic level, the holding of free and fair elections, along with the possibility of building in power sharing arrangements, offers an authoritative means of reconciling the differences between warring factions.³³ Further, democratic institutions and processes are seen as a means of limiting the risk that conflict will re-erupt, as they channel competing interests into discourse and so encourage compromise.³⁴ Democracy thus reduces the threat of civil conflict spilling over into neighbouring states, and therefore serves to offset concerns about a threat to international peace caused by a neglect of political independence in the reconstruction process. This, though, is without consideration of how the value of self-determination has been treated. Indeed, it could be that, in the short-term, peace might best be served through predefined governance arrangements that struggle to be consistent with what one might consider as necessary for consistency with the value of self-determination.³⁵ Long-term, however, it is premised that a disregard for the value of self-determination would be harmful to peace.³⁶

The third association of democracy with international peace is connected to its relevance for the value self-determination, noted above. By the pursuit of democracy, while not curing the infringement of the right to decide, the involvement is cast as facilitating the realisation of self-determination. It is, in the absence of an

³¹ See, making a similar point, B. R. Roth, *Governmental Illegitimacy in International Law* (1999) 369.

³² Franck, *op. cit.*, fn. 23, pp. 80 – 81.

³³ S. Barnes, 'The Contribution of Democracy to Rebuilding Postconflict Societies', (2001) 95 *AJIL* 86 at 86; K. Samuels, 'Post-Conflict Peace Building and Constitution Making', (2005-2006) 6 *Chicago Journal of International Law* 663 at 665.

³⁴ Supplement to Reports on Democratization, UN Doc. A/51/761, 20 Dec. 1996, para. 17; see also ECtHR decision, *United Communist Party of Turkey and others v. Turkey*, Reports of Judgements and Decisions 1998-I, para. 45.

³⁵ See D. Wippman, 'Practical and Legal Constraints on Power Sharing', in D. Wippman (ed.), *International Law and Ethnic Conflict* (1998) 211 at 228 and 230.

³⁶ See Samuels, *op. cit.*, fn. 33, p. 671.

independently effective domestic government, creating the form of government most readily acknowledged as the basis for identifying a government that represents the will of the people for the purpose of exercise of self-determination. Accordingly, the risk that the neglect of the right to political independence would spark conflict is reduced because the underlying values are still addressed, albeit in a different way.

Thus the pursuit of democracy would have a discrete benefit in terms of international peace, as well as one flowing from accommodating the value of self-determination. The approach taken to democracy to address the requirements of peacemaking process, as noted, might lead to a reduction of the actual accommodation of the value of self-determination. There is therefore a need to address what would be required, in terms of the definition of democracy pursued, to accommodate the values of self-determination and international peace in relation to the process of large-scale international involvement in state reconstruction.

C. The Political Concept of Democracy

As Fox and Roth note, 'prior to the events of 1989-91, 'democracy' was a word rarely found in the writings of international lawyers.'³⁷ The extent of development in international legal doctrine on democracy subsequent to the end of the cold war is returned to below. For most of its history democracy has been treated only as a political concept.

As it is used in a variety of ways, in a variety of disciplines, it is not possible to identify a definitive definition of democracy.³⁸ Beetham, from mapping the different usages of the political concept, suggests democracy can be distilled down to two principles about the competence of decision-makers in public affairs. These are popular control, meaning that the decisions are subject to the control of those affected, and political equality, meaning that control is distributed amongst those affected on the basis of equality.³⁹ The identification of these ideals, while a useful tool for 'criticizing actuality and orientating change',⁴⁰ does not in itself indicate

³⁷ G. H. Fox and B. R. Roth, 'Democracy and International Law', (2001) 27 *Review of International Studies* 327 at 327.

³⁸ See, in this respect, the account of political theorist D. Beetham, *Democracy and Human Rights* (1999) chapter 1.

³⁹ Beetham, *op. cit.*, fn. 38, pp. 4-5; see also Marks and Clapham, *op. cit.*, fn. 1, pp. 62-63; J. Crawford, *Democracy in International Law*, (1994) *BYIL* 113 at 114.

⁴⁰ S. Marks, *op. cit.*, fn. 28, p. 150.

what would be required of the international actors for there to be at least an element of truth in a claim of the pursuit of democracy. Democracy as a loose political concept is used to describe a number of different institutions and procedures, including 'electoral politics, multipartyism, interest-group politics, majority rule, political liberalism, participatory decision-making, and a pluralist social and political order',⁴¹ which encompass both the procedure for the identification of the government and the substantive conduct of the government thereafter. Elections, though, remain the dominant process associated with democracy, and although this is only about procedure for the identification of a government, such a limited approach would still have a claim to be 'democracy'. Indeed, in terms of a peacemaking process, if the goal is only to gain an agreement of the warring factions on a way forward, elections alone might suffice.⁴² It does not follow, however, that this would be sufficient to uphold the value of self-determination.

Free and fair elections are essential in the process of identification of those that will govern on behalf of the people.⁴³ If, however, the pursuit of democracy is to be the element that essentially excuses neglect of political independence, there is surely a need for more than just a promise and then the conduct of elections.⁴⁴ There is a need for a more comprehensive attempt at realising the genuine rule by the people that the term democracy promises, as it is this promise that makes democracy of relevance for the value of self-determination.

While genuine rule by the people is perhaps destined to be just beyond reach in even the most developed of democracies, striving to realise the democratic ideal must bring a government closer to this elusive goal. Accordingly, there should be an understanding of democracy that addresses both aspects of the democratic ideal, noted above. This requires a government that is both representative of, and accountable to the people of a state. And means a definition of democracy that includes particular procedures for the identification of the government beyond elections, such as rights to participate, and requires standards of substantive conduct, such as in relation to freedom of expression. Such an understanding of democracy

⁴¹ Clapham and Marks, *op. cit.*, fn. 1, p. 62.

⁴² See Wippman, *op. cit.*, fn. 35, p. 226

⁴³ On the importance of elections in the post conflict situation generally, see G. Fox 'International Law and the Entitlement to Democracy after War', (2003) 9 *Global Governance* 2179 at 2185.

⁴⁴ See, on the importance of a more expansive understanding for the actual success of international efforts to foster a peaceful and effective state, W. Malley, 'Democratic Governance and Post-Conflict Transitions', (2005-2006) 6 *Chicago Journal of International Law* 683 at 700.

will be referred to by this study as genuine democracy. This reflects the stronger claim to produce genuine rule by the people, than an understanding that is satisfied with merely a procedure for identification of government.

Particularly in relation to international involvement in state reconstruction, a key reason for stressing the importance of genuine democracy is that, if all the focus of democracy is on elections, once a government is elected, in terms of the commitment of the international actors to seeing democracy realised, this is more easily the end of the matter. It is, however, unlikely that all the people will have voted for the government. Thus, while the government remains dependent on international actors for its effectiveness, it would seem appropriate for international actors, that excuse their involvement on the basis of democracy, to ensure that the elected government strives to meet the democratic ideal, which will bring it closer to the will of the people; and thereby better reconcile international involvement with the value of self-determination. Moreover, if it is only about elections, the conduct of the governance moving towards the facilitation of elections is taken out of the spotlight. Democracy is projected entirely as something that is coming, as irrelevant for the transitional period. Yet again, if democracy is to excuse international involvement, in order to bring governance as close to the will of the people as possible, it follows that there should be an appropriate level of commitment to the democratic ideal in the governance before elections. After all, it is through such governance that vital decisions about the change and development of the state and civil infrastructure – the exercise of the state and the people's right to decide – will be made.

Whether such a level of commitment to the democratic ideal would be pursued in practice is influenced by whether this would be necessary for the pursuit of democracy to uphold self-determination. Despite the lack of agreement on a definition of democracy as a political concept, the term itself, advising of genuine rule by the people, has a palliative effect, offering reassurance in relation to the value of self-determination.⁴⁵ In the normal run of things, once a government has some democratic credentials, in the loosest sense, such a government has a significant hortatory tool for resisting any challenges to its legitimacy, in the sense of its right to rule. The power of the term democracy to convince that genuine rule by the people is being realised, helps to disguise the level of actual commitment to the democratic

⁴⁵ See also Miller, *op. cit.*, fn. 22, p. 606.

ideal. It is hard to imagine that similar considerations would not apply in the state reconstruction context. Hence, the pursuit of democracy could be nothing more than a promise to hold elections at some distant point in the future, but the fact of the pursuit democracy would remain, and with it the same message of genuine rule by the people. The point is that, in terms of how the international involvement is portrayed in relation to the value of self-determination, the synonymous nature of the term democracy and the idea of genuine rule by the people suggests that it may not be necessary for genuine democracy to be posited in order for democracy to serve its role as an excuse for the neglect of political independence.

Clearly, for the reasons noted above, it would in actual fact be troublesome, in terms of the value of self-determination, if there were no understanding of democracy that stretched beyond elections. Moreover, even if a more acceptable level of democracy was pursued – which addressed the procedural and substantive aspects of governance – as a political concept there would be no scope for regulation or accountability. This latter aspect would seem crucial, in the interests of the value of self-determination, because otherwise there is little to guarantee what has been promised.⁴⁶ In contrast, however, the flexibility of democracy as a political concept could be of utility for the peacemaking process.

To help form a view on which, a legal or a political concept, is most likely to have been found in practice, it is useful to consider whether it is possible to see democracy as an international legal concept, and to address the relevance of this in relation to the values of self-determination and international peace.

3. Democracy in International Law

Most states now acknowledge the importance democracy. This is seen in the raft of declarations emanating from meetings under the auspices of the UN and other international meetings of states. The latter include the 1997 Inter-Parliamentary Union's Universal Declaration on Democracy,⁴⁷ the Bucharest Declaration of the Third International Conference of the New or Restored Democracies,⁴⁸ and the

⁴⁶ See, similarly, Samuels, *op. cit.*, fn. 33, p. 680.

⁴⁷ Inter-Parliamentary Union's (IPU) Universal Declaration on Democracy, 16 September 1997, adopted without a vote.

⁴⁸ The Bucharest Declaration of the Third International Conference of the New or Restored Democracies, 11 September 1997, UN Doc. A/52/334.

Warsaw Declaration: Towards a Community of Democracies.⁴⁹ And from the UN, such documents as the 1993 Vienna Declaration of the World Conference on Human Rights, The GA's Millennium Declaration,⁵⁰ and The GA's World Summit Outcome.⁵¹ Commonly, these declarations call for promotion and assistance with the realisation of democratic ambitions of states, but offer very little in the way of definition of democracy. The Vienna Declaration, for example, determines simply that, '[d]emocracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives'.⁵² As such, it is not clear whether these are intended as *lex lata*, *lex ferenda*, or mere political aspiration.⁵³

The members of the European Union are legally committed to have a democratic government. Article 6(1) of the Treaty on European Union states that, '[t]he Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.' Article 49 provides that only states adhering to the principles contained in Article 6(1) are eligible for membership. New membership of the EU is decided in accordance with the 1993 Copenhagen Principles, which stress that, amongst other things, 'the candidate country has achieved stability of institutions guaranteeing democracy'.⁵⁴ A breach of Article 6 (1) requirements can lead to expulsion under Article 7 of the consolidated treaties, but this requires a vote of the membership and does not specify any further the meaning of democratic principles. Membership of the Organisation of American States is not conditioned on democratic government. But by Article 9 of the OAS Charter:

A Member of the Organization whose democratically constituted government has been overthrown by force may be suspended from the exercise of the right to participate in the sessions of the General Assembly, the Meeting of Consultation, the Councils of the Organization and the Specialized Conferences as well as in the commissions, working groups and any other bodies established.⁵⁵

⁴⁹ Warsaw Declaration: Towards a Community of Democracies, (2000) 39 *ILM* 1306.

⁵⁰ GA Res. 55/2 (8 September, 2000) para. 24.

⁵¹ 2005 World Summit Outcome, UN. Doc. A/60/L.1, September 2005, para. 135.

⁵² United Nations World Conference on Human Rights: Vienna Declaration and Program of Action, adopted by acclamation on 25 June 1993, (1993) 32 *ILM* 1661, at 1666.

⁵³ See G. H. Fox, 'Democracy, right to, International Protection', *EPIL* (forthcoming 2008) para. 4.

⁵⁴ Conclusions of the Presidency - Copenhagen, June 21-22 1993, section 7(a) (iii).

⁵⁵ As amended by the 1992 Washington Protocol.

This is dependent on a decision from the wider membership, with no criteria provided for the determination of democracy.⁵⁶ The African Union does not condition membership on democracy. It does, though, have as an objective of the Union, by Article 3(g) of the 2000 Constitutive Act of the African Union, to ‘promote democratic principles and institutions, popular participation and good governance’. And, by Article 30 of the Act, ‘governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union’. This is noticeably not anti-democratic action, but as Fox notes, ‘the AU’s limited practice in this area suggests that Article 30 was intended to target interruptions of democratic governance.’⁵⁷ The point, here, is that while introducing legal obligations for members of the organisations based on democracy, there is a lack of specificity about what democracy means, and it is essentially for the membership of these organisations to decide what is meant by democracy in a particular circumstance.⁵⁸ If this approach to democracy was employed in state reconstruction, there would be no guarantee of the level of democracy that would be implemented or of objective regulation and accountability.

It is as part of international human rights law that most evidence on a consensus for a legal concept of democracy, which could be of utility in relation to regulation and accountability of the pursuit of democracy in state reconstruction, is found.

A. The Emergence of Democracy as a Human Right?

The present concern is with the identification of a legal concept of democracy, specifically one that seeks to ensure genuine democracy, and that might be employed in the state reconstruction context as a basis for regulation and accountability of those involved. The interest is in universal international law, rather than regional. This is because state reconstruction, in most cases, involves states from a variety of regions.

There has been considerable debate since the end of the cold war about a right to democracy in international law. Such debate has been fuelled by the spread of

⁵⁶ See, though, the 2001 Inter-American Democratic Charter, Article 3; see also T Legler, S Lean and D Boniface (eds.), *Promoting Democracy in the Americas* (2007).

⁵⁷ Fox, *op. cit.*, fn. 53, para. 21.

⁵⁸ The Commonwealth is similar, see, e.g., Harare Commonwealth Declaration, Issued by Heads of Government in Harare, Zimbabwe on 20 October 1991; see also the 1996 Ushuaia Declaration, of MECUSOR.

democratic politics around the world at the national level, the trend for international monitoring of elections, an acceptance of the importance of democracy for the broader protection of human rights, and, indeed, the pursuit of democracy in instances of state reconstruction.⁵⁹ Debate, of course, does not necessarily lead to consensus on a right to democracy.

The most widely ratified international treaty that supports the idea of democracy as a human right is the 1966 ICCPR.⁶⁰ The Human Rights Committee (HRC), a body of experts serving in their individual capacities, through its comments on reports from state parties, views on individual complaints, and general comments on specific articles, provides the most authoritative, albeit not legally binding, interpretations of the Covenants provisions.⁶¹ The HRC has emphasised that Article 25 ICCPR, 'lies at the core of democratic government based on consent of the people'.⁶² Article 25 provides:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restriction:

- (a) to take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) to have access, on general terms of equality, to public service in his country.

While 'Article 25 does seem to provide the minimum foundations upon which democracy can built',⁶³ there is a lack of specificity,⁶⁴ which means it need not be read as requiring genuine democracy, in the sense noted above. In this respect, there is no indication of the powers to be accorded the elected institutions or that there must be more than one party contesting the elections.⁶⁵ The resultant indeterminacy appears to have been central in gaining the consent of states with ideologically opposed views.⁶⁶

The ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR) were intended to give immediate legal meaning to the human

⁵⁹ See Fox and Roth, *op. cit.*, fn. 37, pp. 330-335.

⁶⁰ In force 1976.

⁶¹ See D. McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (1991).

⁶² General Comment No. 25, 12 July 1996, UN Doc. CCPR/C/21/Rev.1/Add.7. para. 1.

⁶³ N. D. White, *The United Nations System: Toward International Justice* (2002) 178.

⁶⁴ Franck, *op. cit.*, fn. 23, p. 64.

⁶⁵ Roth, *op. cit.*, fn. 31, pp. 330-331.

⁶⁶ Roth, *op. cit.*, fn. 31, p. 332.

rights enumerated in the non-legally binding, more political aspiration, 1948 UDHR. The less ideologically neutral tone of the earlier instrument was reflected in the reference to ‘democratic society’ in Article 29 UDHR on permitted limitations to the human rights.⁶⁷ As well as in Article 21 UDHR on political participation, this links the provision on elections with governmental authority:

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
2. Everyone has the right to equal access to public service in his country.
3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent voting procedures.

As Roth notes, ‘although the tone [in the UDHR] was not congenial, the meaning was malleable’, and this encouraged those states not committed to genuine democracy, in the sense of this study, to at least abstain rather than vote against.⁶⁸ There were, though, still limits. The USSR was not, for example, willing to tolerate a version of Article 21 that required multiple political parties contest the election.⁶⁹ Consequently, when it came to agreeing upon the text of the covenants, the legal nature of the instrument, and emergence of the Soviet and Non-Aligned Blocs as significant powers in international society, meant that, in transforming the provisions of the UDHR, terminology which suggested a requirement of genuine democracy was never likely to be included.⁷⁰

Thus, by the law on treaty interpretation,⁷¹ the intended meaning of Article 25 ICCPPR is open to a range of conflicting interpretations.⁷² However, through the factors indicated in Article 31 of the VCLT, the meaning of a treaty is open to change over time. This means that, ‘any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions’,⁷³ and, ‘subsequent practice in the application of the treaty which establishes the agreement

⁶⁷ Article 29 UDHR includes ‘[T]he just requirements of morality, public order and the general welfare in a democratic society’.

⁶⁸ Roth, *op. cit.*, fn. 31, p. 326.

⁶⁹ H. J. Steiner, ‘Political Participation as a Human Right’, (1988) 77 *Harv. Hum. Rts. Y.B.* 1 at 91.

⁷⁰ See Roth, *op. cit.*, fn. 31, pp. 329-332.

⁷¹ See 1969 VCLT, Article 31(1), ‘[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given the terms of the treaty and in their context and in light of their object and purpose’; Article 32 indicates that should there be ambiguity then one may examine ‘the preparatory work of the treaty and the circumstances of its conclusion.’

⁷² Roth, *op. cit.*, fn. 31, p. 332.

⁷³ Article 31(3)(a), VCLT.

of the parties regarding its interpretation',⁷⁴ should be taken into account when seeking to identify if a more specific meaning has developed. Finding evidence to support a development in relation to a multilateral treaty with some 160 states parties is, of course, a difficult task. There is, though, the HRC.

Debate surrounds the exact status of the HRC, 'quasi judicial' or 'conciliator' are oft-heard terms.⁷⁵ It does not provide binding interpretations. But, as the most authoritative body in relation to the ICCPR, its pronouncement on provisions are far from bereft of significance, and would be expected to influence the interpretation of provisions by states parties. Accordingly, how the Committee reads Article 25 is of particular interest for present purposes.

In the 1990s, the HRC started to find its voice in relation to democracy, and sought to improve the specificity of Article 25 along genuine democratic lines in its General Comment.⁷⁶ The Comment takes as its starting point the content of Article 25, which provides rights for individuals to take part in the conduct of public affairs, to vote and be elected at genuine periodic elections, and to have access to public service. The Comment then sets out what the HRC understands as required to ensure fulfilment of these rights. The Comment explains that it is implicit in Article 25 that the freely chosen representatives do in fact exercise governmental power and are accountable,⁷⁷ and that citizens can take part in the conduct of public affairs through public debate and dialogue with representatives, which is supported by ensuring freedom of expression, assembly and association.⁷⁸ Moreover, the rights of freedom of expression, assembly and association are identified as essential conditions for the effective exercise of the right to vote, and suggestions are made as to what these rights, which are enshrined elsewhere in the ICCPR, require in the context of Article 25.⁷⁹ The principle of non-discrimination with regards the citizens right to vote is stressed.⁸⁰ Conditions on eligibility to vote or stand for office on factors such as descent or political affiliation are rejected.⁸¹ It stresses the importance of voters

⁷⁴ Article 31(3)(b), VCLT.

⁷⁵ See McGoldrick, *op. cit.*, fn. 61, p. 54.

⁷⁶ For a detailed overview of the jurisprudence of the HRC in respect of Article 25, see A. Conte, S. Davidson, and R. Burchill, *Defining Civil and Political Rights* (2005) 68-79.

⁷⁷ General Comment No. 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Art. 25), 12/07/96, CCPR/C/21/Rev.1/Add.7, para. 7.

⁷⁸ *Ibid.*, para. 8.

⁷⁹ *Ibid.*, para. 12.

⁸⁰ *Ibid.*, para. 3.

⁸¹ *Ibid.*, para. 15.

being free to form opinions and oppose the government without undue influence or coercion of any kind.⁸² The issue of multiparty elections is not tackled directly, but when one reads that ‘elections must be held at intervals . . . which ensure that the authority of government continues to be based on the free expression of the will of the electors’⁸³ with the statement that ‘political parties play a . . . significant role in the election process’,⁸⁴ the implication appears one of incompatibility with one party states.⁸⁵ In accordance with the idea that these are the basic rights that provide the foundation for democracy, the Comment does not venture so far as to suggest a type of electoral system beyond one person one vote.⁸⁶

In sum, the Comment on Article 25 the HRC sets out what one might describe as ‘all the essential conditions attributed to a [genuine] democratic system’.⁸⁷ While there is an emphasis on the procedure for identification of the government rather than conduct, it acknowledges that substantive conduct of governance must be of a certain type and standard if the procedure is to be consistent with the ideal of democracy. It indicates a set of basic rights that can be thought of as necessary for any society to be termed democratic, rather than a complete blueprint for governance.⁸⁸ This is the sort of legal idea of democracy that might be employed in the practice of state reconstruction. To what extent does it have the support of states?

The reporting system under the ICCPR is an obvious place to look to see if a state subscribes to this interpretation of Article 25, and, more generally, treats democracy as a legal concept substantiated in the manner indicated by the HRC. In fact, however, it is difficult to extract support for a definitive interpretation from these reports. Because the reports are cast in terms of what the state in question does to satisfy the provisions, rather than suggesting their approach is the only way of

⁸² *Ibid.*, para. 19.

⁸³ *Ibid.*, para. 9.

⁸⁴ *Ibid.*, para. 26.

⁸⁵ See White, *op. cit.*, fn. 63, p. 179; cf. R. Rich, ‘Bringing Democracy into International Law’, (2001) 12 *Journal of Democracy* 20 at 24; The Human Rights Commission has, though, been clearer on the need for multiparty elections, in operative para. 1(d)(ii) of Resolution 2000/47, ‘Promoting and Consolidating Democracy’, it refers to the need for the election process to be ‘open to multiple parties’, there were no negative votes but 8 abstentions: Bhutan, China, Cuba, Pakistan, Qatar, Congo (Brazzaville), Rwanda, and Sudan, see below.

⁸⁶ General Comment 25, *op. cit.*, fn. 77, para. 1; options include majority or proportional representation systems, see G. Fox, ‘The Right to Political Participation in International Law’ 2002 *Yale Journal of International Law* 539 at 556.

⁸⁷ White, *op. cit.*, fn. 63, p. 178.

⁸⁸ See S. Wheatley, ‘Democracy and International Law: a European Perspective’, (2002) 51 *ICLQ* 225 at 235; White, *op. cit.*, fn. 63, p. 178.

satisfying the provisions,⁸⁹ the reports leave open that other approaches can be valid. Accordingly, in terms of evidence of a change to a more specific meaning of Article 25, the relevance of those reports that can be read as following genuine democracy is reduced. Moreover, while the term democracy is frequently mentioned in state reports, one struggles to find an example where this is used to identify a set of core rights. Instead, the term democracy appears as a nod towards some type of undefined ideal governmental form.⁹⁰ There is also, of course, the struggle to actually get states to report. Not reporting is the easiest way to avoid setting any precedent in terms of interpretation.

Support for interpretation of Article 25 in line with that of the HRC might further be identified through recourse to the regional human rights agreements that states have entered into.⁹¹ In light of Article 31(3)(a) of the VCLT, noted above, the wording of parallel provisions in regional instruments is relevant in relation to demonstrating the parties' understanding of the ICCPR commitment. States, when creating regional instruments, have, though, tended simply to echo the broad nature of Article 25 ICCPR, and certainly do not seek to offer an explicit definition of democracy.⁹² The earlier 1950 ECHR is particularly weak in this respect, Article 3 of Additional Protocol 1 goes only so far as to require that: '[t]he High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.' This reflects a troublesome preference for discretion by those states that may be seen as the beacons of democracy for those struggling to establish democracy in more perilous conditions.⁹³

Judicial bodies attached to these regional instruments certainly acknowledge the importance of democracy. The ECtHR, for example, declared in the case of *United Communist Party of Turkey and Others v. Turkey* that 'democracy is without doubt a

⁸⁹ See, e.g., the Sixth Periodic Report of the United Kingdom of Great Britain and Northern Ireland [1 November 2006] CCPR/C/GBR/6 at p. 184, detailing how the 2006 UK Electoral Administration Act improves the enjoyment of Article 25 for the people of the UK but with little to suggest that alternative approaches would not be consistent with Article 25.

⁹⁰ See, e.g., the UK Report, *Ibid.*

⁹¹ See A. H. Robertson and J. G. Merrills, *Human Rights in the World: An Introduction to the Study of the International Protection of Human Rights* (1996) 330-335.

⁹² See, e.g., 1981 African Charter on Human and Peoples' Rights, Article 13; 1969 American Convention on Human Rights, 'Pact of San Jose, Costa Rica', Article 23; 2004 League of Arab States, Revised Arab Charter on Human Rights, Article 24.

⁹³ D. J. Harris, M. O'Boyle, and C. Warbrick, *Law of the European Convention on Human Rights* (1995) 557; Franck, *op. cit.*, fn. 23, p. 90; M. Novak, *UN Covenant on Civil and Political Rights: A Commentary* (1993) 437.

fundamental feature of the European public order.’⁹⁴ The Court has identified certain rights as essential in democratic society, for example, ‘[democracy] thrives on freedom of expression’,⁹⁵ but has fallen short of sketching out democracy as a composite of human rights. Indeed, it appears that the HRC has provided the most extensive (quasi)judicial legal account of democracy, at the international level, to date.

Strong support for the importance of the human rights identified as the core of democracy by the HRC is found in the earlier 1990 OSCE Copenhagen Document. The Conference on Security and Co-operation in Europe originated from the 1975 Helsinki Conference of European Powers (plus the US and Canada), through the Helsinki Final Act.⁹⁶ The act was a political document laying down a series of basic principles of behaviour in the areas of security in Europe, co-operation in economics, science and technology, and co-operation with humanitarian matters.⁹⁷ Regular follow-up meetings review implementation, and produce non-binding instruments elaborating on the political commitments made at Helsinki. In respect of the right to democracy, Franck describes the Copenhagen Document ‘as detailed to an unprecedented extent’.⁹⁸ Franck suggests that even though it is in a political document it is weighted with the terminology of *opinio juris*.⁹⁹ Certainly, it does go into some considerable detail in relation to procedure for identification of governments, as well as what rights such as freedom of expression, association and assembly, entail. And, the ‘will of the people, freely and fairly expressed through periodic and genuine elections,’ is declared as ‘the basis of the authority and legitimacy of all government.’¹⁰⁰ However, at no point is any of this explicitly cast as

⁹⁴ *United Communist Party of Turkey and others v. Turkey*, *op. cit.*, fn. 34, para. 45; on the ECtHR’s approach to Article 3 of Additional Protocol 1, see also B. Bowring, ‘Negating Pluralist Democracy: the Strasbourg Court Forgets the Rights of the Electors’, (2007) 11 *KHRP Legal Review* 67.

⁹⁵ *United Communist Party of Turkey and others v. Turkey*, *op. cit.*, fn. 34, para. 45; see also A. Mowbray, ‘The Role of the European Court of Human Rights in the Promotion of Democracy’, (1999) *Public Law* 703.

⁹⁶ Conference on Security and Co-operation in Europe, Final Act of Helsinki, 1 August 1975; renamed the OSCE in 1995, see D. McGoldrick, ‘The Development of the Conference on Security and Co-operation in Europe – From Process to Institution’, in B. S. Jackson and D. McGoldrick (eds.), *Legal Visions of the New Europe* (1993) 135; See also M. Bothe, N. Ronzitti and A. Rosas (eds.), *The OSCE in the Maintenance of Peace and Security* (1997).

⁹⁷ See, on the political nature of the document, N. D. White and M. Odello, ‘The Legal Base for Human Rights Field Operations’ in M. O’Flaherty (ed.), *The Human Rights Field Operation: Law, Theory and Practice*, (2007) 47 at 51

⁹⁸ Franck, *op. cit.*, fn. 23, p. 67.

⁹⁹ Franck, *op. cit.*, fn. 23, p. 67; for a more hesitant approach, see S. Chesterman, *Just War or Just Peace? Humanitarian Intervention* (2001) 95 and references cited therein.

¹⁰⁰ 1990 OSCE Copenhagen Document, Article 6.

constituting democracy. Moreover, where democracy is mentioned it is as an abstract political ideal: 'welcome the commitment expressed by all participating States to the ideals of democracy and political pluralism'.¹⁰¹ Later in 1990, the Paris Charter was signed, again not a legally binding treaty, it included a pledge to 'co-operate and support each other with the aim of making democratic gains irreversible.'¹⁰² Rather than seek to offer a legal definition of democracy, the main effort, by way of democracy, seems to have been the setting up of 'Office for Free Elections at Warsaw' (now renamed the Office for Democratic Institutions and Human Rights), mandated to 'facilitate contacts and the exchange of information on elections within participating States.'¹⁰³

In terms of the explicit promotion of a legal understanding of democracy, the Human Rights Commission was more forthcoming. In its 1999 resolution 'Promotion of the Right to Democracy', the Commission described the right of democratic governance as including the following:

- (a) The rights to freedom of opinion and expression, of thought, conscience and religion, and of peaceful association and assembly;
- (b) The right to freedom to seek, receive and impart information and ideas through any media;
- (c) The rule of law, including legal protection of citizens' rights, interests and personal security, and fairness in the administration of justice and independence of the judiciary;
- (d) The right of universal and equal suffrage, as well as free voting procedures and periodic and free elections;
- (e) The right of political participation, including equal opportunity for all citizens to become candidates;
- (f) Transparent and accountable government institutions;
- (g) The right of citizens to choose their governmental system through constitutional or other democratic means;
- (h) The right to equal access to public service in one's own country.¹⁰⁴

In this concept of democracy, the procedure for the identification of the government is situated amongst aspects of substantive conduct. This varies from the approach of the HRC, noted above, wherein the procedure is the focus, and aspects of substantive

¹⁰¹ 1990 OSCE Copenhagen Document, Preamble.

¹⁰² Conference on Security and Co-operation in Europe, Charter of Paris for a New Europe and Supplementary Document to Give Effect to Certain Provisions of the Charter, 21 November 1990, Preamble; see also Conference on Security and Co-operation in Europe, Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, 3 October 1991, which is often cited on the debate in respect of pro-democratic intervention, see on this debate Roth, *op. cit.*, fn. 31, p. 343; Chesterman, *op. cit.*, fn. 99, pp. 94-96.

¹⁰³ See < <http://www.osce.org/odihr/>>.

¹⁰⁴ Promotion of the Right to Democracy, Commission on Human Rights Resolution 1999/57 (27 April 1999).

conduct are intended to support it. In voting on the resolution there was no dissent, and only two members (China and Cuba) abstained. However, significant concern was expressed in relation to these rights being promoted as a right to democracy.¹⁰⁵

As Fox and Roth note:

The remarks of several states reflect, on the one hand, an unwillingness to repudiate either discrete participatory rights or democracy in the abstract, yet on the other hand, a deep concern about the implications of characterizing an entire and specific form of government as legally mandated.¹⁰⁶

Clearly, then, there is not universal consensus on a legal concept of genuine democracy in the normal run of things. The important point is that the HRC and the Human Rights Commission have indicated that there are a core of human rights which can be treated as a legal concept of democracy. And this is based on an understanding of democracy that addresses both procedure for identification of government and the substantive conduct of government. Accordingly, it could, if adopted by states, offer some reassurance that those involved in state reconstruction would strive for the democratic ideal, and, in so doing, come closer to genuine rule by the people. Consideration of some likely concerns about the development of a legal concept of democracy is an opportunity to clarify the need for such a concept.

B. Why a Legal Concept of Democracy?

In terms of objections to a legal concept of democracy, one might assert that to insist on a particular form of government, is a challenge to the right of self-determination.¹⁰⁷ This concern helps to explain why the UN Secretary General preferred to refer to democratisation, rather than democracy, in his report on assistance from the UN system to new or restored democracies: 'the UN System . . . does not endorse or promote any specific form of government. That is why, in the present report, I do not attempt to define democracy but refer to democratisation.'¹⁰⁸

¹⁰⁵ 25 out of 53 member states on the UN Human Rights Commission dissented or abstained on the 'right to democracy' language of Resolution 1999/57, though none dissented and only two (China and Cuba) abstained on the resolution as a whole. UN Doc. E/CN.4/1999/SR.57 (April 27, 1999).

¹⁰⁶ Fox and Roth, *op. cit.*, fn. 37, p. 346; see also Rich, *op. cit.*, fn. 85, pp. 23-24.

¹⁰⁷ See especially the comments of India on Resolution 1999/57, *op. cit.*, fn. 105, paras. 8-9.

¹⁰⁸ Report by the UN Secretary General, 'Support by the UN system for the efforts of governments to promote and consolidate new or restored democracies', 7 August 1995, A/50/332.

As Rajagopal responds, '[c]onceived in this way, democratisation becomes disaggregated into a series of bureaucratic steps taken by the UN solely in response to the wishes of the countries requesting assistance and therefore conformity with sovereignty.'¹⁰⁹ Even in the normal run of things, where a government is independently in effective control of its territory, this approach struggles to convince of its consistency with the right to political independence. This is because the promotion of democracy by the UN is far from the neutral and apolitical act that the Secretary General and the fact of a consensual basis attempt to portray it as.¹¹⁰ The point, then, is not to try and reconcile a requirement of democracy with the right to political independence *per se*, but rather, when political independence is compromised, to see democracy as another means of accommodating the value of self-determination. If this is to be the case, there is a need for some explicit legal regulation and accountability to ensure that what is advertised – democracy, and with it genuine rule by the people – is at least strived towards.

Further, it might be argued that identifying pre-existing human rights as democracy is to add nothing. But this is to miss that there are core rights that are clearly more central to the democratic ideal than others, and through identifying these, a platform for challenging the misuse of the term of democracy is formed. More specifically, thinking back to the discussion on democracy as a political concept, it is clear that identifying the basic components of democracy in legal terms is a means to challenge the utility of democracy as a malleable concept, able to legitimise even governments with little interest in striving for the democratic ideal. In the opposite respect, to identify all human rights as forming the legal concept of democracy would also be to lose sight of the legal concept of democracy as a basis for assessment of the pursuit of genuine rule by the people, not a basis for passing judgement on a government's provision for human welfare in general.

The idea is not, however, to suggest that other human rights, outside of the legal concept of democracy, are somehow less important. Rather, by identifying those rights that are most central to the democratic ideal, and expecting a government to pursue their achievement, the idea is that the nature of the government, striving for genuine rule by the people, will incline it to seek to uphold all human rights. Clearly

¹⁰⁹ B. Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (2003) 142.

¹¹⁰ Rajagopal, *op. cit.*, fn. 109, p. 142.

this is idealistic,¹¹¹ but certainly in a situation where effective control of the territory is dependent on international actors there is reason for greater optimism, than in fledgling democracies without such invasive international involvement.

Moreover, there is scope for debate about which rights are most central to the democratic ideal. The HRC and the Human Rights Commission have, though, indicated that it is possible to single at least some rights out as more central. Minority rights are noticeably absent. The implementation of minority rights in general is particularly dependent on the circumstances of a given state.¹¹² But the logic of the democratic ideal, that all citizens are equal, means that minorities, particularly their cultural distinctiveness, should not be left to the whim of the democratically elected majority.¹¹³ Ideally, then, there would be provision in a legal concept of democracy to address the importance of minorities being represented in government. Agreement on what such a provision would look like, however, remains elusive.¹¹⁴ And thereby is not likely to be specifically addressed in a legal concept of democracy, even when limited to the state reconstruction context.

As the best that can be hoped for, by way of a legal concept of democracy, reflects minimum standards rather than an extensive blueprint for democratic sophistication, some consideration of the thesis of Marks, the author of a significant critical analysis of the concept of democracy in international law, is required. A key conclusion of Marks is that the democratic ideal must not be reduced to any particular set of institutions and practices. 'Instead, they [the two aspects identified by Beetham, noted above] must be permitted to retain their character as tools for criticizing actuality and orientating change'.¹¹⁵ Marks was writing in response to the trend for the liberal West to encourage countries of the third world and the European transition states to pursue democracy, and, in relation to this, international scholars who attempt to identify a legal concept.¹¹⁶ Mark's criticism stemmed from the promotion of a low-intensity democracy, characterised by 'the holding of periodic

¹¹¹ Wippman, *op. cit.*, fn. 35, p. 241.

¹¹² See R. Mullerson, 'Minorities in Eastern Europe and the Former USSR Problems, Tendencies and Protection' (1993) 56 *The Modern Law Review* 793 at 804.

¹¹³ Marks and Clapham, *op. cit.*, fn. 1, p. 66; Wippman, *op. cit.*, fn. 35, p. 230.

¹¹⁴ See S. Wheatley, *Democracy, Minorities and International Law* (2005) 195.

¹¹⁵ Marks, *op. cit.*, fn. 28, p. 150.

¹¹⁶ See also T. Carothers, 'Empirical Perspectives on the Emerging Norm of Democratic Governance in International Law', (1992) *Proceedings of the American Society of International Law* 261 at 264; M. Koskenniemi, *op. cit.*, fn. 29, p. 234; cf. G. H. Fox, *Humanitarian Occupation* (2008) 155.

multiparty elections and the official separation of powers',¹¹⁷ with an undemanding standard set for 'more far-reaching objectives, such as enhancing respect for human rights, social justice, and civilian control of the military';¹¹⁸ in sharp contrast to the far more demanding standards pursued in 'actually existing democracies'. The concern, for Marks, is that it is not:

orientated to the reproduction of Western political practices, neither is it designed to capitalise on the distinctive democratic possibilities offered by non-Western experiences and traditions. Rather, its significance lies in providing some of the institutions and procedures associated with modern democracy, while leaving established centres of powers substantially intact.

As Gills *et al* emphasise 'in a real sense these new democracies have preserved ossified political and economic structures from an authoritarian past. Not only have they not come close to operating a political structure modelled on actual Western liberal democracies, this is not part of a long-term agenda for the future.'¹¹⁹ Marks also reports on how the theorists of low-intensity democracy 'suggest that moves to support democratic reconstruction may serve to curb democratic aspirations; that free elections may substitute for transformative social and political change.'¹²⁰

In the light of Mark's concern, it is important to stress that identifying the basic rights that are required by democracy is not to suggest that their satisfaction entails the democratic ideal is achieved. But it does offer a basis for legal opinion to be formed on whether there is a commitment to the democratic ideal, which is important if the pursuit of democracy is to be the excuse for the neglect of political independence in the state reconstruction context. Moreover, in the situations being addressed by this study, there are no established centres of power to be legitimised.¹²¹ In fact, it is exactly the lack of an independently effective domestic government to embody the right of the state and its people to political independence, which introduces the need for a legal concept of democracy: to serve as a check on international and domestic actors, that might seek to take advantage of the legitimacy that the term democracy provides, without a commitment to the genuine rule by the

¹¹⁷ Marks, *op. cit.*, fn. 28, p. 53.

¹¹⁸ Marks, *op. cit.*, fn. 28, p. 53.

¹¹⁹ B. Gills, J. Rocamora, and R. Wilson, 'Low Intensity Democracy', in B. Gills, J. Rocamora, and R. Wilson (eds.), *Low Intensity Democracy: Political Power in the New World Order* (1993) 3.

¹²⁰ Marks, *op. cit.*, fn. 28, p. 74.

¹²¹ On the subject of promoting democracy to the major world powers of Russia and China, see R. Mullerson, 'Promoting Democracy Without Starting a New Cold War', (2008) 7 *Chinese Journal of International Law* 1.

people which the term promises. This is not, of course, to suggest the irrelevance of efforts to achieve democracy during the reconstruction of ineffective states for the debate on whether and how democracy should be promoted around the world.¹²² Such debate is not, though, the focus of this study.

Grounded in international human rights law, how would this legal concept of democracy fare as a basis for regulation and accountability of those involved in state reconstruction without an independently effective domestic government?

C. Regulation and Accountability through Democracy as a Human Right

The rationale of this enquiry into democracy in international law is that if an essential cause of international acceptance of large-scale international involvement in the reconstruction of an ineffective state is to be the pursuit of democracy, there is a need for assurances that there is a commitment to what the term implies, genuine rule by the people. This is important because, if understood only as a political concept, democracy could go on to be treated as little more than a platitude, intended to conceal a complete absence of concern for the input of the people into governance. And if this were to occur, the values of self-determination and international peace, the accommodation of which rests on the promise of genuine rule by the people, would be affected, with consequent negative implications for the people of the state in question and international order.

Before commenting on the extent that a legal concept of democracy grounded in international human rights law would serve to provide meaningful regulation and accountability of the process. It is useful to imagine a how model for legal regulation and accountability could operate in the context of state reconstruction where there was not an independently effective domestic government.

If governance were from an un-elected domestic government kept in power through international military presence, or an international governance structure, the idea is that, along with evidence of a genuine commitment to realising the procedural aspects, governance would be expected to be in line with the substantive conduct aspects of the legal concept of democracy. To accommodate the peacemaking situation, there could be reasonable exceptions in the interests of international peace,

¹²² See, on the debate surrounding democracy promotion, T. Carothers, 'How Democracies Emerge: The "Sequencing" Fallacy', (2007) 18 *Journal of Democracy* 12.

but evidence of a genuine commitment beyond the exception must be sustained. Further, the legal approach to democracy, identified above, is still made up of rather abstract terms that leave discretion on implementation. At the present time, it is difficult to imagine agreement on greater specificity, but as it would not be practical to micro manage the process of governance, even if there were greater specificity, this would not affect the core significance of the legal concept of democracy identified above. Crucially, what this legal concept provides is a basis for distinguishing a commitment to the democratic ideal from disregard, which is missing when democracy is treated as a loose political concept. A standard of persistent neglect could be employed to challenge the authority of those that do not display commitment, perhaps dependent on a resolution from the GA or the SC. With the possibility of a challenge to governmental authority, one would hope that those entrusted with governance would be more inclined to ensure at least a strive for the realisation of a model of democracy that addresses both the substantive and procedural aspects of governance, and thus brings the process of reconstruction closer to genuine rule by the people.

Back to reality, whether it was international actors or an otherwise ineffective domestic government administering the move towards democratic self-government, international human rights obligations would still, at least arguably, be applicable.¹²³ But this returns the present enquiry to the nature of international human rights law, as addressed in Chapter 2. International human rights law expects that there is a government that embodies the rights of the state and its people to implement it. Accordingly, the instruments tend to be set up so that they do not come with a meaningful basis for enforcement or, more generally, for challenging the authority of the governments entrusted with fulfilment of the rights. Nor is there a culture of third states complaining about the human rights situation in a particular state. Thus, as a human right, those with authority could easily set aside the legal concept of democracy. As with the political concept, democracy might readily amount to a mere platitude. However, if the legal concept of democracy were treated as the basis of authority, there would be the framework for challenging authority, and, with it, the impetus for adherence to democracy. In light of this, and recalling discussion in Chapter 1 about the relationship between state sovereignty and the legal right to self-

¹²³ See Chapter 2 of this study.

determination, it is useful to consider the likelihood of the legal right to self-determination requiring adherence to the legal concept of democracy.

4. A Legal Concept of Democracy as Part of the Right to Self-Determination?

Chapter 1 set out how the right to self-determination is the best explanation for state sovereignty in contemporary international law. As things stand, it gives legal bite to the idea of popular sovereignty – sovereignty belongs to the people – by granting the people the same right to political independence as the state. There is, though, as was noted in Chapter 1, the conceptual potential for further development. This, if one follows the logic of the ideas associated with the legal right – the general principle – which stresses the importance of the possibility of self-government decided through the freely expressed will of the people, could have wide-ranging significance for international law.

It is not unimaginable that the legal concept of democracy, given the historical association of democracy with self-determination and identification of the will of the people, might come to be seen as a legal requirement for governance to be consistent with the right to self-determination.¹²⁴ If it did, there would be clear implications for the rules on the identification of the agent of the state and its people. Presently, international legal doctrine, on who can embody the rights of the state and its people, is based on the idea that where there is effective control acquiescence of the people can at least be assumed. Thus a failure to meet standards of democratic governance has no direct impact on governmental status in an international legal sense. This helps to sustain the efficacy of international law, which would clearly suffer if effective governments could lose their status as a consequence of a failure to commit to the democratic ideal.¹²⁵

However, where there is no independently effective domestic government, and there is a need for identification of a government to exercise the rights to decide found in the overlapping legal doctrine of state sovereignty and self-determination of

¹²⁴ See I. F. Dekker, 'Reconsidering the Legal Relevance of Structural Violence', in N. Schrijver, P. de Waart, and E. Denters, *Reflections on International Law from the Low Countries: in Honour of Paul de Waart* (1998) 324 at 336.

¹²⁵ Cf. J. d'Aspremont, 'Legitimacy of Governments in the Age of Democracy' 38 *NYU Journal of International Law and Politics* (2006) 877; also C. G. Fenwick, 'The Recognition of De Facto Governments: is there a Basis for Inter-American Collective Action', (1964) 58 *AJIL* 109.

peoples, it is more reasonable to expect that this link between the emerging legal consensus on democracy as a human right and the right to self-determination might have been made. This is because it would not so readily threaten the authority of effective, but hardly democratic, governments, and would help improve the consistency of large-scale international involvement for the purpose of state reconstruction with the value of self-determination. It would provide a basis for challenging the authority of the government, if it did not adhere to the legal concept of democracy, with much more purchase than if democracy were seen only as a human right.¹²⁶ To gain a better idea of the likelihood of this conceptual potential being adopted, it is worth considering how strong the claim, that a legal concept of democracy is already part of the right to self-determination, is.

When the people, for the purpose of the right to self-determination, are understood as the population of the state as a whole, states benefit from the ethical justification this provides for statehood and the legitimacy it confers on sovereignty.¹²⁷ States are, however, reluctant to encourage further developments in the legal doctrine of self-determination. Such reluctance can be explained by fears about the potential encouragement of claims to secession from groups within states, or the risk to the status of effective governments, if a criteria for governmental form and conduct that is consistent with the right of self-determination is introduced. Accordingly, states, as well as the HRC, have tended to concentrate on the external aspects of right to self-determination.¹²⁸ And Harris is confident of legal doctrine in relation to the colonial context: 'a rule of international law by which the political future of a colonial or similar non-independent territory should be determined in accordance with the wishes of its inhabitants, within the limits of the principle of *uti possidetis*'. However, within a state, Harris will only venture that the legal principle of a right of all peoples to self-determination 'may require governments generally to have a democratic base, and that minorities be allowed political autonomy'.¹²⁹ Two related lines of reasoning support the latter, more hopeful, point.

One line of reasoning is based on the inclusion of the right to self-determination as Article 1 in the ICCPR. Cassese argues that 'freely' in Article 1, as well as indicating

¹²⁶ On self-determination as more than just a human right, see C. Drew, 'The East Timor Story: International Law on Trial', (2001) 12 *EJIL* 651 at 663.

¹²⁷ See Chapter 1 of this study.

¹²⁸ See Cassese, *op. cit.*, fn. 5, p. 62-65.

¹²⁹ D. J. Harris, *Cases and Materials on International Law* (2004) 112.

freedom from external influence, also indicates that a people be 'free from any manipulation or undue influence from the domestic authorities themselves' when choosing 'their legislators and political leaders'.¹³⁰ It follows from this, for Cassese, that 'internal self-determination is best explained as a manifestation of the totality of the rights embodied in the Covenant [ICCPR], with particular reference to: freedom of expression (Article 19); the right of peaceful assembly (Article 21); the right to freedom of association (Article 22); the right to vote (Article 25b); and more generally, the right to take part in the conduct of public affairs, directly or through freely chosen representatives (Article 25a).'¹³¹ Cassese concedes, however, that the rights cited, particularly Article 25, are framed in such a manner as to make it easy for states to contend that they are satisfied.¹³² On this reasoning, if one adheres to interpretations of Article 25 such as that offered by the HRC in its General Comment on Article 25, self-determination would already require genuine democracy.

The HRC in this Comment indicated a close relationship between Article 1, the right to decide, and Article 25, the right to participate, but did not link the two.¹³³ Elsewhere, the HRC has, though, noted in the comments on at least one state report that a failure to conduct elections represented an infringement of the people's right to self-determination,¹³⁴ suggesting that it favours seeing the two as linked. A number of states have also stressed a link between democracy and the right to self-determination in their reports, but this is democracy as a loose political concept.¹³⁵ It remains, then, to be confirmed that the right to self-determination in the ICCPR requires genuine democracy.

The other line of reasoning relates to how the right to self-determination was formulated in the Declaration of Principles of International Law Concerning Friendly Relations, GA Res. 2625. After noting that:

By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural

¹³⁰ Cassese, *op. cit.*, fn. 5, p. 58.

¹³¹ Cassese, *op. cit.*, fn. 5, p. 53.

¹³² Cassese, *op. cit.*, fn. 5, p. 53.

¹³³ General Comment 25, *op. cit.*, fn. 62, para. 2.

¹³⁴ Human Rights Committee, Concluding Observations on the Second Periodic Report of the Congo, UN Doc. CCPR/C/79/Add.118, 27 March 2000, para. 20.

¹³⁵ See, e.g., India's Third Periodic Report, UN Doc. CCPR/C/76/Add.6, 17 July 1996, para. 32; cf. Wheatley, *op. cit.*, fn. 88, pp. 231-2.

development, and every state has the duty to respect this right in accordance with the provisions of the Charter.

It is added in the safeguard clause that:

Nothing in the foregoing paragraph shall be construed as authorising or encouraging any action which dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states *conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.*¹³⁶

As a result of the need for compromise to gain agreement on the text of the Declaration, there is a large degree of ambiguity in the clause.¹³⁷

The UK and the US, amongst others, were keen to make the link between the right to self-determination and the nature of the government through which the people would exercise the right. The US draft that was presented to the Special Committee on Friendly Relations, read: '[t]he existence of a sovereign and independent state possessing a representative government, effectively functioning as such to all distinct peoples within its territory, is presumed to satisfy the principle of equal rights and self-determination as regards those peoples.'¹³⁸ The UK draft echoed this.¹³⁹ The ambiguous term 'representative' was used by the US and the UK, but it seems that what these states had in mind was democracy.¹⁴⁰ Other states resisted the inclusion of the term 'representative government' in the manner desired by the US and UK. One reason for resistance was that it implied 'a mild attempt to impose certain of its [the sponsor's] own political persuasions on the constitutional law and practice of other states'.¹⁴¹ Ultimately, it was included in the more ambiguous manner cited above. But Rosenstock still considers that the clause as framed requires a government to represent the governed as part of the right of self-determination.¹⁴²

¹³⁶ GA Res. 2625, (1970) Emphasis added.

¹³⁷ See M. Pomerance, *Self-Determination in Law and Practice* (1982) 37-38.

¹³⁸ UN Doc. A/AC.125/L.32, 12 April 1966.

¹³⁹ UN Doc. A/AC.125/L.44, 19 July 1967.

¹⁴⁰ See Pomerance, *op. cit.*, fn. 137, pp. 38-39.

¹⁴¹ Burmese representative, 1967 session of the Special Committee on Friendly Relations, UN Doc. A/AC.125/SR.68, 4 December 1967, p. 9; the UK representative, Mr. Sinclair, denied that 'only one system of government properly met the criterion' of being 'representative' UN Doc. A/AC.125/SR.69, 4 December 1967, p. 19.

¹⁴² R. Rosenstock, 'The Declaration of Principles of International Law Concerning Friendly Relations: A Survey', (1971) 65 *AJIL* 713 at 732.

Cassese, in contrast, sees that, as originally framed, it only means that racial and religious groups within a state have a right of equal access to government.¹⁴³

Regrettably, the ICJ in the recent *Wall Opinion* missed an opportunity, in its first treatment of the legal right outside the colonial context, to clarify issues surrounding the legal doctrine of self-determination.¹⁴⁴ A significant international instrument endorsing the right of the whole population of a state to self-determination is the Helsinki Final Act of the OSCE, which stresses the importance of the rights to decide but offers nothing that could be read as limiting the right to the colonial context.¹⁴⁵ Perhaps most significant in respect of the safeguard clause is the 1993 Vienna Declaration from the UN World Conference on Human Rights. While it reaffirmed the safeguard clause, it replaced ‘distinction as to race, creed, or colour’ with ‘without distinction of any kind’. As Crawford notes, in reference to the clause as expressed in the Friendly Relations Declaration and the Vienna Declaration, the people of an existing state ‘exercise the right to self-determination through their participation in the government of the state on a basis of equality’.¹⁴⁶ The Badinter Commission on the dissolution of the FRY, and the Canadian Supreme Court in the *Quebec* case, also support the broader views.¹⁴⁷ These instances of support make it difficult to argue against the idea that all peoples in a state have the right to decide, to be enjoyed through a representative government.¹⁴⁸ The issue that remains, of course, is what does ‘representative’ mean?

Cassese sees the change from GA Res. 2625 to Vienna, noted above, as an implication that self-determination means ‘the right freely to determine the ‘political status’ of the country and to have equal access to government without any political, social, economic, racial or ethnic discrimination: in short, it means pluralistic representative democracy.’¹⁴⁹ On this basis, and on the Helsinki Declaration, and

¹⁴³ Cassese, *op. cit.*, fn. 5, p. 114 and p. 150.

¹⁴⁴ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Report 2004, p. 136, see, in particular, the separate opinion of Judge Higgins on the lack of more legal analysis in relation to the legal right of self-determination in the Opinion.

¹⁴⁵ Conference on Security and Co-operation in Europe, Final Act of Helsinki, 1 Aug 1975, Article VIII.

¹⁴⁶ J. Crawford, *The Creation of States in International Law* (2006) 119.

¹⁴⁷ Opinion 2, Badinter Commission, 11 January 1992, (1993) 92 *ILR* 167; see, though, the reasoning of the Supreme Court of Canada in *Reference re. Secession of Quebec*, (1998) 11 *DLR*. (4th) 385 (SCC) para. 138.

¹⁴⁸ See also Musgrave, *op. cit.*, fn. 3, p. 96

¹⁴⁹ Cassese, *op. cit.*, fn. 5, p. 306.

statements of some states at the GA,¹⁵⁰ Cassese suggests it may warrant contending that a customary rule that ‘representative’ means pluralistic representative democracy is in the process of formation.¹⁵¹ However, this as Cassese acknowledges is only a contention. A ‘representative government’ or a ‘government representing the whole people’, if they are different, does not have to entail democracy. The term ‘representative’ is an open ended one; it clearly has associations with democracy, but does not have to mean democracy. This ambiguous nature helps to explain how it was acceptable to the array of states involved in drafting the two declarations referred to above. Beyond blatant policies of exclusion from government, such as apartheid,¹⁵² there is, then, no general agreement on a particular form of government that is required to fulfil the representative requirement.¹⁵³ Accordingly, if a government is in effective control of the territory it is presumed to constitute the embodiment of the peoples’ right to self-determination.¹⁵⁴ This approach makes sense in light of effective control being the criterion for governmental status in international law, and the importance of effective governments for the efficacy of international law.

Moreover, keeping the meaning of representative open protects against a consequence of a logical reading of the safeguard clause, which suggests a government that is not representing the whole people could be at risk of a right to secession being afforded the oppressed group.¹⁵⁵ Perhaps the most significant finding in this respect has been by the Supreme Court of Canada, which suggested that:

the international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; *or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development*. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination.¹⁵⁶

¹⁵⁰ Cassese, *op. cit.*, fn. 5, p. 305

¹⁵¹ Cassese, *op. cit.*, fn. 5, p. 306.

¹⁵² See 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid; 1965 International Convention on the Elimination of All Forms of Racial Discrimination, Art. 3; SC Res. 288 (1970).

¹⁵³ See Musgrave, *op. cit.*, fn. 3, pp. 100-102.

¹⁵⁴ Roth, *op. cit.*, fn. 31, p. 419.

¹⁵⁵ See C. Tomuschat, *Yugoslavia’s Damaged Sovereignty over the Province of Kosovo*, in G. Kreijen (ed.), *State, Sovereignty, and International Governance* 323 at 342.

¹⁵⁶ *Reference re. Secession of Quebec*, *loc. cit.*, fn. 147 (emphasis added).

There is, though, little to support this approach in state practice, with states wary of creating a mass of calls for a right to secession.¹⁵⁷

Given that these inchoate developments linking self-determination to democracy in legal doctrine hinge in some respects on a fear of challenges to the authority of effective governments, it would not be unimaginable in relation to large-scale international involvement in state reconstruction for a legal concept of democracy to be required as part of the right to self-determination. This relates to the fact that, in such a situation, there is no independently effective domestic government, and, accordingly, as was noted in Chapter 2, established international law on governmental status defers in an unsatisfactory manner to international recognition. Thus a normal reason for not adopting the conceptual potential is not present, and there is a clear need in the interests of the value of self-determination and international peace for its adoption. Whether it would be adopted or not is, however, far from clear.

5. Concluding Hypothesis on the Approach to Democracy in the Practice of State Reconstruction

This chapter has addressed the role that democracy could have in inducing toleration of the practice of large-scale international involvement in state reconstruction without an independently effective domestic government. It has suggested that this would be through projection of an accommodation of the values of self-determination of peoples and international peace – the values that are put at stake by a neglect of political independence. It was argued that this could be achieved by the pursuit of democracy as a loose political concept, which would provide flexibility which could be useful for the peacemaking process. But that in order for there to be some truth in democracy's promise genuine rule by the people, there would need to be some commitment to minimum standards derived from the democratic ideal which cover procedural identification and substantive conduct of government. A political concept would not offer the necessary basis for regulation and accountability of democracy to ensure this commitment.

¹⁵⁷ See J. Crawford, 'State Practice and International Law in Relation to Secession', (1998) 69 *BYIL* 85; specifically on the relationship of self-determination with secession, see R. Mullerson, *Ordering Anarchy: International Law in International Society*, (2000) 283; G. H. Fox, 'Self-Determination in the Post-Cold War Era: a New Internal Focus?', (1995) 16 *Mich. J. Int'l L.* 733 at 755.

There are signs of an emerging consensus on democracy as a human right. But as a human right, while it would provide a standard for external assessment of the process, it would not provide a substantive basis for regulating or holding accountable, because of the inherently weak nature of international human rights law in this respect. It was consequently argued that the conceptual potential to make the legal concept of democracy part of the right to self-determination should be adopted. This would acknowledge that democracy was required because of the neglect of the rights to decide, and, because of self-determination as the core of sovereignty, it would provide a basis for the development of a legal framework in relation to limiting changes, imposing obligations, and for monitoring and challenging the policy of even an elected government, at least while it remains ineffective without international support. Operating on the basis of reasonable exceptions in the interests of international peace, this approach would retain flexibility for any peace process. But, if there was persistent neglect of the democratic concept, the authority of any government that received effectiveness through an international military presence could be challenged. Thus as an impetus to strive for the democratic ideal, this approach would more securely accommodate the value of self-determination, in the sense of giving people the possibility of self-government.

International law, though, develops on a 'needs' basis. If international actors perceive it as in their interests to develop law then they will seek to encourage its development. The importance of the right to political independence for the UN system is reason to believe that it would be in the interests of international actors to develop law to regulate international involvement in the reconstruction of states to try and better reconcile such practice with the right to political independence. As things stand, however, legal answers, which counsel against the likelihood of such law, are available in state consent and a chapter VII resolution.

Alone, these justifications look inadequate as explanation for international acceptance. Still, even though these legal answers do not reconcile the practice with the right to political independence, concern about this could be offset by the pursuit of democracy, because of its ability to accommodate the values of self-determination and international peace. Such an approach would more likely induce international acceptance and retain flexibility for all involved. Seen in this light, it is hardly obvious that there will be a perceived 'need' for development of the law. Whether or not there will be signs of new law, in this respect, depends on how strongly the need

for real consistency with the value of self-determination is perceived to be relative to other factors that might counsel against the development of law. Factors such as the need to sustain amicable relations amongst a pluralist international society, and the importance of flexibility for international involvement, in terms of government arrangements that can be introduced, both of which could be affected by the potential legal development outlined.

The next two parts of this study turn attention to how the contemporary practice of state reconstruction without an independently effective domestic government actually relates to the right to political independence. Attention is first given to the law of occupation. As an established framework for the administration of territory without an independently effective domestic government, it is necessary to address why this has not been adopted, at least by analogy, in the other paradigms. And to analyse contemporary practice of state reconstruction under the law of occupation which is relevant for the hypothesis just set out. The other chapter in Part 2 addresses the phenomenon of ITA, which represents reconstruction through direct foreign governance. While Part 3 is concerned with analysis of what this study conceptualises as the assistance model of state reconstruction, the most favoured approach for large-scale international involvement in the reconstruction of a sovereign state without an independently effective domestic government.

Part Two

STATE RECONSTRUCTION BY FOREIGN GOVERNANCE

Chapter 4

State Reconstruction under the Law of Occupation

1. Introduction

The law of occupation is an established legal framework for the administration of territory without an independently effective domestic government. Accordingly, in a study that concerns itself with how the right to political independence is dealt with in state reconstruction without an independently effective domestic government, there is an obvious need for some consideration of the law of occupation. This chapter is interested in how the approach the law of occupation takes to reconstruction relates to the right to political independence of the occupied state, and the relevance of this approach for the other paradigms of state reconstruction. The chapter asks, when does the law apply? What is the approach to state reconstruction? Would it be of utility, if adopted by analogy, for the other paradigms of state reconstruction? Are there lessons for how to improve the other paradigms in relation to political independence? And, does the framework, or practice under it, have any relevance for the hypothesis of Chapter 3?

To re-cap, the hypothesis of Chapter 3 is about how to accommodate the UN system values of self-determination and international peace that are put at risk by large-scale international involvement in an ineffective state's reconstruction. It is contended that the success of such accommodation is likely to be of central importance for international acceptance of the practice as a whole. The hypothesis rests on the idea that, where there is no independently effective domestic government, the pursuit of democracy would be a means of addressing the inadequacy of the legal justifications – state consent/chapter VII resolution – in relation to accommodation of these UN system values. How well the values are in fact accommodated is argued to depend on whether democracy has been pursued as a legal or a political concept. In this respect, it is predicted that international actors are likely to favour a political concept because this retains discretion for all involved while still portraying accommodation of the values of self-determination and international peace. This is despite the better consistency with the value of self-

determination that a legal concept of democracy linked to the right of self-determination is argued to offer.

This chapter argues that, despite originating before the right to self-determination and the prohibition on annexation of territory following a use of force, the law of occupation retains relevance for contemporary efforts at state reconstruction because it was still intended to preserve sovereign rights of the target state. While the presence of, at least one of, state consent and a chapter VII resolution is argued to explain why the law of occupation does not apply in the other two paradigms of state reconstruction addressed by this study. The approach that the law of occupation takes to the surreptitious manufacture of target state consent to end application of the law – insistence on an independently effective domestic government before the application can end – is argued to support the concern about the lack of an independently effective domestic government in the other paradigms. In this respect, attention is drawn to the lack of credentials for an otherwise ineffective domestic government, or an international administration, to be treated as the embodiment of the will of the state and its people, and the lack of scope for domestic resistance to the designs of the international actors in terms of how reconstruction proceeds.

Furthermore, it is contended that the conservationist emphasis of the law of occupation, in terms of change and development of state and civil infrastructure, would frustrate efforts at contemporary state reconstruction, and this signals little prospect of it being adopted by analogy. The law of occupation's approach to addressing concern for the right to political independence, limiting discretion of those with authority, is, though, contended to be support for the idea that, in the interests of the values of self-determination and international peace, there should be limits on the discretion of an authority that is not an independently effective domestic government. In this respect, recent practice is argued to confirm the established law of occupation's unsuitability for wide-scale reconstruction. The basis for international acceptance of the practice of reconstruction in breach of the law of occupation is argued to rest on the particular circumstances and the pursuit of democracy as a core reconstruction aim. The importance of the pursuit of democracy for international acceptance is argued to rest on its ability to accommodate the values of self-determination and international peace put at risk by the disregard for the law of occupation. However, it is also contended that there is little to suggest that the

centrality of democracy in contemporary practice has encouraged development of the law of occupation, or that in any other sense a legal concept of democracy has been adopted.

The chapter begins with an account of the history and rationale of the law of occupation. This is to indicate why, despite existing before the right to self-determination and the prohibition on annexation of territory following a use of force, the law of occupation is expected to have addressed the issue of state reconstruction and the right to political independence, in its framework for administration, in a manner of relevance for contemporary reconstruction efforts. To indicate how occupation relates to the right to political independence, to explain why it does not apply in the other paradigms, and to form a view on whether there are similarities that could justify its adoption by analogy in the other paradigms, the next section addresses the rules on application of the law of occupation. Subsequently, the legal framework the law of occupation provides for state reconstruction is addressed, both in terms of potential for adoption by analogy and general lessons about the level of change and development that should be permissible in state reconstruction without an independently effective domestic government. Moving on, attention is turned to how the emergence of the legal right of self-determination, as the core of state sovereignty, might have encouraged the development of the law of occupation in relation to state reconstruction along the lines set out in Chapter 3. In an effort to identify evidence of such development, subsequent sections address practice of occupation and reconstruction in post World War II Germany, the Occupied Palestinian Territories, and in Iraq. A final section draws together the key themes and relates these to the study as a whole.

2. The History and Rationale of the Law of Occupation

The starting point in the emergence of a law of occupation is commonly linked to the United States Civil War, specifically the 1863 Lieber Code.¹ In 1874, seventeen European States met in Brussels to attempt the production of the first treaty on the

¹ See D. A. Graber, *The Development of the Law of Belligerent Occupation 1863-1914 – A Historical Survey* (1949) 15.

law of occupation;² a final declaration was drafted but never ratified.³ The text of the Brussels Declaration, along with judicial decisions, military manuals and other non-binding instruments, proved highly significant during discussions on the laws of war at The Hague Peace Conferences of 1899 and 1907.⁴ The most significant document from the Hague Conferences for the law of occupation was the 1907 Fourth Hague Convention and annexed Regulations, in particular articles 42-56 of the Regulations.⁵ The whole of the regulations, as confirmed by the International Military Tribunal in Nuremberg, now represent customary international law.⁶

The law of occupation emerged at a time when there was not yet any general prohibition on the use of force,⁷ or a legal right of all peoples to self-determination.⁸ Hence title to territory could still be acquired through annexation following the use of force. In terms of a need for the law, there was, however, a rule that during warfare – if territory of a state came under the authority of an army whose government did not have title to the territory – annexation of the territory was not permitted until the cessation of hostilities.⁹ Thus there was still a period of time when the territory could not just be taken, and the law emerged to instruct the army of the occupier on how to deal with such territory until the war was over.¹⁰

A significant rationale underlying the Hague law is thought to have been the drive to preserve the rights of a sovereign displaced during warfare by another, but not yet completely defeated, so as to prevent a further deterioration in the relations between

² See C. Greenwood, 'Historical Development and Legal Basis', in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts* (1995) 1 at 10; Graber, *loc. cit.*, fn. 1.

³ N. Jochnick, 'The Legitimation of Violence: A Critical History of the Laws of War', (1994) 35 *Harvard JIL* 49.

⁴ See E. Benvenisti, *The International Law of Occupation* (1993) Chapter 2.

⁵ 1907 Regulations Annexed to the Hague Convention No.IV Respecting the Laws and Customs of War on Land [hereinafter the Hague Regulations].

⁶ See 'The Trial of the Major War Criminals', (1947) 41 *AJIL* 172 at 248-49; see also *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 226 at p. 257, para. 79; J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law* (2005).

⁷ See C. Greenwood, 'The Administration of Occupied Territory in International Law', in E. Playfair (ed.), *International Law and the Administration of Occupied Territories* (1992) 242 at 245 and note 16.

⁸ See G. Simpson, 'The Diffusion of Sovereignty: Self-Determination in the Post – Colonial Age', 32 (1996) *Stan.JIL* 255.

⁹ See G. Schwarzenberger, 'The Law of Belligerent Occupation: Basic Issues', (1960) 30 *Nordisk Tidsskrift for International Ret* 10 at 12-14; S. Korman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* (1996) 94-131; Greenwood, *op. cit.*, fn. 7, p. 245.

¹⁰ See Benvenisti, *op. cit.*, fn. 4, p. 3.

belligerents and hopefully make a peace treaty more likely.¹¹ The nature of the law developed at the Hague Conferences was also guided by an expectation of short occupations and a belief that the occupiers would not be particularly interested in civilian affairs, or that they would need to be.¹² These factors help to explain why the body of law found in the Hague Regulations is focused on issues that would concern the displaced government, such as Article 55 which classifies the occupier as only the administrator of public properties which must be done according to the rules of usufruct (prudent administrator),¹³ rather than with civilian affairs or rights.

The concern with the preservation of sovereign rights, one of which is the right to political independence, and the potential desire of the occupier to change and develop state and civil infrastructure, signals that the issue of reconstruction will have been addressed in the law. Protection of the sovereign right to decide also serves as protection for the people's right to decide, so, although developed before the emergence of the legal right of self-determination, the law of occupation retains relevance even when self-determination is seen as the best explanation for the protection afforded to state sovereignty by international law. Indeed, given that annexation through use of force is no longer an option, the law is arguably more relevant today, as the period of occupation might be expected to be longer and the occupier has no prospect of eventually becoming the sovereign.

Developments in the nature of the state and in the conduct of warfare up to and during the world wars showed the state-orientated laws of war to be inadequate.¹⁴ The result was a rethinking of the laws of war at the 1949 Diplomatic Conference in Geneva.¹⁵

The Geneva contribution to the law of occupation is to be found in the Fourth Geneva Convention 1949, especially Articles 27-34 and 47-78.¹⁶ The provisions

¹¹ See A. Roberts, 'Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967', (1990) 84 *AJIL* 44 at 46; Graber, *op. cit.*, fn. 1, pp. 37-40.

¹² E. Benvenisti, 'The Security Council and the Law on Occupation: Resolution 1483 on Iraq in Historical Perspective', (2003) 1 *Israeli Defense Forces Law Review* 19 at 20-21.

¹³ On contemporary relevance of 'Usufruct' see R. D. Langenkamp and R. J. Zedalis, 'What Happens to the Iraqi Oil?: Thoughts on Some Significant, Unexamined International Legal Questions Regarding Occupation of Oil Fields', (2003) 14 *EJIL* 417.

¹⁴ See Benvenisti, *op. cit.*, fn. 12, pp. 23-27.

¹⁵ Benvenisti, *op. cit.*, fn. 12, p. 27.

¹⁶ 1949 Geneva Convention No. IV Relative to the Protection of Civilian Persons in Time of War. [hereinafter GCIV]; see, for an account of these provisions, H. P. Gasser, 'Protection of the Civilian Population' in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts* (1995) 209 at 241.

supplement rather than replace the Hague Regulations.¹⁷ The humanitarian rationale greatly shaped the content of the law. This is focused on the plight of civilians during occupation, typified in provisions such as the requirement not to create unemployment (Article 52), and provisions regarding labour conditions (Article 51).

The four Geneva Conventions of 1949 are now all considered to reflect customary international law in their entirety.¹⁸ The Geneva 1977 Additional Protocol 1, in respect of the law of occupation, supplements the 1949 instruments in some limited ways. It has not, however, been so successful in gaining acceptance and only certain of the provisions are considered to be a reflection of customary international law.¹⁹

The Geneva focus on humanitarian interests is reason to hope that in relation to the regulation of reconstruction the interests of preserving political independence for international peace will have been balanced against the need to provide a functioning a state in humanitarian interests; a balancing which might have resulted in a legal framework for reconstruction that could be employed more generally beyond situations of occupation for regulation of reconstruction. The most important point to be gleaned here is that the law of occupation, even though created before the emergence of the legal right to self-determination, was still designed to protect the right to political independence. Some consideration of the rules on application can help to position situations of occupation in relation to the other two paradigms of state reconstruction that are addressed in this study: ITA and the assistance model.

3. The Rules on Application of the Law of Occupation

A. The Start of Application

Article 42 of the Hague Regulations provides a narrow definition of what an occupation is for the purpose of the law's application:

Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and exercised.

¹⁷ J. Pictet, (ed.), *Commentary: The Fourth Geneva Convention* (1958) 614.

¹⁸ Greenwood, *op. cit.*, fn. 2, p. 23.

¹⁹ Greenwood, *op. cit.*, fn. 2, at 23; see also A. Roberts, 'What is Military Occupation' (1985) 55 *BYIL* 249 at 254.

This strictly limits application of the law to a 'hostile army' with authority over a territory, and indicates that it is the facts that are important, not an acceptance by the parties.²⁰

The second paragraph of common Article 2 of the four Geneva Conventions sets out the applicability of the laws of occupation included therein:

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.²¹

This indicates that the application of the law is ensured even without the declaration of war and despite a lack of hostilities, such as circumstances of invasion and occupation before the outbreak of war where there is no military resistance to the invasion.²² It is also apparent that, although occupation is only mentioned in the second paragraph, the provisions apply to occupation during hostilities.²³ Indeed, there remains a need for some connection with armed conflict; it would not therefore apply to an invited occupation.²⁴

The Geneva law, although broader in its scope of application, does not affect the application of the Hague Regulations. And, given that both place emphasis on a need for uninvited effective control of the territory for application, there should, and has in practice been a large degree of coincidence in application.²⁵

It is clear, then, that the law of occupation applies when the domestic government has been displaced and occupiers that take control, because they are foreign, lack an attachment to the state and its people. The situation it is designed to regulate, the fact

²⁰ See Gasser, *op. cit.*, fn. 16, p. 243; Roberts, *op. cit.*, fn. 19, p. 256; *U.S. v. List (Hostages case)*, (1949) *VIII Law Reports of Trials of Major War Criminals* p. 38 at pp. 55-56; *Prosecutor v. Naletilic*, Judgment of 31 March 2003, ICTY Trial Chamber, para. 217; cf. *Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda)*, ICJ Reports 2005, p. 1, at p. 59 paras. 173-177.

²¹ Common Article 2 reads in whole: 'In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.'

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the convention in relation to the said Power, if the latter accepts and applies the provisions thereof.'

²² See Roberts, *op. cit.*, fn. 19, p. 253.

²³ See Pictet, *op. cit.*, fn. 17, p. 21.

²⁴ See O. Ben-Naftali, A. M. Gross and K. Michaeli, 'Illegal Occupation: Framing the Occupied Palestinian Territory', (2005) 22 *Berkeley JIL* 551 at 565.

²⁵ Benvenisti, *op. cit.*, fn. 4, at 100.

of foreign occupation, is in itself an infringement of the right to political independence, it stops the people exercising their right to decide. The paradox of state reconstruction, as set out in Chapter 1, is encountered here in the sense that today the prohibition on the acquisition of territory by the use of force is best explained by the preservation of the people's right to self-determination, accordingly, to allow unrestrained reconstruction by the occupier – that does not have an attachment to the state or its people – would contradict the reason why the occupier can no longer acquire title to the territory. Thus, despite that the occupation itself is in breach of the right to political independence, the law of occupation could still offer a framework for reconstruction of utility for state reconstruction generally, in the interests of better reconciling the practice with the right to political independence. As in the other two paradigms – ITA and the assistance model – there is also, because of a lack of independently effective domestic government, an apparent lack of attachment to state and its people on behalf of the government charged with administration of the reconstruction process. How the law of occupation deals with reconstruction and political independence is turned to below with assessment of the substantive law. First, it is necessary to enquire into why the law of occupation does not apply in the other paradigms of state reconstruction without an independently effective domestic government.

B. Application in ITA and the Assistance Model

The assumption of plenary authority of a territory by the UN, as in Kosovo and East Timor, can appear to be a case of occupation, and has stimulated comparative discussion as a result.²⁶ Should an international organisation find itself belligerently occupying a territory, most or all of the customary international law of occupation would apply.²⁷ It is, after all, the case that international organisations are bound by customary international law.²⁸ The UN has, though, certainly not operated on the basis that the law of occupation has been applicable. In support of this approach there is a consensual aspect, as well as the chapter VII basis of the authority.²⁹ Both

²⁶ See, e.g., S. R. Ratner, 'Foreign Occupation and International Territorial Administration: The Challenges of Convergence' (2005) 16 *EJIL* 695.

²⁷ Roberts, *op. cit.*, fn. 19, p. 290.

²⁸ See, T. M. Franck, *Fairness in International Law and Institutions* (1995) 218–220.

²⁹ See Chapter 5 of this study.

of which, arguably, serve to remove the necessary connection to armed conflict and, with it, the formal applicability of the law.³⁰ In this respect, as noted in Chapter 2, the absence of state consent can be seen as central to the definition of unlawful intervention.³¹ And, chapter VII trumps the law of occupation in terms of priority as the applicable legal framework.³² Moreover, a chapter VII resolution is not deployed for the purpose of warfare, but rather to preserve and ensure peace, the mandated forces are therefore not seen as belligerents.³³ The SC could, of course, have adopted the law of occupation as an applicable framework, likewise the missions themselves, but there is no reference to it in either the SC resolutions or the regulations of the respective missions.³⁴

In the assistance model context, as found, for example, in the recent past of Sierra Leone, the law of occupation is not applicable because political authority remains vested in a domestic government that provides a consensual basis for the international involvement. Thus there is not even, formally at least, an invited occupation in the assistance model, which is how one might depict the recent situations of partial ITA in Bosnia and Cambodia. In these two examples, there have been substantial international military presences, but, in distinction to the assistance model, political authority has been shared between domestic and international actors. This facet makes it more akin to a situation of invited occupation. However, the consensual aspect again precludes formal application of the law of occupation.

The significant international military presences associated with ITA and the assistance model can in their own right come to control significant areas of territory.³⁵ In respect of UN peacekeeping forces, Kelly has argued that the law of

³⁰ Cf. J. Cerone, 'Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo', (2001) 12 *EJIL* 469; T. H. Imscher, 'The Legal Framework for the Activities of the United Nations Interim Administration Mission in Kosovo: The Charter, Human Rights, and the Law of Occupation', (2001) 44 *GYIL* 353 at 377-387.

³¹ D. Wippman, 'Military Intervention, Regional Organization, and Host State Consent', (1996) 7 *Duke J. Comp. & Int'l L.* 209 at 210; see also A. V. Thomas and A. J. Thomas, *Non Intervention – The Law and its Import in the Americas* (1956) 91.

³² See T. Grant, 'Occupation and Reform', June 2003 *ASIL Insight*.

³³ R. O. Weiner & F. Ni Aolain, 'Beyond the Laws of War: Peacekeeping in Search of a Legal Framework', (1996) 27 *Colum. Hum. Rts. L. Rev.* 293 at 307.

³⁴ K. Boon, 'Legislative Reform in Post-conflict Zones: Jus Post Bellum and the Contemporary Occupant's Law-Making Powers', (2005) 50 *McGill LJ* 285 at 312.

³⁵ In Sierra Leone, at its height, the UN peacekeeping force numbered some 17,000, and UNAMSIL was described as 'indispensable' for the extension of state administration throughout the country. Second Report of the Secretary General Pursuant to Security Council Resolution 1270 (1999) on the United Nations Mission in Sierra Leone, UN Doc S/2000/13 (11 January 2000), para. 44.

occupation should be applicable when these forces come into control of territory.³⁶ The law would serve as a useful approximation of the rights and responsibilities of the UN forces, which can be difficult to discover from broad UN mandates. Kelly identifies that this is significant because the mandates may be required to be interpreted by different force commanders, as was the case in Somalia during 1992 – 1995, which Kelly takes as his case study.³⁷ Kelly's rationale, that the opportunity for differing approaches to engagement with the local population from international forces and the vagueness of the mandates in general do not provide for accountability, and that adoption of the law of occupation could thereby help engender legitimacy in the eyes of the local population, is sound. However, consent, albeit something of a fiction, and/or chapter VII, provided the legal basis for the three main military operations in Somalia from 1992 – 1995, and thus the law of occupation did not formally apply.³⁸ Indeed, where there is also state consent, as in the examples addressed by this study, however unattached to the will of the state and its people it appears, the likelihood of adoption of a legal framework intended for warfare is further reduced. This is because the forces are supposed to be deployed at the wishes of the state and its people, and this makes the situation, formally at least, even more removed from a situation of belligerency than when the legal basis of military intervention is chapter VII alone.³⁹ The UN, in its report on lessons learned from conduct in Somalia, did indicate that the Fourth Geneva Convention could offer some adequate basis for regulating interaction between peacekeepers and the local population, but it does not appear that anything more has come of this tentative suggestion.⁴⁰

While one might see the law of occupation as a means of plugging the accountability gap left by uncertainty around whether human rights obligations apply to the UN missions,⁴¹ the military presence is not the administrator of the

³⁶ M. J. Kelly, *Restoring and Maintaining Order in Complex Peace Operations: the Search for a Legal Framework* (1999) 181.

³⁷ See Chapter 6 of this study; in contrast to the US and UN, the Australian forces identified the law of occupation as applicable, Kelly, *op. cit.*, fn. 36, p. 33.

³⁸ See the notes on the legal basis of the international involvement and the strained efforts that were gone to gain consent for most of the international involvement, Chapter 6 of this study.

³⁹ See, generally, Weiner & Ni Aolain, *op. cit.*, fn. 33.

⁴⁰ United Nations, *The Comprehensive Report on Lessons Learned from United Nations Operation in Somalia (UNOSOM)*, Apr. 1992–Mar. 1995, para. 57 (1995).

⁴¹ See F. Mégret and F. Hoffmann, 'The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities', (2003) 25 *Human Rights Quarterly* 314 at 331-333.

reconstruction process. Accordingly, discussion of application of the law of occupation to the military presence does not address the broader point of whether the law of occupation could serve as an analogous legal framework for the reconstruction process. This latter issue was somewhat beside the point in the Somalia context that Kelly focused on, as the international efforts did not manage to secure sufficient control of the territory for an effort at reconstruction of the state and civil infrastructure to begin. Indeed, Kelly stressed that it was a short-term interim role that was envisaged for the law of occupation with specifically tailored frameworks recommended for more long term involvement.⁴²

That the law of occupation, disregarding the substance for the moment, has the potential to be relevant as an analogous framework for regulation of reconstruction without an independently effective domestic government in general is seen through addressing the rules on the end of application.

C. The End of Application

In relation to the end of application, the Hague Conferences occurred around a time when it was expected that the peace treaty would resolve the matter, or absolute defeat would see the title of the territory pass to the occupier.⁴³ Now with the prohibition on the annexation of territory, it should be a matter of waiting until the displaced sovereign returns.

The displaced sovereign, in such a context, is presumed to still represent the state and its people on the basis of effective control being lost at the hands of external forces, rather than internal factors.⁴⁴ In the absence of the continued existence in exile of a displaced sovereign, one would expect the law to apply until a new domestic government emerges to embody the state's sovereignty or, of course, until the occupiers leave.⁴⁵

As the issue of a new domestic government emerging to end the law's application was not adequately accounted for in the Hague Regulations, it occurred that some occupiers around World War II, keen to escape the restraints of the law, would create a local government with only the pretence of independence. Such a government

⁴² Kelly, *op. cit.*, fn. 36, p. 181.

⁴³ See Schwarzenberger, *op. cit.*, fn. 9, p. 17.

⁴⁴ See B. R. Roth, *Governmental Illegitimacy in International Law* (1999) 188.

⁴⁵ L. Green, *Contemporary Law of Armed Conflict* (1993) 258.

would then provide an invite for the continued occupation and consequently end the law's application.⁴⁶ This obviously undermined the law and its rationale.

Surreptitious circumvention of the law was addressed, albeit indirectly, in Geneva Law through Article 47:

Inviolability of Rights: Protected persons who are in a occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as a result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authoritative of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.

By way of its pursuit of the protection of the rights of individuals, Article 47 is thought to address the possible means of avoiding the application of the law of occupation, such as the appointment of new governments, creation of new states, or changes to the boundaries.⁴⁷ It is commonly interpreted as an indication that the law continues to apply while factually the occupation continues, despite what formalities might have been entered into to try and disguise reality.⁴⁸ Similarly, Article 7 GCIV prohibits protected persons from renouncing the rights secured for them in the Convention.⁴⁹ In these articles there is, however, no explicit indication of how a competent domestic government is to be distinguished from a government that has been created just to escape the restraints of the law. There is, though, some indirect indication in other articles of the Geneva Convention.

Article 6(3) of the Geneva Convention indicates that the law ceases to apply a year after the close of military operations, but that the occupying power is still bound by many of the most significant provisions, which includes Article 47, for the duration of the occupation. Further, Article 3 (b) of the Geneva Additional Protocol I stresses that all humanitarian law is to apply until the end of the occupation.⁵⁰ As there is no suggestion that a particular form of domestic government is to be favoured for ending the occupation while the occupying forces remain, it has been argued that the situation must simply await the emergence of an effective domestic government.

⁴⁶ Benvenisti, *op. cit.*, fn. 4, pp. 63-66.

⁴⁷ See, Benvenisti, *op. cit.*, fn. 4, p. 99; M. Sassoli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers' (2005) 16 *EJIL* 661 at 682.

⁴⁸ See, Benvenisti, *op. cit.*, fn. 4, p. 99; Sassoli, *op. cit.*, fn. 47, p. 682.

⁴⁹ See G. H. Fox, 'The Occupation of Iraq' (2005) 36 *Georgetown Journal of International Law* 195 at 249-250.

⁵⁰ See A. Pellet, 'The Destruction of Troy will not Take Place', in E. Playfair (ed.) *International Law and the Administration of Occupied Territories* (1992) 169 at 193 and note 81.

which could be through the return of a displaced sovereign or, in its absence, the emergence of a new one.⁵¹ Waiting on an effective government to emerge not only means that there is an objective basis for identifying the agent of the state and its people, but it is also a government that is able to support itself, so is more likely to be able to resist the designs of any remnants of the occupiers, than would be the case were it dependent on the former occupiers for effective control.

In state reconstruction by ITA and the assistance model, there is no independently effective domestic government. The administrators of the reconstruction process, either internationals or domestic governments, are dependent on international actors for authority over the territory. Although far from identical, there are clearly similarities between these two paradigms and the attempts at surreptitious circumvention of the law of occupation. Thus the two key concerns in relation to the right to political independence from attempts at surreptitious circumvention of the law of occupation are also pertinent for the other paradigms. Without an independently effective domestic government, there is not an objective basis for identifying an embodiment of the will of the state and its people. And, when a domestic government has been introduced, there is little to support that it can realistically resist the designs of the international actors as to how the reconstruction proceeds. Such similarity is support for an argument that it is reasonable, in the interests of the better preservation of political independence, to seek legal limits and obligations on the political discretion of the administrators of state reconstruction. Furthermore, the similarities with surreptitious circumvention suggest that it is not until a government in a state is independently effective that it would be reasonable for assumptions about attachment to the state and its people to resume.

From what has been identified about the law of occupation in terms of rationale and the situations in which it is applicable, there is good reason for exploring further the relevance of the substantive provisions of the law of occupation as a potential framework for reconstruction outside formal occupation.

4. The Law of Occupation as a Legal Framework for State Reconstruction

⁵¹ See Sassoli, *op. cit.*, fn. 47, p. 682; E. Milano, *Unlawful Territorial Situations in International Law* (2006) 94.

A. An Analogous Legal Framework for ITA and the Assistance Model of State Reconstruction?

The suitability of the law of occupation as an analogous legal framework for state reconstruction is far from assumed, likewise, if deemed suitable, the prospect of it actually being adopted. From some consideration of the nature of the law of occupation in relation to reconstruction one can readily form an opinion on suitability and likelihood of adoption.

The cornerstone provision of the law of occupation is Article 43 of the Hague Regulations:

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and safety [civil life], while respecting, unless absolutely prevented, the laws in force in the country.⁵²

Article 43 indicates, by an emphasis on the *de facto* nature of authority and respect for the laws in force, that the occupant only has a temporary authority and no sovereignty over the territory.⁵³

The requirement that the occupant ‘take all the measures in his power to restore and ensure, as far as possible, public order and safety [civil life]’ is thought to impose a duty to provide for the government of the occupied territory.⁵⁴ There is no blueprint for the form this administration must take. It does not have to use the existing institutions, but of course can, and must respect the existing law unless absolutely prevented.⁵⁵

The vast majority of provisions impose obligations on the occupiers and give rights to the occupied in relation to how the administration is conducted. These are extensive and cover a range of areas. For example, Article 50 (GCIV) requires for provision of education; Article 55 the supply of foodstuffs and medical supplies to the civilian population; Article 48 (Hague Regulations) collection of taxes; and Article 52 requisitions. There is a clear emphasis on areas where administration must be conducted rather than on change and development.⁵⁶ The expectation is that

⁵² Benvenisti, *op. cit.* fn. 4, p. 7; see also E. H. Schwenk, ‘Legislative Power of the Military Occupant under Article 43, Hague Regulations’, (1945) 54 *Yale LJ* 393 at 393.

⁵³ Greenwood, *op. cit.*, fn. 7, p. 244; see also Pictet, *op. cit.*, fn. 17, p. 275.

⁵⁴ Greenwood, *op. cit.*, fn. 7, p. 246.

⁵⁵ Greenwood, *op. cit.*, fn. 7, pp. 252-259.

⁵⁶ Greenwood, *op. cit.*, fn. 7, p. 246.

change will be deferred until the end of the occupation,⁵⁷ when any temporary changes made would be open to the possibility of change, or adoption, on return of the displaced sovereign.⁵⁸ Any attempts to make permanent changes would therefore be of doubtful legality.⁵⁹ The unsuitability of the law of occupation as a framework for change and development is further evidenced through a brief review of some practice where reconstruction has been attempted.

There were two major World War I occupations: the German Occupation of Belgium (1914-1918) and the Armistice Occupation of the Rhineland. Belgium was still a functioning state when Germany invaded and gained effective control. The law of occupation was, formally at least, accepted as applicable.⁶⁰ In the pursuit of political and economic gains,⁶¹ the German 'Government Central' made extensive changes to the Belgian law in almost all areas.⁶² There was a significant level of reorganisation of the Belgian economy, regulation of industry, eventually major changes in the court system, changes to welfare legislation, and attempts to influence the balance between the Flemings and Walloons through regulations in favour of the Flemish. In the German occupation of Belgium, the law of occupation was accepted as applicable then simply flouted for the purpose of reconstruction. In the Rhineland occupation, different forces occupied different zones and their individual interests informed their policies as occupiers. The occupation came about as a result of agreement with the enemy sovereign of that territory pending a peace treaty; this supports claims that the law was not formally applicable, as it was based on consent, although the law's applicability had been acknowledged.⁶³ The territory as a whole appears to have been in a worse condition than Belgium, characterised by poverty, unemployment, and social unrest.⁶⁴ The US and British forces are said to have operated within the Hague Regulations, while the French and Belgian forces made far reaching changes in the territorial infrastructure in pursuit of political and economic gains, reversing the tide on the earlier German approach.⁶⁵ In the

⁵⁷ See Fox, *op. cit.*, fn. 49, pp. 234 - 240.

⁵⁸ H. McCoubrey and N. D. White, *International Law and Armed Conflict* (1992) 287.

⁵⁹ Greenwood, *op. cit.* fn. 7, p. 245; see also Fox, *op. cit.*, fn. 49, p. 237.

⁶⁰ Benvenisti, *op. cit.*, fn. 4, p. 34 and in particular references at note 10.

⁶¹ Benvenisti, *op. cit.*, fn. 4, p. 57.

⁶² Benvenisti, *op. cit.*, fn. 4, p. 34.

⁶³ See Benvenisti, *op. cit.*, fn. 4, p. 49 and p. 57.

⁶⁴ Benvenisti, *op. cit.*, fn. 4, p. 50.

⁶⁵ Benvenisti, *op. cit.*, fn. 4, p. 50.

Rhineland, the French and Belgian forces tried to cover the appearance of unlawfulness by emphasising the consensual nature of the occupation.⁶⁶

In the build up to and during World War II, the axis powers – Germany, Italy, and Japan – and also the communist Soviet Union pursued aggressive invasion policies seeking to strengthen their regional and world positions, make economic gains, and ensure ideological supremacy through the acquisition of territory. This resulted in the law's application, but it was denied through surreptitious means, so they also did not govern as if restrained by the law.⁶⁷

During World War II there were widespread instances of allied occupation. In particular, there was a significant amount of British involvement in the French and Italian colonies in Africa.⁶⁸ In Somalia, the law of occupation was accepted as applicable. But the British were faced with a collapsed local administrative system and a lack of law and order and, as a result, it is said that the British set up in effect a colonial administration, by which new systems of administration had to be created from 'first principles'.⁶⁹ The implication being that a lack of guidance on reconstruction in the law of occupation helped justify the disregard for the law.

The major joint allied occupations of World War II were in Italy, Japan and Germany. In general, these were marked by a tendency for widespread reform of the civil and state infrastructure, to remove the doctrines that were so prevalent in these societies. And, with the exception of some of the involvement in Italy, were not accepted as restrained by the law of occupation.⁷⁰ In Japan the government was still in existence and the reforms went through this government as the intermediary on the basis of the Instrument of Surrender,⁷¹ which arguably removed the restraints of the law of occupation. The Germany example is addressed below. One struggles, from this brief overview of practice, to find an example of practice of state reconstruction that came within the law of occupation framework.

As a measure to avoid future ineffectiveness, the preference in contemporary practice on state reconstruction tends to be for significant change and development

⁶⁶ Benvenisti, *op. cit.*, fn. 4, p. 57.

⁶⁷ Benvenisti, *op. cit.*, fn. 4, pp. 63-66.

⁶⁸ See Benvenisti, *op. cit.*, fn. 4, p. 76.

⁶⁹ F. Rennel, *British Military Administration of Occupied Territories in Africa* (1948) 45; see also War Office, *British Military Administration of Occupied Territories in Africa During the Years 1941 – 43* (Cmd 6589, 1945).

⁷⁰ See Benvenisti, *op. cit.*, fn. 4, p. 89.

⁷¹ Benvenisti, *op. cit.*, fn. 4, p. 93.

of the state and civil infrastructure. The law of occupation, in contrast, expects occupiers to be concerned with the ‘pragmatic tasks of administration’.⁷² Undoubtedly, adopting the law of occupation for contemporary state reconstruction would help protect political independence. Delaying change and development until the emergence of an effective domestic government is a sure way of minimising the impact on the right to political independence. However, the obvious conflict with the transformative ambitions of contemporary state reconstruction, suggests that there is little likelihood of the law of occupation actually being adopted as an analogous legal framework for state reconstruction. This is not to mention the negative connotation of colonial domination that the term carries, and which those involved would not likely want to be associated. In this respect, how much impact renaming it, to something like ‘international law regulating civilian-military relations’, would have, is debatable.⁷³

B. The Law of Occupation and the Permissible Level of Change and Development by an Otherwise Ineffective Domestic Government

The law of occupation depicts an administering occupier that is required to respect the existing laws, essentially, because they lack an attachment to the state and its people.⁷⁴ There are, however, circumstances in which the law of occupation allows for temporary legislative changes to be made. By addressing these, one can glean some indication of the level change and development that would, at a minimum, be acceptable in the other paradigms, in the sense of the level of deference that should be accorded political independence – if it is permissible for a belligerent occupant then it should also be the case in the other reconstruction paradigms.

Article 43, supplemented with Article 64 GCIV, is thought to embody the *raison d’être* of the law of occupation, what has been referred to as the ‘conservationist

⁷² Fox, *op. cit.*, fn. 49, p. 45; see also M. S. McDougal and F. P. Feliciano, *The International Law of War* (1961) 768.

⁷³ Kelly proposes this terminology as a substitute for the law of occupation in contexts where the UN comes into control of territory. Kelly, *op. cit.*, fn. 36, p. 179; cf. Mégret and Hoffmann, *op. cit.*, fn. 41, p. 332.

⁷⁴ See G. von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation* (1957) 95.

principle' or the 'presumption of continuity'.⁷⁵ Article 43 requires that the existing laws must be respected unless absolutely prevented in pursuit of 'public order and safety [civil life]'. Exactly how far this provides scope for some change is the subject of debate, as it was at Brussels and during the Hague Conference, where the eventual terms adopted reflected a compromise – they are more restrictive than the Brussels Declaration's use of 'maintaining' 'unless necessary'.⁷⁶ However, as Stone notes, '[t]he limits on the legislative and regulatory authority power are as vague as the authority is general'.⁷⁷

The key term in Article 43 is 'absolutely prevented'. The nature of the term is aptly described by Stone, '[i]t has never been taken literally; and unless it is so taken, the boundaries of the occupant's legislative powers are still to be drawn.'⁷⁸ It has been seen as a matter military necessity only.⁷⁹ But most texts now link it with military necessity and necessity for public order and safety/civil life depending on language.⁸⁰ Civil life is broader than safety, and is generally accepted as the correct terminology.⁸¹

Article 43 is closely related to Article 64 GCIV.⁸² Article 64 highlights that the occupying power is to have 'legislative competence in matters concerned with the fulfilment of its obligations under the convention, the maintenance of orderly government, and the security of itself, its personnel, equipment and establishments.'⁸³ The inclusion of 'fulfilment of its obligations' suggests a potentially broad scope for change in light of the breadth of areas covered in the

⁷⁵ The difference between 'conservation' and 'continuity' is one of semantics, on the principle of 'conservation' see McCoubrey and White, *op. cit.*, fn. 58 p. 286; for use of 'continuity' see Boon, *op. cit.*, fn. 34, p. 303, fn. 85.

⁷⁶ See Benvenisti, *op. cit.*, fn. 4, pp. 12 -13.

⁷⁷ J. Stone, *Legal Controls of International Conflict* (1954) 698

⁷⁸ Stone, *loc. cit.*, fn. 77.

⁷⁹ See Schwenk, *op. cit.* fn. 52, p. 393 and the many citations therein.

⁸⁰ See M. Bothe, 'Occupation, Belligerent', (1996) *EPIL* 763 at 765; McCoubrey and White (1992), *op. cit.*, fn. 58, p. 284

⁸¹ See Schwenk, *loc. cit.*, fn. 52.

⁸² Article 64 GCIV: 'The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.'

The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.'

⁸³ H. McCoubrey, *International Humanitarian Law: Modern Developments in the Limitation of Warfare* (1998) 202

Fourth Geneva Convention.⁸⁴ These rights, however, are ‘generally limited to instances of egregious misconduct’ such as Article 31’s reference to physical and moral coercion, and so would, generally, not require great legislative change to ‘enable’ them to be achieved.⁸⁵ Nonetheless, the wording of Article 64 provides a degree of scope to argue for the validity of some temporary change in almost all areas covered by the administration, and what is meant by the requirement of necessity, which the ‘absolutely prevented’ clause is thought to represent, is of importance for determining the extent of such change.

Although what is meant by ‘necessity’ will, like what is covered as an area suitable for change, be dependent on the circumstances,⁸⁶ in the literature an emphasis on the importance of a narrow interpretation in line with the principle of conservation is dominant. The potential for Article 64 to be seen as introducing a more flexible test is dismissed by Pictet, who notes: ‘the occupation authorities cannot abrogate or suspend penal laws for any other reason -- and not, in particular, merely to make it accord with their own legal conceptions.’ Pictet further notes:

The reason for the Diplomatic Conference making express reference only to respect for penal law was that it had not been sufficiently observed during past conflicts; there is no reason to infer *a contrario* that the occupation authorities are not also bound to respect the civil law of the country, or even its constitution.⁸⁷

Benvenisti has, nevertheless, argued that there is scope, on the basis of the preparatory work, for arguing that Article 64 was intended to separate law, other than penal, from the principle of conservation, and to be more flexible on the basis of the permissive language used.⁸⁸ However, any lessening of the burden for change must be treated with caution because it introduces potential for the rationale of the law to be undermined. This is because a wide scope to make changes to the civil and state infrastructure runs the risk, even though of a temporary nature, of the occupier cementing its position to the detriment of the displaced sovereign.⁸⁹ The fact that

⁸⁴ See Benvenisti, *op. cit.*, fn. 4, p. 101.

⁸⁵ Fox, *op. cit.*, fn. 49, pp. 243-244.

⁸⁶ See McCoubrey and White, *op. cit.*, fn. 58, p. 284.

⁸⁷ Pictet, *op. cit.*, fn. 17, p. 335.

⁸⁸ Benvenisti, *op. cit.*, fn. 4, p. 101.

⁸⁹ See McCoubrey, *op. cit.*, fn. 83, p. 202, quoting P. Rowe, *Defence: The Legal Implications* (1987) 184; see also McCoubrey and White, *op. cit.*, fn. 58, p. 284.

national military manuals ‘uniformly’ reaffirm the principle of conservation is strong support for the narrower view.⁹⁰

The framework for change in the law of occupation is support for change and development in the other paradigms of state reconstruction that is required as a matter of military or humanitarian necessity. This would likely cover some efforts in the security sector. On the basis that security must be a key aspect in relation to both the military and humanitarian needs in a state suffering from a lack of effectiveness. In this respect, there would likely need to be plans to remove the international military presence from the state or else it would be hard to suggest necessity. However, even with such plans, anything beyond training and recruitment of the police and military would likely be hard to support in light of the ‘conservationist’ emphasis that attaches to the necessity requirement. And, consequently, it is very difficult on the basis of the law of occupation to make a case for change and development in other areas of the state and civil infrastructure of the target states.

The law of occupation’s emphasis on conservation reflects that it is designed to regulate a relationship based on force rather than law, and is consequently about balancing the competing interests of security with protection of humanitarian interests; rather than directing benevolent intentions.⁹¹ As a consequence, in response to the threat posed to self-determination and international peace by a neglect of political independence, its advice, until there is an independent and effective domestic government, is to change very little.

The context for state reconstruction in ITA or the assistance model lacks the aspect of international warfare, but the risks it poses to political independence and the attendant values are similar.⁹² The international actors involved in such paradigms of state reconstruction do, though, at least purport to have benevolent intentions, so there is perhaps not the need for the same degree of hesitancy about change and development as is found in the law of occupation. This is not, however, to suggest that there is no need for hesitancy, as one state’s benevolent intentions can be another state’s evil.⁹³ Accordingly, the law of occupation should be seen as supporting the need for a more suitable legal framework to limit the discretion of

⁹⁰ Fox, *op. cit.*, fn. 49, p. 264, note 351 includes a list of national military manuals which reaffirm the principle.

⁹¹ See Greenwood *op. cit.*, fn. 7, p. 251.

⁹² See Chapters 5 and 6 of this study.

⁹³ See Roth, *op. cit.*, fn. 44, p. 430.

those involved in the reconstruction. This would be in the interest of limiting the negative impact on political independence, or, failing this, seeking to accommodate the values of self-determination and international peace by other means, until the government can demonstrate effectiveness independent of international actors. Might the emergence of the legal right to self-determination, as the best explanation for state sovereignty, have been a stimulus for modification of the law of occupation so that it is more suited to reconstruction and accommodation of these values?

5. The Potential Impact of Self-Determination on the Law of Occupation

The established law of occupation existed before the emergence of the legal right of self-determination. Nonetheless, in seeking to protect the rights of the sovereign it also serves to protect the rights of the people to self-determination in the sense of the right to political independence. Essentially, it precludes the exercise of the right to decide, pending the emergence of an effective domestic government that can serve as an agent for the rights of the state and its people in place of the belligerent occupier. Accordingly, despite a potentially wrongful basis for the involvement, the law of occupation can be seen as an attempt to reduce further risk to the values of self-determination of peoples and international peace by strongly counselling against interference in the affairs of the state. It can be read as an extension of the principle of non-intervention, designed to rein in a situation that already affects self-determination of peoples and international peace but has the potential to do much more damage if not regulated.

The law of occupation does not appear well suited for situations of state reconstruction where there is an apparent need for some far reaching changes if an independently effective domestic government is to become a reality in something like a reasonable time span. Recalling how self-determination overlaps with state sovereignty as an explanation for non-intervention, and, indeed, provides the best explanation for state sovereignty. And, that the law of occupation is designed to protect state sovereignty. It would not be unreasonable to expect that right of self-determination might be seen by states as requiring modification of the law of occupation so that it better accords with self-determination as a basic principle: 'the possibility of self-government decided through the freely expressed will of the people'. Accordingly, one might expect a more purposeful framework for occupation

administration, one designed to facilitate self-determination rather than just restrain the activity of the occupier, to be emerging.

However, the concept of the will of the people is abstract and open to misuse. Developments in the doctrine of self-determination beyond the right to political independence, which might help to guard against this, such as links with a legal concept of democracy, remain, at best, inchoate. There is thus the possibility that the pursuit of a self-determination framework, while covering reconstruction activity of an occupier with legitimacy, might serve only to enable the occupier to entrench its position to the detriment of the rights of the target state and its people. Hence, while some impact appears likely, the actual impact of the emergence of the right to self-determination on the law of occupation as a framework for state reconstruction need not be a positive one from the perspective of the core values of the UN system of self-determination of peoples and international peace. The fact that the law of occupation is already a challenge to an effective reality, does, though, encourage one to be hopeful that inchoate developments in relation to self-determination and democracy will have been harnessed in an occupation situation. This is on the basis, as suggested in Chapter 3, that such developments have stalled in the normal run of things, in part at least, as a result of the threat they pose to the authority of effective but hardly democratic governments.

As the law of occupation already has provisions dealing with reconstruction, this is an area where the Martens clause of the preamble of the 1907 Hague Convention IV, which counsels that general international law be looked to where the laws of armed conflict do not deal with a specific case occurring in warfare,⁹⁴ does not seem a likely route for modification of the law of occupation. Moreover, the states parties to the multilateral treaties, which are the law of occupation, have not sought modification by agreement.⁹⁵ There are, though, other avenues for the development of the law of occupation. Practice under the law of occupation can result in development of the law through interpretation of a provision,⁹⁶ amendment of the treaty,⁹⁷ or new customary international law.⁹⁸

⁹⁴ See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*. Merits, Judgement, ICJ Reports 1986, p. 14 at pp. 113-114, para.78; *Legality of the Threat or Use of Nuclear Weapons*, *op. cit.*, fn. 6, p. 257, para. 78 and p. 259, para. 84; A. Cassese, 'The Martens Clause: Half a Loaf or Simply Pie in the Sky?', (2000) 11 *EJIL* 187.

⁹⁵ See 1969 VCLT, Articles 39-41.

⁹⁶ This is provided for in Article 31 (3) (c) of the VCLT, which allows for interpretation of treaties in light of 'any subsequent practice in the application of the treaty which establishes the agreement of

Two aspects of the law of occupation which appear susceptible to a re-interpretation in light of the right to self-determination, and which could be of relevance in terms of a framework for state reconstruction, are the principle of conservation and the rules on the end of application while the occupiers remain.

In relation to principle of conservation, the potential impact of the right to self-determination has not gone unnoticed by Pellet. Pellet has argued that whereas:

In the classic law of war, the non-acquisition of sovereignty by the occupier constitutes the criterion of occupation...thanks to the 'subsequent development of law through the Charter of the United Nations and by way of customary law' the respect of the sovereign rights of the occupied people has become the effective criterion not only of occupation itself, but of the rights of the occupier.⁹⁹

This means for Pellet that, whereas originally the law of occupation was intended to protect the rights of the displaced sovereign so the principle of conservation should determine the validity of any changes made in the interest of military or humanitarian necessity, now, when it is the people who are sovereign, the limit should be the right of self-determination. Hence changes linked to humanitarian interests can be pursued to the extent that they do not affect the right to self-determination or, in Pellet's words, '[t]o the extent that the 'humanitarian' measures taken by the occupation authorities do not threaten these rights [sovereign rights of the people whose territory is occupied], they are lawful.'¹⁰⁰ This, for Pellet, would allow such changes up to the point of 'change the physical character, demographic composition, institutional structure, or status of ... territories.'

the parties regarding its interpretation', Article 31 (3) (c) also allows for interpretation of treaties in light of 'any relevant rules of international law applicable in the relations between the parties'.

⁹⁷ This is found only in customary law. It was included in the 1966 ILC Draft Articles on the Law of Treaties as: '[a] treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions', (1996) *YILC* 236; that it was already custom is supported by reference to the *Temple Vihear (Cambodia v. Thailand)*, Merits, Judgement, ICJ Reports 1962, p. 6 at pp. 33-4; the ILC has identified that the line between interpretation and amendment through subsequent practice may be blurred, but they remain legally distinct, (1996) *YILC* 236; see also G. Danilenko, *Law-Making in the International Community* (1993) 165-166.

⁹⁸ *North Sea Continental Shelf*, Judgement, ICJ Reports 1969, p. 3 at p. 44; see also M. Akehurst, 'Custom as a Source of international Law', (1974 - 5) 47 *BYIL* 1; R. Cryer, 'Of Custom, Treaties, Scholars and the Gavel: the Influence of the International Criminal Tribunals on the ICRC Customary Law Study', (2006) 11 *JCSL* 239.

⁹⁹ Pellet, *op. cit.*, fn. 50, p. 186.

¹⁰⁰ Pellet, *op. cit.*, fn. 50, p. 202

While, for Pellet, there clearly is a limit to what could be changed, this is vastly more lenient than the principle of conservation. In its favour, Pellet's proposal retains a conceptual link with the protection of sovereign rights (cast as the people's sovereign rights), and is not as lenient as that suggested by Dinstein: that the limit for validity of changes introduced by an occupier should depend upon whether not the occupier has displayed equal concern for their own population.¹⁰¹ Still, the lack of specificity in Pellet's proposal would hand a large degree of discretion to the occupiers, with little means of distinguishing activity which helps entrench the occupier's position to the detriment of self-determination rather than its realisation. This is not improved if one refers to the doctrine of self-determination in international law because it does not yet offer any specificity on state and civil infrastructure required for consistency with the will of the people. Accordingly, one doubts whether use of self-determination as a directive for change and development could presently be read as consistent with the object and purposes of the law of occupation. In this respect, the signs of an emerging consensus on the procedure for identification of a government and standards of substantive conduct for a government to be considered consistent with the will of the people for the purpose of self-determination – the legal concept of democracy – appear more relevant for modification of the rules on the end of application; if the application of the law of occupation can be ended while the occupier remains there is obvious opportunity for greater reconstruction.

Benvenisti, writing in 1992, sought to offer a contemporary reading of the law of occupation based on different codifications of the law, state practice, and other developments in international law. One of 'the other developments' is the emergence of the legal right of self-determination, which confirms 'the idea that sovereignty lies in a people rather than a government'.¹⁰² Benvenisti includes a range of examples in his study, including a host of examples where the law of occupation was not accepted as applicable by the occupiers, and without substantial opinion that it was applicable, such as US interventions in Grenada in 1983, and Panama in 1989, and Vietnamese intervention in Cambodia in 1978.¹⁰³ In relation to Grenada, Benvenisti describes how 'infringements of the law of occupation, if such existed, were healed

¹⁰¹ Y. Dinstein, 'The International Law of Belligerent Occupation and Human Rights', (1978) 8 *IYHR* 105 at 113.

¹⁰² Benvenisti, *op. cit.*, fn. 4, p. 215.

¹⁰³ Benvenisti, *op. cit.*, fn. 4, p. 164-173.

by the institution of a democratic process through which the general public expressed its endorsement of the new political system'.¹⁰⁴ The fact that the will of the people appeared to coincide with the action of the occupiers is the essential point for Benvenisti's acceptance of the validity of the activity under the law of occupation. Whether one thinks that the law of occupation should have applied or not, the fact that it was not generally treated as applicable undermines the relevance in terms of evidence of development of the law of occupation. Nonetheless, Benvenisti's study indicates that it is reasonable to imagine that self-determination might have had an impact on the rules related to the end of application of the law of occupation while the occupiers remain. Certainly some scholars, without furnishing *opinio juris*, have offered opinions which can be read as suggesting this has been the case.¹⁰⁵ And the fact that since Benvenisti's study, the strength of the consensus on a legal concept of democracy linked to the right of self-determination has improved, is support for the likelihood of such an impact.

A few examples of practice stand out in terms of the level of reconstruction, the pursuit of democracy, and level of international acceptance – Post World War II Germany, Occupied Palestinian Territories (OPT), and Iraq. Recalling Chapter 3, this commonality suggests that democracy has served to accommodate the values of self-determination and international peace, which are put at risk by the neglect of political independence occasioned by the disregard of the law of occupation for the purpose of reconstruction. It also hints at potential modification of the law of occupation in relation to the emergence of the right to self-determination. It is important, however, not to confuse trend with legal development. A survey of these examples is necessary to reveal the reality of the role of democracy.

6. The Reconstruction of Post World War II Germany

'By the middle of 1944 the ultimate result of the war in Europe was not in doubt and the Allies began to make arrangements for the treatment of Germany after its surrender.'¹⁰⁶ The idea was that there would be unconditional surrender, followed by

¹⁰⁴ Benvenisti, *op. cit.*, fn. 4, p. 171.

¹⁰⁵ See, e.g., B. S. Brown, 'Intervention, Democracy, and the Residual Responsibilities of the Occupying Power in Iraq', (2005) 12 *UC Davis Journal of International Law and Policy* 24 at 43; F. L. Kirgis, 'SC Resolution 1483 on the Rebuilding of Iraq', May 2003 *ASIL Insights*.

¹⁰⁶ J. Crawford, *The Creation of States in International Law* (2006) 452.

continued allied occupation.¹⁰⁷ The unconditional surrender came on 8 May 1945, signed by Admiral Donitz.¹⁰⁸ By 5 June 1945, there was no longer any German government, either effective or recognised, which could be 'capable of accepting responsibility for the maintenance of order, the administration of the country and compliance with the requirements of the victorious Powers.'¹⁰⁹ Accordingly, the Allied Powers, without entering into a peace treaty that would signal the end of warfare, assumed 'supreme authority with respect to Germany'.¹¹⁰ The Allied Powers did not purport to annex the territory nor did they consider themselves bound by the law of occupation. Extensive reconstruction of the German state and civil infrastructure was undertaken.¹¹¹ Without a domestic government, the right to political independence of the German state was clearly not respected. Still, international recognition of the process was forthcoming.¹¹² The fact of international acceptance of foreign governance, along with extensive reconstruction, without any form of state consent, is reason to consider how the process was positioned in relation to the value of self-determination, as it is posited that this would be of crucial importance for international acceptance. A key issue in this respect is why the law of occupation was not thought to be applicable. After all, if it were applicable, it would have better preserved the right to political independence and, consequently, the value of self-determination.

The debate on the explanation for the non-applicability of the law of occupation remains unresolved. Virally argued that the territory had become *res nullius*, this is a suggestion that the German state ceased to exist and was open to acquisition through a display of effective control and claim to title.¹¹³ While at the time, before the emergence of a legal right to self-determination, a sovereign state becoming *res nullius* may have been a theoretical possibility, in Fox's words, 'the formality of surrender and the continuing functioning of at least some local governmental units

¹⁰⁷ See Protocol on Zones of Occupation in Germany, London, 12 September 1944: 227 UNTS 279, Art. 1.

¹⁰⁸ Act of Surrender by Germany, Signed at Berlin, 8 May 1945.

¹⁰⁹ Berlin Declaration, 5 June 1945, 145 BFSP 796.

¹¹⁰ Statement on Control Machinery in Germany, 5 June 1945, 145 BFSP 803, affirmed at Postdam: the structure of the authority as well as the guiding principles were set out in the Berlin Declaration (June 1945, control machinery) and the Postdam Agreement (between July and August 1945).

¹¹¹ W. Friedmann, *The Allied Military Government of Germany* (1947) 65.

¹¹² See, e. g., Exchange of Notes with Spain concerning German Enemy Assets, Madrid, 28 Oct 1946: 147 BFSP 1058: 'the Allied Control Council for Germany will assume, after its recognition by Spain as the Government of Germany, the rights and obligations incident to its status as a government.'

¹¹³ See M. Virally, *L'Administration Internationale De L'Allemagne* (1948) 26, as cited by G. H. Fox, *Humanitarian Occupation* (2008) 257.

belied this claim'.¹¹⁴ Kelsen argued it was an instance of *debellatio*.¹¹⁵ While the exact meaning of *debellatio* is debated, generally it is seen to reflect circumstances in which 'one of the belligerent states has been defeated so totally that its adversary or adversaries are able to decide alone what the fate of the territory of that state and of the state authorities will be.'¹¹⁶ It does not follow that there would have to be annexation.¹¹⁷ Accordingly, it does seem to capture well the circumstances of German defeat, but it tends to be Jennings' theory that is cast as most influential.¹¹⁸ Jennings view was that: 'the whole *raison d'etre* of the law of belligerent occupation is absent in the circumstances of the Allied occupation of Germany, and to attempt to apply it would be a manifest anachronism'.¹¹⁹ This opinion was reasoned on the basis that the law of occupation was designed for a temporary occupation awaiting annexation or a peace treaty, and as these were absent the law was not relevant. The implication, then, is that had there been a possibility of one of these two outcomes the law of occupation would have applied. Jennings supports the course of action taken (assumption of governmental authority) by indicating that the allies would have been free to annex the territory had they chosen to do so, so that a lesser form of annexation, government only, was permissible. While this starts to sound like *debellatio*, the important point is that the emergence of the legal right to self-determination would today, amongst other factors,¹²⁰ prevent claims of *debellatio*, or Jennings' logic, because the right supports a persistent prohibition on annexation of territory following occupation.

At the time, the legal right of self-determination had not yet emerged. The right to political independence at stake was solely that of the German state. However, the Allied Powers signed the UN Charter on 26 June 1945, and by this, the importance of the value of self-determination, in the sense of giving the possibility of self-government to all peoples, for the UN system was identified. Hence there was some onus on the Allied Powers to at least appear to be acting consistently with the value of self-determination. Not annexing the territory can be read as a nod in the direction

¹¹⁴ Fox, *op. cit.*, fn. 113, p. 257

¹¹⁵ See, e.g., H. Kelsen, 'The Legal Status of Germany According to the Declaration of Berlin', (1945) 39 *AJIL* 518.

¹¹⁶ K-U. Meyn, 'Debellatio', (1992) *EPIL* 969 at 969.

¹¹⁷ Cf. Fox, *op. cit.*, fn. 113, p. 257.

¹¹⁸ See, e.g., Fox, *op. cit.*, fn. 113, p. 269.

¹¹⁹ R. Jennings, 'Government in Commission', (1946) 23 *BYIL* 116 at 136.

¹²⁰ See Fox, *op. cit.*, fn. 113, p. 259.

of the importance of the value of self-determination. However, continuing to occupy the territory without the regulation of the law of occupation, and the protection it provides for the right to political independence, is hardly consistent with the value of self-determination. This is especially so when one considers that the level of reconstruction pursued went far beyond what could be reconciled with the law of occupation, as Friedmann notes:

even the most elastic interpretation could not bring the wholesale abolition of laws, the denazification procedure, the arrest of thousands of individuals, the introduction of sweeping social reforms, the expropriation of industries, and above all the sweeping changes in the territorial and constitutional structure of Germany within the rights of belligerent occupation. These are symbols of sovereign government, yet it is of the essence of belligerent occupation that it does not claim such powers.¹²¹

Given the fact of German aggression, and that reconstruction of the state and civil infrastructure was needed to prevent a reoccurrence, there was always likely to be a significant amount of leeway accorded by the rest of international society with regards the attention given by the Allied Powers to the value of self-determination. Still, to govern without any concern for the value of self-determination would not only contradict its inclusion in the UN Charter but would also risk igniting conflict, as a core tenet of the inclusion in the UN Charter is that respect for self-determination supports international peace. Hence one would expect the level of international acceptance to have been affected had there not been efforts to address the value of self-determination. With the discussion from Chapter 3 in mind, the form of government pursued is of vital importance, in terms of how consistency with the value of self-determination is portrayed.

In the Postdam Agreement, which set out the core of objectives of the Allied Powers administration, there is stress on the realisation of democratic German self-government. One of the guiding political principles identified as a purpose of the occupation is '[t]o prepare for the eventual reconstruction of German political life on a democratic basis and for eventual peaceful cooperation in international life by Germany.'¹²² Moreover, Nazi party members removed from public and semi-public office are to be replaced 'by persons who, by their political and moral qualities, are deemed capable of assisting in developing genuine democratic institutions in

¹²¹ W. Friedmann, *op. cit.*, fn. 111, p. 65.

¹²² Agreements of the Berlin (Potsdam) Conference, July 17-August 2, 1945, (a) Protocol of the Proceedings, 1 August 1945, Section II (a) (3) (IV).

Germany.’¹²³ ‘German education shall be so controlled as completely to eliminate Nazi and militarist doctrines and to make possible the successful development of democratic ideas’.¹²⁴ ‘The judicial system will be reorganized in accordance with the principles of democracy, of justice under law, and of equal rights for all citizens without distinction of race, nationality or religion’.¹²⁵ ‘Local self-government shall be restored throughout Germany on democratic principles and in particular through elective councils as rapidly as is consistent with military security and the purposes of military occupation’,¹²⁶ ‘All democratic political parties with rights of assembly and of public discussion shall be allowed and encouraged throughout Germany’¹²⁷; ‘Representative and elective principles shall be introduced into regional, provincial and state (Land) administration as rapidly as may be justified by the successful application of these principles in local self-government’.¹²⁸

The actual approach to democratic reconstruction has been described as involving ‘programmed installations of democracy’¹²⁹ and ‘a period of re-education in democratic responsibilities’.¹³⁰ Yet there was no attempt to define democracy in the Postdam agreement and at the time there was no suggestion of a legal aspect to democracy. Thus there was no scope for regulation or accountability in relation to the pursuit of democracy. But even as a political concept, democracy still carries the message of genuine rule by the people. Consequently, by pursuing this form of political reconstruction, the Allied Powers are projected as necessary for self-determination; they are cast as the vehicle which creates the form of government most readily identified as the basis for identifying a government that represents the will of the people for the purpose of exercise of self-determination. Attention is taken away from the neglect of the value of self-determination that the Allied Powers assumption of the rights to decide represented. Consequently, one is less inclined to challenge the looseness in respect of when authority will be handed back to the

¹²³ Section II (a) (6); see also E. Plischke, ‘Denazification Law and Procedure’, (1947) 41 *AJIL* 807.

¹²⁴ Section II (a) (7).

¹²⁵ Section II (a) (8).

¹²⁶ Section II (a) (9) (i).

¹²⁷ Section II (a) (9) (ii).

¹²⁸ Section II (a) (9) (iii).

¹²⁹ J. D. Montgomery, *Forced to Be Free* (1957) 4.

¹³⁰ E. Chadwick, *Self-Determination, Terrorism and the International Humanitarian Law of Armed Conflict* (1996) 184

German people – ‘[f]or the time being, no central German Government shall be established’.¹³¹

Administration of Germany was split into four zones of occupation. Each zone was administered by one of the four powers – US, UK, France, USSR. The Powers acted jointly with regards Germany as a whole.¹³² There was, however, in May 1949, a breakdown in the relationship between the Western Powers and the USSR. While the Western Powers combined their zones of occupation to form the Federal Republic of Germany, the USSR responded with the creation of the German Democratic Republic.¹³³ That the latter name was possible, despite an apparent lack of commitment to anything like the democratic ideal, is testament to how democracy as a hortatory device is subject to misuse.¹³⁴ It did not, though, manage to speed up the conferral of international recognition on the purported East German State. Other factors, such as the level of USSR involvement, slowed down this process.¹³⁵ Democracy, then, is not to be seen as some instant remedy for securing international recognition for activity in neglect of the right to political independence.¹³⁶ Rather, where the context in which neglect political independence has its own worthy goal, such as international peace in the occupation and reconstruction of post-World War II Germany, democracy is a vital element for galvanising international acceptance. This is because it upholds the value of self-determination, which is important for its own sake, but if neglected would likely affect international peace.

Most pertinently, the Germany example is a reminder that, even today with an emerging legal concept of democracy, there may not be a need for occupiers to encourage legal development to secure international acceptance of reconstruction in breach of the law of occupation; despite the greater uncertainty about what will be realised, by way of democracy, which this introduces.

7. The Reconstruction of the Occupied Palestinian Territories (OPT)

¹³¹ Section II (a) (9) (iv).

¹³² See J. L. Kunz, ‘Ending the War with Germany’, (1952) 46 *AJIL* 114 at 115-117.

¹³³ See Crawford, *op. cit.*, fn. 106, pp. 454-458.

¹³⁴ On the (lack of)commitment to democracy, see Statement by the United States Secretary of State, Dean Acheson, 12 Oct 1949, in R. von Oppen (ed.), *Documents on Germany Under Occupation 1945 – 1954*, (1955) p. 424.

¹³⁵ See Crawford, *op. cit.*, fn. 106, pp. 456-457.

¹³⁶ One need only consider the situation with Turkey in Cyprus, there, despite free elections, the conduct is still attributed to Turkey which remains cast as the occupier, see *Loizidou v Turkey. Merits*, ECtHR (1996), Series VI, 2216 at 2235-2236, para. 56; and *Cyprus v Turkey*, 10 May 2001, at paras. 69-77, available at <<http://hudoc.echr.coe.int>>.

The occupation of the Palestinian Territories by Israel is a prolonged one, during which change and development of the infrastructure is needed to stop stagnation.¹³⁷ It is generally agreed, although disputed by Israel in relation to Geneva law, that both of the main instruments of occupation apply to the occupied territories (although Israel still claims to follow Geneva law).¹³⁸ Still lacking the status of a sovereign state, the law of occupation serves to protect further impediment of the right of the Palestinian people to self-determination.¹³⁹ Israel does not acknowledge a right to Palestinian self-determination, so would not be expected to invoke pursuit of it in legal reasoning.¹⁴⁰ Nonetheless, because of its relevance for international acceptance of activity not in accordance with established doctrine of the law of occupation, there is the possibility of Israeli interpretation of the law of occupation taking into account the right to self-determination, albeit without explicit acknowledgement.

A key occurrence that has permitted change and development of the Palestinian infrastructure is the considerable degree of self-government that has been accorded since 1993. This arose as a consequence of a breakthrough in the peace process in 1993, whereby Chairman Arafat, the leader of the Palestine Liberation Organisation (PLO), recognized the right of Israel to live in peace and security, and Prime Minister Rabin of Israel recognized the PLO as the representative of the Palestinian People.¹⁴¹ By putting aside the question of the final settlement of the dispute,¹⁴² the parties were able to agree on an interim settlement, which provided for a degree of self-government for a 5 year transitional period, leading to further negotiations on a permanent settlement.¹⁴³ The framework for the interim period was set out in the Declaration of Principles on Interim Self-Government Arrangements (DoP)

¹³⁷ See Roberts, *op. cit.*, fn. 11.

¹³⁸ See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Report 2004, p. 136, at p. 171, paras. 89 - 101; Milano, *op. cit.*, fn. 51, p. 92; Ben-Naftali, Gross and Michaeli, *op. cit.*, fn. 24, p. 567 and references therein.

¹³⁹ GA Res. 2672 (1970) was the first of many resolutions to proclaim that the people of Palestine are 'entitled to equal rights and self-determination, in accordance with the Charter of the UN. '; see also *Wall Opinion*, *op. cit.*, fn. 138, p. 182, para. 118; A. Imseis, 'On the Fourth Geneva Convention and the Occupied Palestinian Territory', (2003) 44 *Harvard JIL* at 97; Roberts, *op. cit.*, fn. 19, p. 304; specifically on the lack of statehood see Crawford, *op. cit.*, fn. 106, p. 435.

¹⁴⁰ See C. Bell, *Peace Agreements and Human Rights* (2000) 153.

¹⁴¹ Israel-PLO Mutual Recognition, Letters and Speeches, 10 September 1993.

¹⁴² This centres on the right of the Palestinians to statehood and the territory that this would be based on.

¹⁴³ See A. Shlaim, *The Iron Wall: Israel and the Arab World* (2000) 516-523.

negotiated in Oslo and signed in Washington on 13 September 1993,¹⁴⁴ and elaborated on in subsequent interim agreements.¹⁴⁵ The DoP provided for immediate transfer of authority to an interim Palestinian Authority (PA), to be appointed by the PLO with Israeli approval, in the areas of education and culture, health, social welfare, direct taxation, and tourism ‘with the view to promoting economic development in the West Bank and Gaza Strip’;¹⁴⁶ further authority being gradually transferred to an elected Palestinian Council,¹⁴⁷ such as has been provided for in subsequent agreements.¹⁴⁸ While the governance arrangements, as agreed upon and as have evolved, are complex,¹⁴⁹ the present concern is with how the fact of self-government, and the fact of consequent further reconstruction of the infrastructure of the OPT, relates to the law of occupation.

Israeli action in breach of the law of occupation is usually identified as such, for example, the ICJ identified that the Israeli settlements in the OPT are illegal pursuant to Article 49(6) of the Fourth Geneva Convention, which prohibits the transfer of population of an occupying power into the territory it occupies.¹⁵⁰ While there may be little effort at enforcement, flagging up breaches of the law goes some way to stopping situations from becoming, overtime, legalized. In this respect, the arrangements for self-government, and the level of change and development this has made possible, are hardly compatible with the principle of conservation. Yet, one struggles to find comment on how this process relates to the law of occupation.¹⁵¹

One might ponder whether this occurrence represents a more expansive interpretation of the principle of conservation in order to better ensure the self-

¹⁴⁴ Declaration of Principles on Interim Self-Government Arrangements, Washington, 13 Sept. 1993 (witnessed by US and Russian Federation).

¹⁴⁵ See, e.g., Interim Agreement between Israel and the Palestinians, 28 September 1995 (Oslo II) (witnessed by US, Russian Federation, Arab Republic of Egypt, Hashemite Kingdom of Jordan, Kingdom of Norway, and EU); for all the agreements visit <www.israelmfa.gov.il/mfa/go.asp?MFAHOOOcO>; Watson identifies the agreements as legally binding bilateral treaties, G. R. Watson, ‘The “Wall” Decisions in Legal and Political Context’, (2005) 99 *AJIL* 6 at 22-24, and at 23 noting that neither side has invoked any law to suggest that they no longer apply in light of practice in breach; see, though, Y. Shany, ‘Faraway, So Close: The Legal Status of Gaza after Israel’s Disengagement’, (2006) 8 *Yearbook of International Humanitarian Law* 369 at 16-17 (on author’s copy).

¹⁴⁶ Article VI, DoP.

¹⁴⁷ Article III, DoP.

¹⁴⁸ See, e.g., Oslo II, *loc. cit.*, fn. 145, for the long list of areas see Annex III.

¹⁴⁹ See, e.g., Bell, *op. cit.*, fn. 140, p. 157

¹⁵⁰ *Wall Advisory Opinion, op. cit.*, fn. 138, paras. 119-20.

¹⁵¹ The ICJ, for example, hardly mentioned any aspect of the Oslo process in the *Wall Opinion*, on its apparent relevance for the Opinion see Watson, *op. cit.*, fn. 145, p. 24.

determination of the Palestinian people.¹⁵² However, there is nothing to support this view in the relevant agreements. Indeed, the Interim Agreement directs the limits on Palestinian authority to be gauged by reference to the provisions of 'the DoP, this Agreement, or any other agreement that may be reached between the two sides', with no mention of the law of occupation.¹⁵³ It can seem, then, that the law of occupation no longer applies.¹⁵⁴ However, this is far from a situation in which the occupier has left, in the sense of no longer exerting any influence, and has been replaced by an independent effective domestic government, a situation that one would readily accept as no longer occupation. In this respect, Malanczuk has emphasised that Israel retains jurisdiction over Israelis, controls security and external relations, and maintains residual power, so Israel is still an occupant 'with regard to the fields that it has not transferred to the Palestinians for self-government'.¹⁵⁵ The implication being that the law of occupation continues but does not affect those areas designated for self-government. While the law of occupation does not contemplate such a process, it does, indeed, appear that the consent of the PLO, followed by international acceptance of the consent as sufficient, has essentially removed the application of the law of occupation for those areas designated for self-government. How, then, does this consent position the reconstruction process in relation to the right of political independence?

At the time of the signing the DoP, the PLO is a national liberation movement,¹⁵⁶ an umbrella organisation for a number of factions,¹⁵⁷ which had received widespread international recognition as the representative of the people's right to self-determination.¹⁵⁸ Without effective control of the territory, one would hope

¹⁵² See the discussion of Pellet's idea in this respect, above.

¹⁵³ Article XIII, Interim Agreement (Oslo II).

¹⁵⁴ See E. Benvenisti, 'The Israeli-Palestinian Declaration of Principles: A Framework for Future Settlement', (1993) 4 *EJIL* 542 at 545-546 arguing that by the Israeli giving up control in these areas the law of occupation ceases to apply.

¹⁵⁵ P. Malanczuk, 'Some Basic Aspects of the Agreements between Israel and the PLO from the Perspective of International Law', (1996) 7 *EJIL* 485 at 487; see, similarly, A. Imseis, 'ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory: Critical Reflections on the International Humanitarian Law Aspects of the ICJ Wall Advisory Opinion', (2005) 99 *AJIL* 102 at note 21; *Wall Opinion*, *op. cit.*, fn. 138, para. 78; on the position following the recent Israeli moves for disengagement from Gaza, see the contrasting positions of I. Scobbie 'An Intimate Disengagement: Israel's Withdrawal from Gaza, the Law of Occupation and of Self-Determination', (2007) 11 *Yearbook of Islamic and Middle Eastern Law (2004-2005)* 3; and, Shany, *op. cit.*, fn. 145.

¹⁵⁶ F.L.M. Van de Craen, 'Palestine Liberation Movement', (1990) 12 *EPIL* 278.

¹⁵⁷ See E. Wing, 'The Palestinian Basic Law: Embryonic Constitutionalism', (1999) 31 *Case Western Reserve Journal of International Law* 383 at 392.

¹⁵⁸ In 1974, the UN General Assembly recognised the PLO as 'the principal party to the question of Palestine', GA Res. 3210 (14 Oct 1974).

international recognition is based on an assessment of the allegiance of the people. In this respect, to support the PLO's status at the time, one can identify pledges of allegiance from significant unions, as well as other institutions such as newspapers, political parties and guerrilla groups.¹⁵⁹ One is thus much more convinced of the representative quality of the agent than in a situation where the occupier has clearly selected a group favourable to its own interests as a source of consent. However, without independent effective control, there is still an unequal bargaining position that could see the people's rights under the law of occupation too readily given away to the occupier. Further, when one adds to this the significant level of opposition to the Oslo Accord amongst Palestinians, that the PLO Executive Committee was split, making it a struggle for Arafat to muster the necessary majority amongst the 18 members,¹⁶⁰ and Arafat was accused by some of 'abandoning principles to grab power',¹⁶¹ there is good reason for being hesitant about accepting the consent of the PLO as remedying concern for the right of the Palestinian's to decide on change and development of the infrastructure; a right which, by curtailing its exercise, the continued application of the law of occupation would help to preserve.¹⁶²

Such a criticism is not intended to challenge that, in the interests of the peace process, there was a need to be pragmatic as to who could consent,¹⁶³ especially not in light of the complexity of the territorial situation.¹⁶⁴ But, given the risk to the Palestinian rights that removing the law of occupation represents, one struggles to imagine that international acceptance of the approach would have been so forthcoming were there not further assurances that self-government would be in accordance with the will of the people. This is found in the democratic element of the DoP. Article III of the DoP indicates that:

In order that the Palestinian people in the West Bank and Gaza Strip may govern themselves according to democratic principles, direct, free and general political elections will be held for

¹⁵⁹ See O. M. Dajani, 'Stalled between Seasons: the International Legal Status of Palestine during the Interim Period', (1997) 26 *Denver Journal of International Law and Policy* 27 at 50-51, citing J. R. Nassar, *The Palestine Liberation Organization: from Armed Struggle to the Declaration of Independence* (1991) 30-36; see also Crawford, *op. cit.*, fn. 106, p. 437.

¹⁶⁰ See Shlaim, *op. cit.*, fn. 143, p. 521.

¹⁶¹ Shlaim, *op. cit.*, fn. 143, p. 521.

¹⁶² See also C. Campbell, 'A Problematic Peace: International Humanitarian Law and the Israeli/Palestinian Peace Process', in K. Schulze, M. Stokes, and C. Campbell (eds.), *Nationalism, Minorities and Diasporas: Identities and Rights in the Middle East* (1996) 39 at 53.

¹⁶³ See Malanczuk, *op. cit.*, fn. 155, p. 498.

¹⁶⁴ See Dajani, *op. cit.*, fn. 159.

the Council under agreed supervision and international observation, while the Palestinian police will ensure public order.

This projects the removal of the law of occupation as in pursuit of genuine rule by the people, rather than about empowering the PLO for its own sake. However, the indication, in Oslo II, that the process is bound by international human rights law,¹⁶⁵ and the provision for a dispute settlement mechanism, in DoP, essentially dependent on co-operation from both sides, offers little in terms of a basis for regulation and accountability of the pursuit of democracy.¹⁶⁶ There is no suggestion of a legal concept of democracy, encompassing procedural identification and substantive conduct, to help ensure that which the term democracy promises, and which makes it a useful device for engendering international acceptance, through the projected accommodation of the value of self-determination.

In practice, the path to democracy in Palestine is a slow one. Circumstances do not make it an easy task.¹⁶⁷ In particular, the need to communicate all legislation to Israel can frustrate efforts at change and development.¹⁶⁸ To the extent that progress has been slowed due to a lack of a genuine commitment to the democratic ideal, a legal concept of democracy as part of the right to self-determination could have provided an impetus for more effort. However, 'both sides had reasons not to negotiate into the peace agreements, a package which would harmonise Palestinian autonomy with internal self-determination',¹⁶⁹ thus an interest in a continued security presence for Israel,¹⁷⁰ and a retaining of discretion for the Palestinian authorities,¹⁷¹ helps explain why a legal concept of democracy was not in their interests. Particularly, when the same hortatory effect can be achieved with democracy depicted merely as a political

¹⁶⁵ The DoP does not even mention the process as bound by international human rights law, the later interim agreement (Oslo II) does mention that the process is bound by international human rights law, Article XIV.

¹⁶⁶ Article XV, DoP offers some scope for dispute settlement but as Bell notes 'it is essentially a political mechanism dependent on cooperation from both sides, Bell, *op. cit.*, fn. 140, p. 308.

¹⁶⁷ See NORDEM Report, *Palestine: Presidential Elections 2005* (August 2005) p. 16 and p. 23.

¹⁶⁸ See Bell, *op. cit.*, fn. 140, p. 204.

¹⁶⁹ Bell, *op. cit.*, fn. 140, p. 186.

¹⁷⁰ This has a serious impact on freedom of movement, and thus freedom of association and assembly as required by the emerging legal concept of democracy; see the discussion of the checkpoint system as an impingement on freedom of movement by Machsomwatch, 'A Counterinterview: Checkpoints 2004' (2004), available at <<http://www.machsomwatch.org/docs/Counterinterview.pdf>>; see also B'Tselem – The Israeli Information Center for Human Rights in the Occupied Territories, 'Forbidden Roads: The Discriminatory West Bank Road Regime' (2004), available at <http://www.btselem.org/download/200408_Forbidden_Roads_Eng.pdf>.

¹⁷¹ Wing reports the avoidance of the signing of the Basic Law (the Palestinian constitution) because of a desire to avoid the checks and balances on government which it would introduce, Wing, *op. cit.*, fn. 157, p. 404.

concept. And, of course, Israel would not have agreed to explicit mention of the Palestinian right to self-determination.¹⁷² Consequently, while the pursuit of democracy helps to excuse the avoidance of the law of occupation, so far it does not appear a sufficient excuse for the people who are left disappointed at the undemocratic practices of the Palestinian Administration.¹⁷³ Indeed, the peoples yearning for democratic self-government has been suggested as an element that might erode the peace process.¹⁷⁴ This feeds into debate on the relevance of law for resolution of the dispute, which raises the broader question as to the extent that justice is expendable in the interest of peace? The answer remains far from clear,¹⁷⁵ but there are certainly signs that avoiding legal regulation of the governance deal struck in the pursuit of peace might eventually have the opposite effect.

The complexity of the situation, in relation to Israeli occupation of the Palestinian Territories, helps to explain why the pursuit of democracy as a loose political concept would be sufficient to satisfy wider international opinion that the value of self-determination has been addressed. In a more traditional situation of belligerent occupation, such as occurred in Iraq, one might hope, at least, that wider international opinion would not be satisfied with the promise of the pursuit of a loose political concept as sufficient to accommodate the value of self-determination in place of the law of occupation.

8. The Reconstruction of Occupied Iraq

It is widely accepted that during at least May 2003 to June 2004 the coalition forces occupied Iraq.¹⁷⁶ These dates represent the point from which the Coalition Provisional Authority (CPA) was established to administer Iraq until authority was transferred to the Iraqi Interim Government.¹⁷⁷ The occupation followed a short period of conflict between Iraq, led by Saddam Hussein, and the coalition forces,

¹⁷² See Bell, *op. cit.*, fn. 140, p. 153.

¹⁷³ See G. E. Bisharat, 'Peace and the Political Imperative Reform in Palestine', (1999) 31 *Case Western Reserve Journal of International Law* 253 at 284.

¹⁷⁴ See Bisharat, *op. cit.*, fn. 173, p. 254

¹⁷⁵ See J. Quigley, 'The Role of Law in a Palestinian-Israeli Accommodation', (1999) 31 *Case Western Reserve Journal of International Law* 351 at 375; Bell, *op. cit.*, fn. 140, p. 187.

¹⁷⁶ See, e.g., Boon, *op. cit.*, fn. 34.

¹⁷⁷ On the CPA, see L. E. Halchin, "The Coalition Provisional Authority (CPA): Origin, Characteristics, and Institutional Authorities", *Congressional Research Service*, The Library of Congress, 6 June 2005, available at: <www.fas.org/sgp/crs/mideast/RL32370.pdf>.

predominantly US and UK forces, in response to a perceived threat posed by Iraq's purported possession of WMD. The legality of the coalition forces use of force to remove Hussein from power has received a significant amount of scholarly attention.¹⁷⁸ However firmly the coalition might have protested the legality of their action, it is, in the words of Lowe:

simply unacceptable that a step as serious and important as a massive military attack upon a State should be launched on the basis of a legal argument dependent upon dubious inferences drawn from silences in Resolution 1441 and the muffled echoes of earlier resolutions, unsupported by any contemporary authorisation to use force.¹⁷⁹

The coalition, then, became the occupiers of Iraq following a use of force that struggled for wider international support,¹⁸⁰ which meant that its administration would receive close international scrutiny. Nonetheless, the CPA still engaged in change and development of Iraqi state and civil infrastructure far beyond what could be reasonably reconciled with the principle of conservation.

The CPA introduced a wide range of reforms. These were in relation to security and military institutions, human rights reform, criminal law and law enforcement reforms, economic reform, as well as changes to remove the influence of the Ba'ath party on Iraqi society and reduce corruption in governmental bodies.¹⁸¹ The latter included the complete overhaul of the existing structure of government. This practice of change and development attracted significant scholarly comment,¹⁸² but not the level of international condemnation that one might have expected, particularly in light of the circumstantial origins of the occupation. Such international endorsement hints at modification of the law of occupation to be more permissive of reconstruction, and is thus of interest for this study.

¹⁷⁸ See, e. g., N. D. White and E. P. J. Myjer, 'The Use of Force Against Iraq', (2003) 8 *JCSL* 1.

¹⁷⁹ V. Lowe, 'The Iraq Crisis: What Next?'. (2003) 52 *ICLQ* 859 at 866.

¹⁸⁰ When the SC discussions broke down in March 2003, the three other permanent members of the SC remained strongly opposed to the use of force, see UN Doc. S/PV/4721 (19 March 2003); the UK Foreign Affairs Committee (FAC) explained the division in the SC as 'likely to have been a consequence of genuinely different assessments of the nature and extent of that threat.' , Ninth Report, FAC, Session 2002-03, The Decision to Go to War in Iraq, HC 813-I (7 July 2003) para. 82.

¹⁸¹ For an account see Fox, *op. cit.*, fn. 49, 208-223; see also, as an example of more in depth investigation of specific areas changed and developed, T. W. Kassinger and D. J. Williams, 'Commercial Law Reform Issues in the Reconstruction of Iraq', (2004-05) 33 *Georgia Journal of International and Comparative Law* 217.

¹⁸² See, e.g., K. Kaikobad, 'Problems of Belligerent Occupation: The Scope of Powers Exercised by the Coalition Provisional Authority', (2005) 54 *ICLQ* 253; C. McCarthy, 'The Paradox of the International Law of Military Occupation: Sovereignty and the Reformation of Iraq', (2005) 10 *JCSL* 43; R. Buchan, 'International Community and the Occupation of Iraq', (2007) 12 *JCSL* 37.

The occupation of Iraq did not involve a straightforward application of the law of occupation. The law of occupation was arguably modified for the situation by a chapter VII resolution. In this respect, SC Resolution 1483 refers to ‘certain transformative objectives for the occupation’, which suggests authorization beyond the conservationist *raison d’être* of the law of occupation.¹⁸³ The exact intention of the SC is, however, muddled by the continued stress on the importance of adherence to the law of occupation; for example, paragraph 5 of Resolution 1483 requires the occupiers to ‘comply fully with their obligations under ... the Geneva Conventions of 1949 and Hague Regulations of 1907’.¹⁸⁴ This resulted in legal ambiguity, for which the conditioning of changes by the occupiers in the areas of economic reconstruction, conditions for sustainable development, the protection of human rights, legal and judicial reform, on consultation with the Special Representative of the UN Secretary General,¹⁸⁵ is a rather weak substitute for the stringent protection that the law of occupation provides for the right to political independence.

Although, ‘[m]ost [CPA] regulations contained a blanket preamble to the effect that instruments issued by the CPA were enacted ‘under the laws and usages of war’’,¹⁸⁶ it remains that the muddled SC chapter VII authorisation of activity beyond the law of occupation helped remove the need for the occupiers to try and explain their activity as consistent with the established doctrine of the law of occupation.¹⁸⁷ This undermines the example in terms of evidence of modification of the law of occupation.¹⁸⁸ It does not, though, provide a comprehensive explanation for international acceptance of practice beyond the established framework of the law of occupation, which neglects the right of the state of Iraq and its people to political independence.

Scheffer has addressed the problem of how to find a more coherent legal basis for the transformative reconstruction intentions of the coalition forces in Iraq, than was found in the uncertain mix of law of occupation modified in a vague manner by SC Resolution 1483. Scheffer suggests that answers could be found in a fresh UN

¹⁸³ See A. Roberts, ‘Transformative Military Occupation: Applying the Laws of War and Human Rights’ (2006) 100 *AJIL* 580; D. Scheffer, ‘Future Implications of the Iraq Conflict: Beyond Occupation Law’ (2003) 97 *AJIL* 842 at 845-6.

¹⁸⁴ See also Fox, *op. cit.*, fn. 49, pp. 259 – 62.

¹⁸⁵ SC Res. 1483 (2003) para. 8.

¹⁸⁶ Boon, *op. cit.*, fn. 34, p. 14.

¹⁸⁷ See, e.g., comments to this effect in the UK House of Commons Research Paper 03/51, 2 June 2003, 25.

¹⁸⁸ Cf. Benvenisti, *op. cit.*, fn. 12, pp. 37-38.

chapter VII mandate establishing an international territorial administration; a clearer delegation of administrative responsibilities to the coalition forces so that they would not necessarily be acting as occupying powers; or in the creation of an Iraqi government that might invite the occupying powers return.¹⁸⁹ Roberts, similarly suggests that any legal validation of transformative policies in a situation of occupation could only come from a chapter VII resolution or an amendment of the GCIV.¹⁹⁰ While the SC could have done better in its drafting of Resolution 1483 for legal certainty, and this could have helped improve the accountability of the CPA which was able to take advantage of the legal ambiguity, in itself, as was noted in Chapter 2, a chapter VII resolution would not address the neglect of the right to political independence.

The neglect of political independence puts at stake the values of self-determination and international peace. Restoring effective government in Iraq was of clear importance for international peace, but to attempt to do so in neglect of the value of self-determination would be counterproductive because the people would be unlikely to adhere to an imposed regime and this would likely spark conflict. Some efforts to project accommodation of the value of self-determination are found in the introduction of an Iraqi element into the administration of the occupied state.¹⁹¹ This was in the form of the Governing Iraqi Council (GIC), which was to be part of a tripartite type formation for governance, composed also of the UN Secretary General and CPA.¹⁹² The CPA essentially selected the 25 members of the GIC,¹⁹³ and its significance in relation to addressing the value of self-determination was further diminished because it ended up with a limited advisory role.¹⁹⁴ The GIC might have

¹⁸⁹ Scheffer, *op. cit.*, fn. 183, p. 859.

¹⁹⁰ Roberts, *op. cit.*, fn. 183, p. 622.

¹⁹¹ The UN Secretary General was well aware that involving Iraqis in the reconstruction was crucial for the success of the efforts, and when discussing political and legal reforms had emphasized this point, Report of the Secretary-General Pursuant to Paragraph 24 of Security Council Resolution 1483, UN Doc. S/2003/715 (2003), para. 23.

¹⁹² See T. D. Grant, 'The Security Council and Iraq: An Incremental Practice', (2003) 97 *AJIL* 823.

¹⁹³ See Report of the Secretary General Pursuant to Paragraph 24 of Security Council Resolution 1483 UN Doc. S/2003/715; see the FCO website, 'Iraq country profile' describing how: 'The Governing Council was neither selected nor elected - it emerged from a consensus building process involving the CPA and the main bodies of Iraqis interested in influencing the future of their country.' Accessed on <08/09/2005>; conversation with General Tim Cross a deputy to the CPA revealed that prominent Iraqis in exile were selected and then encouraged to agree with prominent Iraqis in Iraq on who should be on the GIC; see also C. J. Williams, 'Iraqi Council's Most Pressing Task: Legitimacy', *Los Angeles Times*, 28 August 2003.

¹⁹⁴ A lack of precision surrounded how the Governing Council would fit into the governing structure, as Fox has surmised '[i]n sum, the Governing Council appears to have played a purely advisory role.' Fox, *op. cit.*, fn. 49, p. 206.

been better than nothing but no one could pretend that the GIC actually reconciled the practice with the right to political independence.

More important for the projection of the accommodation of the value of self-determination was the depiction, by the SC, of the occupiers as working towards the 'creation of conditions in which the Iraqi people can freely determine their own political future.'¹⁹⁵ To be achieved when 'an internationally recognized, representative government is established by the people of Iraq and assumes the responsibilities of the Authority.'¹⁹⁶ There has been some scholarly consideration of what the SC meant when it specified that the Iraqi government must be 'representative'.¹⁹⁷ It is, after all, as noted in Chapter 3, still an open-ended term that does not limit the government to a democratic one. Orakhelashvili has argued, on the basis of his view that the self-determination of peoples has assumed peremptory norm status, that the term 'representative' must be interpreted in accordance with this principle, which means (if one accepts that self-determination requires it) that a democratic form was required.¹⁹⁸ Orakhelashvili needs to resort to the right of self-determination as a norm of *jus cogens* because of the general lack of mention of the right in the resolutions or the preceding debates. The argument struggles not least because if self-determination has the status of *jus cogens* then it is as a right to free from foreign domination not ideas that are at best emerging such as the link with democracy.¹⁹⁹ Alternatively, White suggests that, in light of past SC practice in relation to election monitoring, the term representative should be understood as obliging a democratic form of government to be constituted.²⁰⁰ However, in the debate on the signing of Resolution 1483, only Germany's comments implied that representative meant democratic:

It is important now to give the Iraqi people the perspective of building a democratic and stable Government, at peace with itself and its regional neighbours — a respected member of the family of nations.

¹⁹⁵ SC. Res. 1483 (2003), para 4.

¹⁹⁶ SC. Res. 1483 (2003).

¹⁹⁷ On the wider debate about what should guide the interpretation of SC resolutions, see M. C. Wood, 'The Interpretation of Security Council Resolutions', (1998) 2 *Max Planck UNYB* 73, at 74-5 and 92.

¹⁹⁸ A. Orakhelashvili, 'The Post War Settlement in Iraq: The UN Security Council Resolution 1483 (2003) and General International Law', (2003) 8 *JCSL* 307 at 312-13.

¹⁹⁹ See discussion in Chapter 1 and Conclusions of this study.

²⁰⁰ N. D. White, 'The Will and Authority of the Security Council after Iraq', (2004) 17 *LJIL* 645 at 653 – 54; see also Kirgis, *loc. cit.*, fn. 105, suggesting that the use of the term 'representative' may be seen as further step in the development of the emerging international law principle of democratic governance.

And then it is the context of its relevance for international peace that Germany believes a democratic form is inevitable in Iraq.²⁰¹ It thus seems most likely that the term ‘representative’ was adopted exactly because it preserved flexibility for all those involved when it came to the process of identifying an agent to work with on behalf of the Iraqi state and its people. This flexibility allowed the handing over of political authority to an interim government to be treated as sufficient to remove the restraints of the law of occupation, despite the fact that the government was still dependent on the coalition forces for its control of the territory and was, essentially, CPA selected rather than elected.²⁰²

Moreover, the invitation from the SC, to the CPA and GIC, to select a democratic form,²⁰³ without specification of the components, further emphasises that democracy was not legally required by the term ‘representative’, but also that it was treated as a political rather than a legal concept. The choice of democracy was, then, an act of self-determination rather than a requirement of self-determination, albeit a rather inadequate one given the credentials of the GIC and the CPA that chose democracy and gave meaning to it in the first stages of the constitution making process.²⁰⁴

Nonetheless, it was readily apparent that the term representative would in fact lead to the introduction of a democratic form of government, not least because of the dominant influence of US and UK, and the understanding of the term that they promoted in debates leading to GA Resolution 2625 (1970).²⁰⁵ Indeed, the CPA was not shy about stating, in a mid-term review, that ‘the ultimate goal for Iraq is a durable peace for a unified and stable, democratic Iraq that is underpinned by new and protected freedoms and a growing market economy.’²⁰⁶ Thus, despite the reluctance to be explicit, because democracy was always understood as the

²⁰¹ SC 4761stmtg, 22 May 2003, p. 5.

²⁰² For criticism, see A. Carcano, ‘End of the Occupation in 2004? The Status of the Multinational Force after the Transfer of Sovereignty to the Interim Iraqi Government’, (2006) 11 *JCSL* 41 at 66.

²⁰³ UN Doc. SC Res. 1511 (2003), para. 7.

²⁰⁴ One might also argue that the term ‘representative’ was chosen so as not to infringe the right to self-determination by taking the choice of governmental form away from the Iraqi people. In this respect, the input of the Iraqi people in the form of the GIC was hardly sufficient, see S. Wheatley, ‘The Security Council, Democratic Legitimacy, and Regime Change in Iraq’, (2006) 17 *EJIL* 531 at 541; cf. N. Feldman, ‘Imposed Constitutionalism’, (2004/5) 37 *Connecticut Law Review* 857 at 857-858.

²⁰⁵ On GA. Res. 2625, see Chapter 3 of this study.

²⁰⁶ CPA, *An Historic Overview of CPA Accomplishments* at 4, available at <www.cpa-iraq.org>.

outcome,²⁰⁷ the occupation was still seen as about democracy, and hence about the realisation of genuine rule by the people. The failure to be explicit at the SC on this point, or to identify links with the law of occupation, or the right to self-determination, of course, guarded against encouraging the development of more relevant legal bounds for the discretion of the occupiers, in terms of actually achieving a minimum standard of democracy.

The point, though, is that it is not simply by pursuing democracy that the coalition was able to escape the restraints of the law of occupation. Nor is it to suggest that there was no criticism of the change and development as in violation of the right to self-determination.²⁰⁸ And it is certainly not to advocate intervention in sovereign states to impose democracy.²⁰⁹ The point is that democracy, because of its ability to project accommodation of the value of self-determination, is an essential element of the explanation for international acceptance of the process as whole. In terms of international acceptance of a practice that, through disregarding the law of occupation in relation to reconstruction and the end of application, neglected the right to political independence, the apparent legality and confirmation of importance for international peace from chapter VII authorisation must also be seen as of extreme importance.

In relation to the subsequent consensual basis of the occupation following the establishment of the Interim Government, without democracy, or at least the promise of democracy, one struggles to accept that international recognition for the interim government,²¹⁰ or the otherwise ineffective governments that followed, would have been forthcoming. Without international recognition the interim government would not have been treated as competent to validly consent to end of the application of the law of occupation when the military forces remained, and so the prospect of some legal restraint from the law of occupation would have continued.²¹¹ In this instance, the underdeveloped rules on the expression of the will of the state and its people combine with the pursuit of democracy to explain international acceptance of the end of application without an independently effective domestic government.

²⁰⁷ See, e.g., A. Roberts, 'The End of Occupation: Iraq 2004', (2005) 54 *ICLQ* 27 at 42.

²⁰⁸ See McCarthy, *loc. cit.*, fn. 182.

²⁰⁹ See K. Reinhart and G. S. Merritt, *Reconstruction and Constitution Building in Iraq*, (2004) 37 *Vanderbilt Journal of Transnational Law* 765 at 767.

²¹⁰ On the extensive international recognition of the interim government, see Carcano, *op. cit.*, fn. 202, p. 49.

²¹¹ See also Carcano, *op. cit.*, fn. 202, pp. 53-54.

When the time came for the actual constitution of Iraq to be drafted, following the selection of a Constitutional Committee from the elected Transitional National Assembly in January 2005, application of the law of occupation had ended. The framework and, essentially, the blueprint for the new constitution,²¹² the ‘Transitional Administrative Law’ (TAL), was, however, drafted before the end of the formal application of the law of occupation, between January and March 2004.²¹³ The fact that a permanent constitution was not drafted during the occupation appears to have had more to do with concerns of acceptance by the Iraqi people rather than any perceived limitation because of the application of the law of occupation. This is because the US had in fact planned to appoint a national conference to draft a permanent constitution,²¹⁴ but ‘under pressure from Iraq’s most senior religious authority²¹⁵ and the United Nations,²¹⁶ it accepted that direct elections would in fact be held, and that a transitional law should be written in order to establish the framework within which the country’s permanent constitution would be drafted.’²¹⁷

The GIC was given formal responsibility for drafting the TAL, but there was considerable CPA involvement.²¹⁸ The content of the TAL is wide ranging, significant aspects relating to the infrastructure of Iraq were addressed.²¹⁹ It points the direction of Iraq’s political future towards democratic self-government, and received implicit international endorsement in the form of SC Resolution 1546.²²⁰

It was always expected that the Iraqi government would draft a constitution committed to democracy, indeed, one reflecting the emerging consensus on democracy as a human right.²²¹ However, the failure to link a legal concept of democracy to the legal right of self-determination during the process leading to the

²¹² P. Dann and Z. Al-Ali, ‘The Internationalized *Pouvoir Constituant* – Constitution-Making Under External Influence in Iraq, Sudan and East Timor’, (2006) 10 *Max Planck UNYB* 423 – 463 at 440; see also International Crisis Group (ICG), ‘Iraq: Don’t Rush the Constitution’, *Middle East Report*, Number 42, 8 June 2005, 7.

²¹³ Law of Administration for the State of Iraq for the Transitional Period (March, 2004) available at <<http://www.cpa-iraq.org/government/TAL.html>>.

²¹⁴ L. Diamond, *Squandered Victory* (2005) 41.

²¹⁵ Feldman, *op. cit.*, fn. 204, 857.

²¹⁶ See The Political Transition in Iraq: Report of the Fact-finding Mission, United Nations Security Council, 23 February 2004, Doc. S/2004/140 available at <<http://www.un.int/usa/s-2004-140-iraq.pdf>>.

²¹⁷ Dann and Al-Ali, *op. cit.*, fn. 212, p. 436.

²¹⁸ Dann and Al-Ali, *op. cit.*, fn. 212, p. 436.

²¹⁹ See, e.g., Article 13 of the TAL.

²²⁰ SC Res. 1546 (8 June 2004)

²²¹ See Dann and Al-Ali, *op. cit.*, fn. 212, p. 440 – 442; full text of the constitution adopted October 2005 available at <<http://www.washingtonpost.com/wp-dyn/content/article/2005/10/12/AR2005101201450.html>>.

establishment of the government, raises a pressing question: on what basis can the elected Iraqi government, still dependent on international actors for effective control, be challenged if it should abandon its democratic commitment by, for example, seriously impeding freedom of expression?

In terms of challenging the authority of an elected government, scholarly reactions to the purported location of sovereignty since the formal end of the occupation are telling. The international acceptance of the interim government as the embodiment of Iraq's sovereignty was criticised because of the dominance of international actors in its selection.²²² This was not repeated with regards the treatment of the subsequently elected government as the embodiment of Iraqi sovereignty.²²³ Yet in neither instance was there a government with independent effective control of the territory, the occupiers remained. If scholars treat the fact of elections as an adequate substitute for independent effective control of the territory, then it is unlikely that states, which were satisfied with the selected Interim Government, will feel confident, or be inclined to challenge an elected government's authority. This indicates that, in either situations, if the government's democratic commitment was abandoned, elected or not, international actors that provide the effectiveness would be left to call for compliance with the individual human rights. This is far from adequate, when the cornerstone of the excuse for neglect of political independence in the reconstruction processes is the realisation of democracy, genuine rule by the people.

In Iraq, then, legal regulation of the democracy excuse for neglect of political independence was eschewed, but international acceptance of the process was still forthcoming. This supports that the positing of the pursuit of democracy can in itself, and dependent on the surrounding circumstances, provide enough satisfaction for international actors, in relation to the value of self-determination, for there not to be a 'need' to seek to develop new law. Whether the international actors and the people of Iraq will live to regret the lack of scope for international regulation and accountability of the government they put in power remains to be seen. The relationship between the reconstruction of Iraq and the right to political

²²² See, e.g., A. Carcano, *op. cit.*, fn. 202, pp. 49-57; S. Wheatley, *op. cit.*, fn. 204, p. 541 and p. 550.

²²³ See, e.g., Caracno, *op. cit.*, fn. 202, p.66; Wheatley, *op. cit.*, fn. 204, p.550 Orakhelashvili, *op. cit.*, fn. 198, pp. 312-13; White, *op. cit.*, fn. 200, pp. 653-654.

independence after the formal end of the occupation is addressed in Chapter 7 as an example of the assistance model of state reconstruction.

9. Conclusion

This chapter has addressed how the law of occupation deals with reconstruction in relation to the right to political independence, and the relevance of this approach for the other paradigms. It has been seen that, despite origins prior to the right to self-determination and the prohibition on annexation of territory by the use force, there are good reasons, found in the desire to protect the sovereign rights of the target state, for further interest to be shown in the law of occupation as a framework for contemporary state reconstruction. The situations, in which it applies, despite originating from a neglect of political independence, relate to the subject of this study because of the need for no further neglect. The other paradigms rest on state consent and chapter VII but this has been argued not to make the premise of the law of occupation, that the authority in charge lacks attachment to the state and its people, irrelevant. With its design intended for warfare, the conservative emphasis makes the law of occupation unsuitable for contemporary reconstruction and thereby unlikely to be adopted by analogy in the other paradigms. Still, the fact that it permits some change even in the context of warfare is support for the idea that some change should be permissible, the difficulty, of course, is gauging the extent, once you move away from strict conservation.

The legal right of self-determination could have encouraged development of the law of occupation so that it permits and regulates the creation of a democratic government that could pursue the changes. A review of practice has revealed democracy to be an essential part of the excuse for the neglect of political independence occasioned by a disregard for the law of occupation for the purpose of state reconstruction. This is because of its ability to project accommodation of the value of self-determination by advising that genuine rule by the people will be realised; recalling Chapter 3, in light of neglect of political independence, accommodation of both self-determination and international peace would be expected in an explanation for international acceptance. The value of self-determination being something which the other elements in the explanation for international acceptance in the practice reviewed – legality from one, or both, of

consent and a chapter VII resolution, and discrete benefits for international peace – struggle to address. It is, however, democracy as a political rather than a legal concept that has been pursued. This is not an adequate guarantee for the value of self-determination. Especially not when compared with the stringent legal regulation that the law of occupation provides in the interest of preserving the right to political independence. With these findings in mind, the next chapter turns attention to how reconstruction through ITA relates to political independence.

Chapter 5

State Reconstruction by International Territorial Administration

1. Introduction

International territorial administration (ITA) denotes direct governance of a territory by international actors.¹ A flourishing political science and international legal literature has emerged in response to, in particular, the recent occurrence of ITA in Cambodia (1992 – 1993), Bosnia Herzegovina (1995 –), Kosovo (1999 –), and East Timor (1999 – 2002).² Despite similarities with occupation,³ the law of occupation does not apply because of one, or both, of the legal justifications of state consent and SC chapter VII resolution.⁴ Wilde's comprehensive study of ITA as a policy institution has provided a broader understanding of the historical and political context within which the projects operate.⁵ How ITA and reconstruction through this medium relates to the right to political independence was, however, beyond the scope of Wilde's study. Indeed, one struggles to identify a comprehensive analysis of the practice from the perspective of the right to political independence.⁶ Most commentators appear at least implicitly satisfied with a valid legal justification in the form of one, or both, of state consent and a chapter VII resolution for dispelling any reason for doubt about (in)consistency with the right to political independence.⁷ Yet, as was noted in Chapter 2, when there is no independently effective domestic

¹ Wilde defines territorial administration as reference 'to a formally constituted, locally based management structure operating with respect to a particular territorial unit; it can be limited (e.g., a territorial program concerned with certain matters) or plenary (e.g., a territorial government) in scope.' R. Wilde, 'From Danzig to East Timor and Beyond: The Role of International Territorial Administration', 95 *AJIL* (2001) 583 at 585

² See, e.g., the literature listed in the introduction to this study.

³ See T. H. Irmscher, 'The Legal Framework for the Activities of the United Nations Interim Administration Mission in Kosovo: The Charter, Human Rights, and the Law of Occupation', (2001) 44 *GYIL* 353; S. R. Ratner, 'Foreign Occupation and International Territorial Administration: The Challenges of Convergence' (2005) 16 *EJIL* 695.

⁴ See Chapter 4 of this study.

⁵ R. Wilde, *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away* (2008) 439.

⁶ See, though, D. Zaum, *The Sovereignty Paradox: The Norms and Politics of International Statebuilding* (2007), and G. H. Fox, *Humanitarian Occupation* (2008).

⁷ See, e.g., A. J. J. de Hoogh, 'Attribution or Delegation of (Legislative Power by the Security Council? The Case of UNTAET', (2001) 7 *The Yearbook of International Peace Operations* 1; M. Matheson, 'United Nations Governance of Post-Conflict Societies', (2001) 95 *AJIL* 76 at 84.

government, both legal justifications have shortcomings in terms of reconciling large-scale international involvement in state reconstruction with the right to political independence. In light of the significance of the preservation of the right to political independence for the UN system, this chapter addresses how the fact of ITA and reconstruction through this medium in the four prominent examples, noted above, relates to the right to political independence and the attendant core UN system values of self-determination of peoples and international peace.

There are significant differences in the context, nature of the ITA, and approach to reconstruction in the examples addressed. Not least, there is the fact that neither Kosovo nor East Timor were whole sovereign states at the time, and that in these two examples the ITA has been of a plenary nature (international actors have exercised complete governmental authority), unlike in the sovereign states of Cambodia and Bosnia where the ITA has been of a more partial or limited nature (international governmental authority has been concerned with certain matters and has operated in a complex dynamic with domestic government). There is, though, a common theme of reconstruction without an independently effective domestic government. It is this common theme that leads one to expect a degree of commonality in the approach taken to political independence and the attendant values.

The second section of this chapter surveys each of the examples in turn to identify the extent to which the ITA can be read as consistent with the right to political independence. This involves consideration of the context, legal justification, and nature of the ITA. The rest of the chapter deals with how the approaches to reconstruction across the examples position the practice in relation to political independence and the attendant UN system values of self-determination and international peace.

The main argument is that, while there are variations in the level of consistency with the right to political independence, none of the examples represent sufficient consistency with political independence to satisfy the values of self-determination and international peace. In this respect, it is argued that democracy, as a prominent aim of reconstruction, is an essential element for accommodation of the value of self-determination and the engendering of international acceptance. It is further argued that the lack of a legal concept of democracy makes the portrayal of consistency with the value of self-determination less convincing. This is because of the lack of scope

for regulation and accountability to ensure the genuine rule by the people that democracy promises.

Other recent examples of ITA in the divided city of Mostar in Bosnia, and Eastern Slavonia (Danube Region of Croatia) are not addressed. This is because the contexts, a divided city within a state and facilitation of a peaceful transfer of territory from one state to another, make issues related to the right to political independence less prominent, and, consequently, less significant for the UN system than in the examples to be addressed.⁸ Another example that is often cited in relation to ITA is the transition to independence of Namibia. For Namibia, however, while ITA was proposed, the UN never actually went beyond an advisory role.⁹ The main reason older examples, such as the League of Nations administration of the Free City of Danzig (1920 – 1939) or the German Saar Basin (1920 – 1935), are not addressed is that at this time the only right to political independence was that of states. Thus an impact on the right to political independence would not be expected to be seen as so significant for the international society of states as it would be today, when the people's right to political independence, with its stronger ethical pedigree, is also at stake.¹⁰

A further point of clarification relates to the distinction between assistance and administration. In practice, because assistance can be so comprehensive, it is not always clear whether the assistors are actually the administrators.¹¹ The lack of local governance capabilities in Afghanistan, following the international intervention in 2001, coupled with comprehensive international assistance is a clear example. In light of this, Chesterman, in his study on key policy issues confronting what he terms international transitional administrations, includes examples where the international actors are not formally, at least, the administrators under the banner of 'transitional administrative-like powers'.¹² It is, however, an important distinction for this study to maintain. This is because the choice to pursue assistance rather than direct

⁸ See S. Chesterman, *You the People: The United Nations, Transitional Administration, and State Building* (2004) 70 -72 (Eastern Slavonia), 77 -78 (Mostar).

⁹ See J. S. Kreilkamp 'UN Postconflict Reconstruction', (2003) *Journal of International Law and Politics* 619 a 624.

¹⁰ See N. Berman, "'But the Alternative is Despair": European Nationalism and the Modernist Renewal of International Law', (1993) 8 *Harvard Law Review* 1792 at 1874-1893, discussing such examples in relation to self-determination of peoples as a political principle.

¹¹ See also Wilde, *op. cit.*, fn. 1, p. 585.

¹² Chesterman, *op. cit.*, fn. 8, p. 83.

administration appears in itself as a means of projecting greater consistency with the right to political independence; such examples are addressed in Chapter 6.

2. The Consistency of ITA with Political Independence

If the law of occupation is applicable in a given situation this indicates that the international presence is not consistent with the right to political independence and therefore must be regulated in its administration of the territory. In none of the four examples of ITA addressed by this study has the law of occupation applied, and one struggles to find a commentator addressing the consistency with the right to political independence. This is despite that governance without an independently effective domestic government, primarily because of a lack of objective attachment to the will of the target state and its people, is better presumed inconsistent than consistent with the right to political independence. To form a view on the extent of consistency with the right to political independence, along with its relevance for the particular situation, this section explores the context, legal basis, and nature of ITA, in each of the four noted examples of ITA from this perspective.

A. Cambodia

Cambodia gained independence from France, for the second time,¹³ at the end of 1953.¹⁴ The political history of Cambodia since then has been described as ‘a struggle among factions and visions of order ... contested by different sectors of Cambodian society and supported from time to time by foreign powers.’¹⁵ ITA was introduced in 1991 as part of the peacemaking process that sought to bring the main factions together and end the conflict that plagued Cambodia, to varying degrees, throughout the 1970s and 1980s.¹⁶ The lack of earlier international efforts to bring the factions together is explained by the connection between the conflict and the Cold War.

¹³ See D. Chandler, ‘The Political Dynamics of the Peacemaking Process in Cambodia’, in M. W. Doyle, I. Johnstone, and R. C. Orr. (eds.), *Keeping the Peace – Multidimensional UN Operations in Cambodia and El Salvador* (1997) 25 at 25.

¹⁴ Chandler, *op. cit.*, fn. 13, p. 31.

¹⁵ Chandler, *op. cit.*, fn. 13, p. 25.

¹⁶ See J. A. Tully, *A Short History of Cambodia: From Empire to Survival* (2006).

In 1978, the Vietnamese communists invaded. By 1979 they had gained control of most of Cambodia, ruling through a government known as the People's Republic of Kampuchea (PRK).¹⁷ While the Soviet bloc supported the incumbent PRK government, the US, China, and Association of Southeast Asian Nations (ASEAN) supported the factions that had coalesced along the Thai border.¹⁸ These joined together, with international encouragement, and were internationally recognised as the Coalition Government of Democratic Kampuchea (CGDK).¹⁹

A series of internationally sponsored peace conferences, involving the factions and a variety of international actors, eventually led to the 1991 Paris Agreements, which set out the terms for peace,²⁰ including ITA. Given the context of long-term conflict, with a significant international commitment on both sides already, it is easy to understand how a solution which did not accord with the right to political independence might be entertained by all those involved. As Cambodia is a whole sovereign state, however, the right of political independence is not easily evaded. Accordingly, efforts to minimise neglect and maintain consistency, if the international actors are still committed to the values of self-determination and international peace that underpin the legal protection afforded political independence in the normal run of things, would be expected. Some evidence of this is found in both the nature of the ITA and its legal justification.

As was noted in Chapter 2, while both a SC chapter VII resolution and state consent can preclude the wrongfulness of international involvement in the internal affairs of a state, it is state consent that better reconciles the practice with the right to political independence. The extent to which this is possible, as was argued in Chapter 2, depends on the level of independent effective control that the source of consent possesses. It is only upon state consent that the ITA, and international involvement surrounding it, was legally justified in Cambodia.²¹

¹⁷ Chandler, *op. cit.*, fn. 13, p. 48 and p. 50; see also S. R. Ratner, 'The Cambodia Settlement Agreements', (1993) 87 *AJIL* 1 at 3 and 7; N. Suntharalingam, 'The Cambodian Settlement Agreements', in M. W. Doyle, I. Johnstone, and R. C. Orr. (eds.), *Keeping the Peace – Multidimensional UN Operations in Cambodia and El Salvador* (1997) 82 at 86.

¹⁸ See J. Song, 'The Political Dynamics of the Peacemaking Process in Cambodia' in M. W. Doyle, I. Johnstone, and R. C. Orr. (eds.), *Keeping the Peace – Multidimensional UN Operations in Cambodia and El Salvador* (1997) 53 at 54.

¹⁹ See Suntharalingam, *op. cit.*, fn. 17, p. 86.

²⁰ See Song, *op. cit.*, fn. 18.

²¹ The process was, though, endorsed in SC Res. 668 (1990).

Although there was a not a complete lack of effective control on the territory, the context meant that there was a need for ingenuity to identify a source of consent that satisfied the interested actors, domestic and international. At the time, the State of Cambodia (SOC) (formerly PRK), retained control of somewhere around 80% of the territory.²² That this control was sustained through significant Vietnamese support helps to explain why there was considerably more international recognition of the CGDK.²³ With neither side of the international groupings confident that they had both a politically legitimate and legally entitled to consent government,²⁴ the Supreme National Council (SNC), consisting of the two governments, was created as a source of consent.²⁵ The SNC was not recognised as the government; both sides still maintained that they were the government.²⁶ Rather the SNC was treated and recognised as the embodiment of Cambodian sovereignty, and permitted to represent Cambodia externally during the transitional period.²⁷

While better than no consent, one factor which undermines the consent of the SNC as an authentic expression of the will of the state and its people is that the factions with significantly less control of the territory were given an equal say in the SNC. Also, those with control of the territory, the SOC, were heavily dependent on Vietnamese support. Further, as the international recognition of SNC competence appears to be inextricably linked to the factions acceptance of an agreement acceptable to the international parties at the Paris negotiations,²⁸ a lack of SNC autonomy in the decision making process is implied. One is therefore hardly reassured that international involvement is reconciled with the right to political independence by means of consent.

If the arrangements for governance during the transitional period were consistent with the right to political independence, through being an authentic expression of the will of the state and its people, this would remedy concerns about the legal basis for

²² Suntharalingam, *op. cit.*, fn. 17, p. 86; Chandler, *op. cit.*, fn. 13, pp. 49-52; see also M. W. Doyle, *UN Peacekeeping in Cambodia: UNTAC's Civil Mandate* (1995) 17 who suggests 90 percent of territory; E. Uphoff Kato, 'Quick Impact, Slow Rehabilitation', in M. W. Doyle, I. Johnstone, and R. C. Orr, (eds.), *Keeping the Peace – Multidimensional UN Operations in Cambodia and El Salvador* (1997) 186 at 186 who suggests 75-80 percent control of the territory.

²³ See Suntharalingam, *op. cit.*, fn. 17, p. 86; Chandler, *op. cit.*, fn. 13, pp. 49-52; Ratner, *op. cit.*, fn. 17, p. 9 note 45.

²⁴ See Ratner, *op. cit.*, fn. 17, p. 9.

²⁵ 1991 Agreement on a Comprehensive Political Settlement of the Cambodia Conflict [hereinafter 1991 Comprehensive Settlement Agreement], Part 1, Section 1, Article 1 and Article 6.

²⁶ Ratner, *op. cit.*, fn. 17, p. 10.

²⁷ Ratner, *op. cit.*, fn. 17, p. 11.

²⁸ See Ratner *op. cit.*, fn. 17, p. 40.

international involvement and the reconstruction pursued during the transitional period. The makeup of ITA in Cambodia as partial, governance was shared between the SNC and the UN, helps to portray greater consistency with the right to political independence.²⁹ This is because it suggests at least some correlation between governance and the will of the state and its people. However, a complex and far from transparent formula for the distribution of authority between the domestic and international,³⁰ and a tendency for considerable diplomatic pressure being exerted over the decision making of the SNC,³¹ do not serve to convince that such a correlation was a reality. Moreover, both the SNC and the UN relied upon a substantial international military presence for effective control of the territory.³² This removed the traditional basis for identification of a government as an authentic embodiment of the will of the state its people in international law, and thus undermines the consistency with the right to political independence, which the domestic element in the government suggests.

B. Bosnia and Herzegovina

Bosnia consists of three main ethnic groups, the Bosniacs (Muslim), Bosnian-Croats, and Bosnian-Serbs.³³ The process of disintegration of the Socialist Federal Republic of Yugoslavia (SFRY), 1991 - 1992, brought the tensions between these groups to the forefront.³⁴ A European Community (EC) mediator sought to liase between these main groups in Bosnia to seek agreement on the future of the republic.³⁵ The Bosnia-Serbs wanted to keep the SFRY together.³⁶ But in an EC supervised referendum on independence, on 29 February and 1 March 1992, without the participation of the

²⁹ See SC Res. 745 (1992) para. 2; Report of the Secretary General on Cambodia UN Doc. S/23613, 19 February 1992; UNTAC, 'Final Report of the Civil Administrative Component' Phom Penh, September 16, 1993, pp. 1-37.

³⁰ See 1991 Comprehensive Settlement Agreement, Annex 1, Section A, para. 2(a), (d) and (e) and para. 2(c) and (d); see also Ratner, *op. cit.*, fn. 17, p. 12.

³¹ Doyle, *op. cit.*, fn. 22, p. 27; see also L. Keller, 'UNTAC in Cambodia – from Occupation, Civil War and Genocide to Peace', (2005) *Max Planck UNYB* 127 at 161.

³² See 1991 Comprehensive Settlement Agreement, Annex 1, Section C.

³³ M. Cox, *The Making of the Bosnian State: International Law and the Authority of the International Community* (2002) (unpublished Ph.D Thesis, Cambridge) 90; see also Zaum, *op. cit.*, fn. 6, p. 89.

³⁴ See J. Gow, 'One Year of War in Bosnia and Herzegovina (1993) 2 *Jane's Intelligence Review* 1 at 1; R. Caplan, *Europe and the Recognition of New States in Yugoslavia* (2005) 124-125.

³⁵ See Economist, 7 March 1992, p52; D. Türk, 'Remarks Concerning the Breakup of the Former Yugoslavia', (1993) 3 *Transnat'l. & Contemp. Probs.* 50.

³⁶ Caplan, *op. cit.*, fn. 34, p. 126, the Serbian Democratic Party (SDS) held a referendum of Bosnian-Serbs on 9-10 November 1991 at which they decided to live in a single state.

Serb population, a majority voted for independence.³⁷ This led the EC, despite the lack of Bosnian-Serb participation, to recognise BiH as an independent state (the Republic of Bosnia and Herzegovina), from 7 April 1992.³⁸ Belgrade refused to recognise the independence of Bosnia. However, admission to the UN soon followed, helping to confirm the status of BiH as sovereign state.³⁹ This was despite the obvious difficulties of the government in exercising control of the whole territory, particularly after the Serbs, with support from Belgrade, prior to recognition, had abandoned their role in governance of the republic and began making moves towards the partition of BiH.⁴⁰

Over the subsequent three and a half years, from the point of international recognition of statehood, in the context of a war with internal and external aspects, Yugoslav and Croatian forces continued to operate on Bosnian territory, and areas aspiring to breakaway – the Republic of Srpska and the Bosnian Republic of Herzeg-Bosna – engaged in what Cox describes as ‘systematic ethnic cleansing of territory under its control’.⁴¹ The international actors who were instrumental in the realisation of the legal status of statehood received heavy criticism for not doing more to ensure that Bosnia could function as a peaceful state.⁴² A desire to put an end to the blood bath, which the international actors might be seen as in part responsible for, suggests a likely willingness to entertain a solution not entirely consistent with the right to political independence. Still, as a sovereign state, the right to political independence is prominent, and efforts to minimise neglect and maintain consistency with the right to political independence, as with Cambodia, would be expected. Again, some evidence of this is found in both the nature of the ITA and its legal justification.

It was not until 1995 that the international actors decided to change approach and become particularly pro-active in attempting to improve conditions in the Bosnian

³⁷ Türk, *op. cit.*, fn. 35, p. 55.

³⁸ Caplan, *op. cit.*, fn. 34, p. 120.

³⁹ The Republic of Bosnia and Herzegovina was admitted as a Member of the UN by GA Res. 46/237, (22 May 1992); the ICJ considered admission to the UN to be definitive evidence of statehood, see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Preliminary Objections, Judgment, ICJ Reports 1996, p. 595 at p. 611.

⁴⁰ Caplan, *op. cit.*, fn. 34, p. 124; Türk, *op. cit.*, fn. 35, p. 54, ‘In Bosnia-Herzegovina the situation was much more difficult [than in Croatia or Slovenia] and every reader of newspapers knew that the government in Sarajevo did not have effective control over the territory of the country.’

⁴¹ Cox, *op. cit.*, fn. 33, p. 88.

⁴² See M. Weller, ‘The International Response to the Dissolution to the Socialist Federal Republic of Yugoslavia’, (1992) 86 *AJIL* 601; Caplan, *op. cit.*, fn. 34, p. 133.

state.⁴³ The conflict was ended with the Dayton Agreement of November 1995, which set out the terms for peace, including an element of ITA.⁴⁴

As with the Paris Agreements, there is no legal basis in a chapter VII resolution, the legal basis is found in the consent of the warring factions.⁴⁵ A number of factors affect the level of reconciliation with the right to political independence that the consensual basis for the international involvement suggests. The fact that, of the three ethnic groups, only the Bosniacs, as the dominant group in the internationally recognised government of Bosnia, signed the actual agreement is not as significant as it might seem.⁴⁶ This is because representatives of all three groups were involved in the negotiations and signed the annexes,⁴⁷ which set out the key arrangements for the transitional period, including the international involvement.⁴⁸ More pressing is the fact that what control of the territory each group had varied in light of the war context,⁴⁹ and was severely affected by the persistent military support from Croatian and Serbian forces.⁵⁰ Moreover, the negotiation procedure at Dayton was hardly free of impediment on the autonomy of the representatives of the groups. The Bosnian-Serb aspect was dominated by the FRY, with which the delegation was paired.⁵¹ This saw the Bosnia-Serb grouping refuse to initial several of the Dayton instruments, (initials which were gained several days later from an American visit to Pale).⁵² And, the Croatian President, Tudjman, is said to have overruled certain objections of

⁴³ See Cox, *op. cit.*, fn. 33, p. 89.

⁴⁴ The General Framework Agreement for Peace in Bosnia and Herzegovina (GFAP), initialled at Dayton on 21 November 1995 and signed in Paris on 14 December 1995, (1996) 35 *ILM* 75; for an account of proceedings see C. Bildt, *Peace Journey* (1998), Chief EU negotiator in Bosnia from 1995.

⁴⁵ SC Res. 1031 (1995) para. 26 merely endorsed the Dayton Agreement.

⁴⁶ Interestingly, in the absence of effective control of the territory, the ICJ has used the international acceptance of Izetbegovic as the representative of Bosnia for the purpose of signing the Dayton agreements, as evidence of status as the government in an international legal sense, *Genocide case*, *op. cit.*, fn. 39, pp. 621-2.

⁴⁷ These, for the most part, take the form of agreements between the Government of Bosnia and Herzegovina and the two entities which are to constitute it: Republika Srpska and the BH Federation.

⁴⁸ See, for an overview of the changes introduced, K. Oellers Frahm, 'Restructuring Bosnia-Herzegovina: A Model with Pitfalls', (2005) 9 *Max Planck UNYB* 179 at 189-194.

⁴⁹ Fox notes that on the eve of Dayton the Bosnian Serbs 'controlled approximately seventy percent of Bosnian territory, acquired through a series of ethnic cleansing campaigns' Fox, *op. cit.*, fn. 6, p. 77; Oellers-Frahm notes how 'Croat and Bosnian forces had regained considerable parcels of territory lost to the Serbs and in early October 1995 they controlled again about 51 per cent of Bosnian territory', Oellers Frahm, *op. cit.*, fn. 48, p. 187.

⁵⁰ See B. Magas and I. Zanic, *The War in Croatia and Bosnia-Herzegovina 1991-1995* (2001) 131-236.

⁵¹ Certain concessions made by FRY on behalf of the Bosnian Serbs were kept secret from the Bosnian Serb representative, in particular the ceding of some territory. Bildt, *op. cit.*, fn. 44, p. 151; see also Cox, *op. cit.*, fn. 33, p. 90.

⁵² P. Szasz, 'The Dayton Accord: The Balkan Peace Agreement', (1997) 30 *Cornell International Law Journal* 759 at 763, at Pale more pressure was exerted and promises made to gain the consent.

Bosnian-Croats.⁵³ Moreover, the fact that the various groups were kept separate, with US negotiators moving between them with texts that the US had prepared, is a cause for doubt about the extent that the parties truly agreed on the meaning of key terms.⁵⁴ Furthermore, it was a UN authorised NATO air campaign, and the conditions required for its suspension, that paved the way for the peace settlement.⁵⁵ This, while not affecting the validity of consent in the framework of the VCLT,⁵⁶ casts further doubts on the level of autonomy in the negotiating position of the Bosnian-Serbs. In light of these factors, the consent struggles to reassure in terms of consistency with the right to political independence.

Again, as with Cambodia, the nature of the governance arrangement is a potential means for addressing neglect of political independence. Dayton foresaw governance by a set of elected domestic institutions of government.⁵⁷ In relation to which, it appeared that the central element of international governance, the Office of the High Representative (OHR), had largely an oversight role.⁵⁸ However, when the reality of the political and security situation did not follow what was expected, the OHR, in 1997, re-interpreted its prerogative and assumed a much greater governance role.⁵⁹ With the re-interpretation of its powers, endorsed by the Peace Implementation Council (PIC),⁶⁰ it assumed a much greater set of administrative powers, placing it as an authority above the domestic government when the government was unable to reach agreement, as well as a host of other powers.⁶¹ While a loose oversight role for international actors in the decision making process appears far less offensive to political independence than the latter situation, neither arrangement, in terms of traditional legal doctrine, ensures consistency with political independence. This is because both the domestic and international aspects of the administration have been

⁵³ Cox, *op. cit.*, fn. 33, pp. 90-91.

⁵⁴ See Oellers-Frahm, *op. cit.*, fn. 48.

⁵⁵ Operation Deliberate Force, 30 August 1995, see E. Milano, *Unlawful Territorial Situations* (2006) 252; Oellers-Frahm, *op. cit.*, fn. 48, p. 187; N. D. White, *Keeping the Peace* (1997) 99.

⁵⁶ See VCLT, Articles 52 and 75; see Milano, *op. cit.*, fn. 55, p. 252.

⁵⁷ See GFAP, Annex 3 (preamble).

⁵⁸ Zaum, *op. cit.*, fn. 6, p. 83.

⁵⁹ Zaum, *op. cit.*, fn. 6, p. 83.

⁶⁰ The PIC is the 55 states and international organisations that attended the December 1995 conference on Bosnia, which, through a steering board, designates the High Representative and gives policy guidance.

⁶¹ Zaum, *op. cit.*, fn. 6, p. 83.

heavily dependent on a substantial NATO military presence for effective control of the territory.⁶²

C. Kosovo

Kosovo, unlike Bosnia, was a province, not a republic, in the constitutional framework for the SFRY. The distinction between republic and province in the SFRY constitution related to the ethnic origin of the population. As the majority in Kosovo was Albanian, a nationality with a homeland outside of the SFRY, Kosovo was not entitled to apply to be recognised as a state by the EC, which only considered recognition of republics.⁶³ This was despite Kosovo having enjoyed almost all the prerogatives of a republic.⁶⁴ Subsequently, in the words of Caplan, '[a] combination of repressive measures by Belgrade and a campaign of non-violent resistance by the Kosovo Albanian leadership had kept a lid on unrest [reduction in the degree of autonomy was a major source of unrest] for nearly eight years since the breakup of Yugoslavia.'⁶⁵ International attention returned to Kosovo when, over the course of 1997 and 1998, the violent activity by the Kosovo Liberation Army (KLA) increased,⁶⁶ and was met by a violent response from the Yugoslav security forces.

The SC found the ensuing internal conflict to represent a threat to international peace and security.⁶⁷ An arms embargo was imposed under chapter VII.⁶⁸ SC Resolution 1199 called for a ceasefire. A deal for the ceasefire was made, along with agreements allowing for an OSCE observer mission to oversee compliance with the ceasefire, and a NATO air verification mission.⁶⁹ However, the ceasefire did not hold, and, after initial violations by the KLA, Yugoslav forces in the village of Racak massacred 45 civilians.⁷⁰ It was on 24 March 1999, that NATO, without an explicit SC chapter VII mandate, began bombing FRY. The NATO campaign lasted

⁶² See Milano, *op. cit.*, fn. 55, p. 207.

⁶³ See *EC Declaration on the Guidelines on Recognition of New States in Eastern Europe and the Soviet Union* (December 1991).

⁶⁴ See Caplan, *op. cit.*, fn. 34, p. 138.

⁶⁵ Caplan, *op. cit.*, fn. 34, p. 138; see also N. Malcolm, *Kosovo: a Short History* (1998)

⁶⁶ See Caplan, *op. cit.*, fn. 34, pp. 141-145.

⁶⁷ SC Res. 1160 (1998) para. 2 condemned the 'use of excessive force by Serbian police forces against civilians and peaceful demonstrators in Kosovo, as well as acts of terrorism by the KLA.'

⁶⁸ SC Res. 1160 (1998) para. 8.

⁶⁹ Agreement on the OSCE Kosovo Verification Mission, 16 October 1998, S/1998/278; KVM Agreement Between NATO and the FRY, 15 October 1998, S/1998/991.

⁷⁰ See Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Responses, Lessons Learned* (2000).

until 9 June 1999. Its end coincided with the agreement of FRY – the Kumanovo Agreement – to withdraw its forces from Kosovo and the deployment of a NATO-led force.⁷¹ A day later, by Resolution 1244, a UN led ITA was mandated for Kosovo. At the date of the introduction of ITA, Kosovo, unlike Cambodia or Bosnia, was not considered a sovereign state. Rather it was part of a sovereign state, the FRY. This context introduces some uncertainty with respect to the right to political independence.

As part of the FRY, Kosovo's right to political independence is presumed to rest with the government of the FRY. However, a number of factors challenge this presumption. In light of the safeguard clause in the GA Res. 2625 statement on the right to self-determination,⁷² one might argue that, through the merciless campaign against Kosovo, the FRY government proved themselves to not be representative and so not competent to speak for the rights of Kosovo and people.⁷³ Moreover, the FRY was clearly struggling to exert control over Kosovo, and this is a challenge to the attachment of the FRY government to the will of the people on that part of its territory. Arguably determinative of the approach that should be taken in respect to the right to political independence is that the future status of Kosovo is at the heart of the conflict. Thus, while both sides have claim to the right to political independence, to prefer one side would be to prejudge the outcome. Accordingly, Kosovo and FRY should have been seen as sharing the right to political independence, with attempts made to accommodate the wishes of both sides in relation to how the territory is administered and changed and developed.

Following the NATO bombing, at least the NATO states appeared inextricably involved in the search for a lasting end to the conflict. This desire to end the conflict, and uncertainty surrounding the right to political independence suggest that consistency with the right to political independence might not have been seen as relevant as in the cases of Cambodia and Bosnia. The arrangements for ITA and its legal justification support this view.

⁷¹ Military-Technical Agreement between the International Security Force (KFOR) and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia, signed in Kumanovo, (FYROMacedonia) 9 June 1999, in (1999) 38 *ILM* 1217.

⁷² See Chapter 1 and 3 of this study.

⁷³ For this argument in relation to a right to secession, see C. Tomuschat, 'Yugoslavia's Damaged Sovereignty over the Province of Kosovo', in G. Kreijen (ed.), *State, Sovereignty, and International Governance* (2002) 323 at 342.

Notwithstanding certain complexities with regards the military presence,⁷⁴ chapter VII Resolution 1244 is commonly seen as the total legal basis for the UN-led territorial administration as well as the NATO-led KFOR security presence.⁷⁵ As set out in Chapter 2, a chapter VII resolution does not reconcile activity with the right to political independence. There are elements of consent in relation to both the Kosovo and the FRY claim to political independence. These suggest a greater consistency with political independence than a chapter VII resolution alone. However, there are significant factors that reduce the relevance for the maintenance of political independence.

FRY consent is found in the acceptance of points 1-9 of the general principles on a political solution to the Kosovo crisis, which had been adopted by the G-8 Foreign Ministers on 6 May 1999 (the St Petersburg Principles),⁷⁶ accepted on 3 June 1999 by the FRY (Ahtisaari Principles).⁷⁷ As the FRY agreed that the establishment of a UN civil presence was to be permitted to act under chapter VII in the manner decided by the SC,⁷⁸ any regime created by the UN could readily be interpreted as consistent with the consent. But the consent was not gained in the normal run of things. The G8 states gained the consent of the FRY during a sustained bombing campaign by NATO. It was made clear that if FRY wanted the military action to stop, demands should be accepted.⁷⁹ Leaving aside considerations of invalidity, this aspect clearly affects the idea of autonomous consent in relation to the 3 June 1999 Agreement and, consequently, its ability to reconcile the involvement with the FRY's claim to the right to political independence.⁸⁰

There was no explicit Kosovo consent to the ITA, which Resolution 1244 created. Resolution 1244 and the Ahtisarri Principles do both indicate genesis in light of the agreement for international involvement that Kosovo representatives, but not the

⁷⁴ See E. Milano, 'Security Council Action in the Balkans: Reviewing the Legality of Kosovo's Territorial Status', (2003) 14 *EJIL* 999 at 1009.

⁷⁵ For a detailed exploration of the legal basis of, in particular, the security presence see Milano, *op. cit.*, fn. 55, pp. 237-265.

⁷⁶ The Petersberg Principles agreed to by the G8 Foreign Ministers at the Petersberg Centre on 6 May 1999, S/1999/516, Annex 1 to SC Res. 1244; see also Tomuschat, *op. cit.*, fn. 73, p. 327.

⁷⁷ The 'Ahtisaari paper', named after the Finnish President Martti Ahtisaari who, together with Russian envoy Victor Chernomyrdin presented to the Yugoslav President Milosovic the G8 position, S/1999/649 Annex 2 to SC Res 1244.

⁷⁸ 3 June Agreement, UN Doc. S/1999/649, para. 2 and para. 5.

⁷⁹ Milano, *op. cit.*, fn. 55, p. 244.

⁸⁰ The recent declaration of independence by Kosovo is addressed below.

ones from the FRY, had agreed to in February 1999 in Rambouillet, France.⁸¹ This draft agreement, negotiated with NATO air strikes looming, set out a solution including the withdrawal of Yugoslav troops, establishment of a NATO led security force, and a period of autonomy followed by the possibility of a vote on independence for Kosovo.⁸² The type of international involvement agreed to was, however, considerably different to that which Resolution 1244 instigated. It looked much more akin to the model adopted in Bosnia,⁸³ and has even been suggested by some to have been imagined as an assistance rather than an ITA effort.⁸⁴ Accordingly, consent at Rambouillet hardly removes concern about consistency of the ITA, created by Resolution 1244, with the Kosovo claim to the right to political independence.

The actual arrangements for ITA in Kosovo continue the theme of less concern for political independence than in the sovereign states of Cambodia and Bosnia. Resolution 1244 granted the UN Secretary General a great deal of discretion in his authority to create and conduct the ITA of Kosovo,⁸⁵ which hardly suggests a concern for preservation of political independence. The Secretary General constituted the United Nations Interim Administration in Kosovo (UNMIK) as a plenary international territorial administration, exercising 'all executive and legislative powers, including the administration of the judiciary'.⁸⁶ It was based on a four pillar structure, including roles for the UNHCR, OCSE, and EU, with the SRSG the single head of the mission, and with each pillar headed by a Deputy SRSG.⁸⁷ Despite the fact that parallel Kosovar structures of governance had emerged, there was no direct role for the Kosovars in governance.⁸⁸ This changed over time, with

⁸¹ This is through the repeated phrase of 'taking full account of the Rambouillet Accords'.

⁸² See M. Weller, 'The Rambouillet Conference on Kosovo', (1999) 75 *International Affairs* 211.

⁸³ Interim Agreement for Peace and Self Government In Kosovo, Rambouillet, France – February 23, 1999, Article V: Authority to Interpret 'The CIM [Chief of the Implementation Mission] shall be the final authority in theater regarding interpretation of the civilian aspects of this Agreement, and the Parties agree to abide by his determinations as binding on all Parties and persons.'

⁸⁴ See Zaum, *op. cit.*, fn. 6, p. 132.

⁸⁵ SC Res. 1244 (1999) para. 10.

⁸⁶ Report of the Secretary-General on the United Nations Interim Mission in Kosovo, UN Doc. S/1999/779, 12 July 1999, paras. 35-9; this followed the more general suggestions on the authority to be assumed in Report of the Secretary-General Pursuant to Paragraph 10 of Security Council Resolution 1244 (1999), UN Doc. S/1999/672, 12 June 1999, para. 10.

⁸⁷ Report of the Secretary General, 12 July 1999, *op. cit.*, fn. 86, paras. 43-108.

⁸⁸ See R. Caplan, *International Governance of War-Torn Territories – Rule and Reconstruction* (2005) 93; M. Brand (The Centre for Applied Studies in International Negotiations CASIN), *The Development of Kosovo Institutions and the Transition of Authority from UNMIK to Local Self-Government* (2003) 11.

more and more authority being transferred to Kosovar institutions of governance.⁸⁹ These latter developments do not, though, remove the original complete lack concern for a domestic element in the ITA, which could have served to improve consistency with the right to political independence.

D. East Timor

For centuries the island of Timor has been politically divided into two parts, an East and a West Timor. In 1946, following the end of Dutch colonial rule, West Timor became part of the newly independent Indonesia.⁹⁰ East Timor was subject to Portuguese colonial rule, and the Portuguese continued to resist the UN GA's declaration of East Timor as a non-self governing territory.⁹¹ The, eventual, Portuguese acceptance of the right of the people of East Timor to self-determination, in 1974,⁹² unearthed divergent views on the best outcome for the territory amongst the East Timorese. On one side of the debate, and favouring independence, was Fretilin;⁹³ on the other, was a coalition of pro-Indonesian parties dominated by the UDT, pursuing integration with Indonesia.⁹⁴ This disagreement, along with Portuguese withdrawal and Indonesian interference, fuelled a civil war, from which Fretilin are said to have controlled most of the territory.⁹⁵ On 28 November 1975, Fretilin declared independence.⁹⁶ A few days later, the pro-Indonesian parties declared independence and integration with Indonesia. Neither declaration gained international recognition.⁹⁷ Following an invitation from the UDT, Indonesia invaded.⁹⁸ The UN called on Indonesia to withdraw, but to no avail.⁹⁹ As Indonesia gained more territorial control, through a provisional government, they established

⁸⁹ See, Brand, *op. cit.*, fn. 88; C. P. M. Waters, 'Nationalising Kosovo's Ombudsperson', (2007) 12 *JCSL* 139.

⁹⁰ See A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (1995) 224.

⁹¹ GA Res. 1542 (1960) para. 1.

⁹² See I. Martin, *Self-Determination in East Timor – The United Nations, the Ballot, and International Intervention* (2001) 15.

⁹³ Revolutionary Front for an Independent East Timor.

⁹⁴ The Timorese Democratic Union.

⁹⁵ Martin, *op. cit.*, fn. 92, p. 16.

⁹⁶ See E. Benvenisti, *International Law of Occupation* (1993) 154.

⁹⁷ Zaum, *op. cit.*, fn. 6, p. 182.

⁹⁸ M. Benzing, 'Midwifing a New State: The United Nations in East Timor' (2005) 9 *Max Planck UNYB* 295 at 301.

⁹⁹ See SC Res. 384 (22 Dec 1975); SC Res. 389 (22 Apr 1976); GA Res. 3485 (xxx) (12 Dec 1975).

the un-elected Regional Popular Assembly.¹⁰⁰ In May 1976, the Assembly passed a resolution, in its only meeting, in favour of incorporation in Indonesia, from which point Indonesia treated East Timor as a self-determined province.¹⁰¹

Many states remained silent, or offered vague statements, with respect to the actions of Indonesia.¹⁰² The GA did, from 1975 until 1982, pass annual resolutions calling for Indonesia to withdraw, stressing the inalienable right of the people of East Timor to self-determination and expressing concern at the suffering that was caused by the ongoing conflict in East Timor.¹⁰³ From 1982, the Secretary General was given the mandate to help find a diplomatic solution to the problem; a progress report was then submitted to the GA each year.¹⁰⁴ An apparent thawing in the Indonesian position on East Timor's status in May 1999 paved the way for the East Timorese to vote on the question:

Do you *accept* the proposed special autonomy for East Timor within the Unitary State of the Republic of Indonesia?

OR

Do you *reject* the proposed special autonomy for East Timor, leading to East Timor's separation from Indonesia?¹⁰⁵

The East Timorese chose the latter option, confident that it meant independence.¹⁰⁶ A period of UN administration would, though, precede independence. Thus East Timor was not yet a whole sovereign state at the time of the introduction of ITA. East Timor's actual status at this time relates to the relevance of the right to political independence in terms of the approach to ITA and reconstruction.

¹⁰⁰ Martin, *op. cit.*, fn. 92, p. 16; see also Cassese, *op. cit.*, fn. 90, p. 224.

¹⁰¹ Cassese, *op. cit.*, fn. 90, p. 226.

¹⁰² See Cassese, *op. cit.*, fn. 90, pp. 226 – 230; only Australia formally recognised the incorporation of East Timor, on the basis of the effective control that Indonesia came to exercise over the territory see (1987) 10 *AYIL* 273.

¹⁰³ See GA Res. 31/53 (1 Dec 1976); GA Res. 32/34 (28 Nov 1977); GA Res. 33/39 (13 Dec 1978); GA Res. 34/40 (21 Nov 1979); GA Res. 35/27 (11 Nov 1980); GA Res. 36/50 (24 Nov 1981); *East Timor (Portugal v. Australia)*, Judgement, ICJ Reports 1995, p. 90 at pp. 96-7, paras. 14-16.

¹⁰⁴ GA Res. 37/30 (23 Nov 1982).

¹⁰⁵ Annex II: Agreement Regarding the Modalities for the Popular Consultation of the East Timorese through a Direct Ballot, para. b; it was termed a 'popular consultation' rather than a 'referendum' as Indonesia felt the later implied an act of self-determination which for them had already occurred, Martin, *op. cit.*, fn. 92, p. 28.

¹⁰⁶ See the details which support this view provided in Wilde, *op. cit.*, fn. 5, pp. 182-183, in particular, publicity material for the vote stressed that the choice was between autonomy within Indonesia or independence, '[t]he popular consultation is your chance to decide about East Timor's future. Every eligible person, no matter whether they want autonomy or independence, has the right to vote. Your vote is your choice.', (UNMAET Notice, 'To vote you need to register', available at <www.un.org/peace/etimor99/etimor.htm>).

Chapter XI of the UN Charter provides the regime for non-self governing territories. It sought to rein in colonial administration by requiring reports on non-self governing territories, based on the principle that the interests of the inhabitants are paramount and that there is an obligation to promote self government.¹⁰⁷ In the period preceding the vote, Portugal remained listed as the administering power of East Timor as a non-self governing territory, and insisted on this basis that it was the sole entity entitled 'to speak on behalf of East Timor and to ensure the right of the East Timorese to self-determination.'¹⁰⁸ In such a context, East Timor is seen as part of Portugal, and thus it is with Portugal that the East Timor right to political independence rests. Up until the vote, then, there would be reason to accept that consent from Portugal would suffice to reconcile international involvement with the right to political independence. This is despite the Indonesian efforts, through military coercion and unrepresentative declarations of independence, to suggest that East Timor was part of Indonesia.¹⁰⁹ Nonetheless, the fact that they held effective control of the territory meant that in the interests of international peace there was a need to gain agreement from Indonesia to the granting of East Timor a vote on self-government.

In practice, Portugal and Indonesia transferred authority to the UN,¹¹⁰ and it was listed as a non-self governing territory with the UN as the administering power.¹¹¹ The implication being that the right to political independence now rested with the UN.¹¹² However, following the vote, East Timor was destined for statehood.¹¹³ This distinguishes East Timor from a normal self-governing territory where the future status is not known; the self-determining people had self-determined. The fact that they were not yet a state, by want of a formal declaration if one draws analogy with other states emerging following the end of colonial rule, should not be a bar to the possession of a right to decide on the change and development of the territorial

¹⁰⁷ See, for an overview of the concept, J. Crawford, *Creation of States in International Law* (2006) 602-637.

¹⁰⁸ Cassese, *op. cit.*, fn. 90, p. 225.

¹⁰⁹ See G. Nettheim, 'International Law and International Politics' in J. Dunn (ed.), *International Law and the Question of East Timor* (1995) 181.

¹¹⁰ See J. Chopra, 'The UN's Kingdom of East Timor', (2000) 42 *Survival* 27 at 29.

¹¹¹ C. Stahn, 'The United Nations Transitional Administration in Kosovo and East Timor: A First Analysis', (2001) 5 *Max Planck UNYB* 105 at 115.

¹¹² Chopra thus refers to East Timor as UN sovereign territory, Chopra, *op. cit.*, fn. 110, pp. 29-30; see, though, on the view that the UN is not expected to acquire title to territory, Stahn, *op. cit.*, fn. 111, p. 144; I. Brownlie, *Principles of Public International Law* (2003) 167.

¹¹³ See preamble para. 3 of SC Res. 1272 (1990).

infrastructure – a core facet of the right to self-determination. After all, it was not the people that decided that official independence should be delayed pending a period of ITA. The international actors should therefore have sought, in the approach to ITA, to maintain consistency with East Timorese political independence.

The central role of the UN Secretary General in getting things to the point where independence from Indonesia became a possibility clearly helps to explain the commitment at the UN to realise a successful outcome, in terms of an independently effective East Timor through ITA. This commitment, coupled with the uncertainty surrounding the status of East Timor subsequent to the vote, and during ITA,¹¹⁴ is reason to suspect less concern for the maintenance of political independence than in other situations where the location of a right to political independence is more firmly established. Another reason is found in the need for far greater international involvement than had been anticipated. This was a result of devastation inflicted on the existing infrastructure in East Timor by pro-integration militia and Indonesian military forces,¹¹⁵ following the vote to reject autonomy within Indonesia.¹¹⁶ As this only became apparent after the vote, it left little time for the planning that could help maintain political independence. The arrangements for ITA and its legal basis support the view that maintenance of political independence was far from prioritised.

It was the restoration of security by an Indonesian requested,¹¹⁷ chapter VII authorised Australian-led multinational force (INTERFET),¹¹⁸ which paved the way for ITA. By Resolution 1272, acting under chapter VII, the SC created UNTAET.¹¹⁹ A chapter VII basis does not reconcile activity with the right to political independence. In relation to Portuguese and Indonesian claims to the right to political independence, the broad consent in the May 5th Agreement to a UN role in

¹¹⁴ Wilde prefers either that it was still part of Portugal or a 'form of *sui generis* legal personality as a non-state territorial entity that was to become a state within a finite period', R. Wilde, 'International Territorial Administration and Human Rights' in N. D. White and D. Klassen (eds.), *The UN, Human Rights and Post-Conflict Situations* (2005) 149 at 168.

¹¹⁵ See J. Chopra, 'Building State Failure in East Timor', (2002) 33 *Development and Change* 979 at 983 describing the three week campaign triggered by the vote 'Operation Clean Sweep'; members of UNMAET described the violence as 'nothing less than a systematic implementation of a 'scorched earth' policy in East Timor, under the direction of the Indonesian military', UN Doc. S/1999/976, Annex, para. 1.; see also Martin, *op. cit.*, fn. 92, p. 115; Zaum, *op. cit.*, fn. 6, p. 185.

¹¹⁶ In the popular consultation, 98.6% of registered voters participated and 78.5% of those rejected autonomy, Progress Report of the Secretary General, Question of East Timor, A/54/654 (13 Dec 1999), paras. 30-31; see also J. C. Beauvais, 'Benevolent Depotism: A Critique of UN State-Building in East Timor', (2001) 33/4 *NYU Journal for International Law and Politics* 1101 at 1121.

¹¹⁷ See Chesterman, *op. cit.*, fn. 8, p. 63.

¹¹⁸ SC Res. 1264 (1999); see also Martin, *op. cit.*, fn. 92, p. 115.

¹¹⁹ SC Res. 1272 (25 October 1999).

the event of rejection of autonomy in Indonesia is evidence of concern for the interests of these two states.¹²⁰ This pertains despite that their consent was not directly referred to in the resolution or in subsequent regulations issued by UNTAET.¹²¹

From the perspective of an East Timorese claim to political independence, the question put to the East Timorese was far from forthcoming about what would follow a rejection of autonomy within Indonesia. Certain publicity material did indicate the consequences of a rejection of autonomy within Indonesia as: '[t]he United Nations will oversee East Timor's transition towards Independence'.¹²² There is, though, little to suggest the nature of this transitional period or the change and development that would come with it. Moreover, in the process of establishing the ITA, the East Timorese were ignored.¹²³ This was despite that in the little planning that was undertaken by the UN prior to the actual consultation there had been some limited room for East Timor representation through consultation with the National Council of Timorese Resistance (CNRT).¹²⁴ This lack of concern for East Timor claim to political independence is typified by the fact that East Timorese leaders had drawn up a proposal for a joint Timorese–UN administration and passed it to UNAMET,¹²⁵ but it never came before the SC.¹²⁶

The actual arrangements for ITA were similar to those in Kosovo, with the SRSG head of a pillared governance structure.¹²⁷ While, in contrast to Kosovo, there was greater specificity in the enabling resolution about the degree of authority that the

¹²⁰ Article 6, May 5th Agreement 1999, between Portugal, Indonesia, and the Secretary General indicated that should the option of rejecting special autonomy prevail '[t]he Secretary General shall . . . initiate the procedure enabling East Timor to begin a process of transition towards independence.'; this is arguably made more specific with the tripartite meeting of September 28 where the mandate of UNTAET was discussed between Portugal, Indonesia, and the Secretary General, see Report of the Secretary General on the Situation in East Timor, S/1999/1024, 4 October 1999, at 5 and 6 ;

¹²¹ Consent from Indonesia and Portugal, as noted above, is not directly referred to in the Resolution, or in subsequent regulations issued by UNTAET, see Zaum, *op. cit.*, fn. 6, p. 61.

¹²² See Wilde, *op. cit.*, fn. 5, p. 183, citing poster entitled 'If you accept autonomy', UNAMET Posters for the self-determination consultation, <<http://www.un.org/peace/etimor99/etimor.htm>>; see also preamble SC Res. 1272: 'and taking note of its [vote] outcome through which the East Timorese people expressed their clear wish to begin a process of transition under the authority of the United Nations towards independence'.

¹²³ See Chopra, *op. cit.*, fn. 115, p. 990.

¹²⁴ See S. Cliffe, 'The Joint Assessment Mission and Reconstruction of East Timor', in J. Fox and D. Babo-Soares (eds.), *Out of the Ashes: Destruction and Reconstruction of East Timor* (2000) 252 at 252-253.

¹²⁵ The UN mission that arranged the vote.

¹²⁶ J. Steele, 'Nation Building in East Timor' (2002) *World Policy Journal* 76 at 79 citing José Ramos-Horta, East Timor's Foreign Minister.

¹²⁷ For the structure of UNTAET, see Zaum, *op. cit.*, fn. 6, p. 186, Figure 5. 1.

ITA would possess,¹²⁸ and a much more centralised mission, including civilian and military presence under a single command,¹²⁹ there was the same lack of a domestic element in the governance arrangements. Zaum identifies that the requirement of consultation with the East Timorese as part of UNTAET's mandate, in Resolution 1272 para. 8, 'underlines the UN's commitment to East Timorese self-determination'.¹³⁰ One cannot pretend, however, that such a loose requirement represented anything more than a gesture, especially not when contrasted with the degree of commitment that an authoritative position in government for the East Timorese would have represented. The subsequent moves towards greater domestic involvement in the ITA do not affect the initial lack of concern for political independence which the governance arrangements displayed.

E. Evaluation

In all the examples there are aims that could lead international actors to attempt to move beyond the confines of respect for political independence. These are conditions in which one might expect there to be a need for new law to protect the values that are important for the UN system, and ensured in the normal run of things by the preservation of the right to political independence. The need for such law may, though, be avoided by attempts to maintain consistency with political independence or, indeed, attempts to accommodate the attendant values of self-determination and international peace.

In Cambodia and Bosnia, the right to political independence was more prominent than in relation to situations that led to the introduction of ITA in Kosovo and East Timor. This was because there was little doubt that the former two were whole sovereign states, and the right to political independence is a key attribute of sovereignty. In the latter situations, political independence was still affected by the introduction of ITA. However, uncertainty about the location of the right to political independence, amongst other factors, means that evasion of its maintenance is more susceptible to international acceptance. For, at least, the reason that it does not threaten to introduce a precedent for action that is inconsistent with the right of

¹²⁸ SC Res. 1272 (25 October 1999) para. 1; Benzing, *op. cit.*, fn. 98, p. 320.

¹²⁹ See Report of the Secretary-General on the Situation in East Timor.' UN document S/1999/1024, 4 October 1999, para. 27; see also Zaum, *op. cit.*, fn. 6, p. 185.

¹³⁰ Zaum, *op. cit.*, fn. 6, p. 184.

political independence of a whole sovereign state. This difference, in respect of the prominence of political independence, helps to explain the differences in relation to the nature of the ITA and its legal basis across the examples. The focus on consent and inclusion of significant domestic aspects in the arrangements for ITA in the two whole sovereign states (Cambodia and Bosnia) is an attempt to maintain political independence of the target state. This is in contrast to the approach in the non-whole sovereign states (Kosovo and East Timor) where the emphasis was on the chapter VII basis and no need was felt, initially, for a domestic element in the ITA. That political independence, nonetheless, retained significance in these two latter examples is supported by the efforts that were made to seek consent from domestic elements. The seeking of consent in all the examples also suggests a lack of relevance for the concept of suspended sovereignty, which describes a situation where sovereign rights are not present for a temporary period of time,¹³¹ as a means of encapsulating these realities.

In terms of realising consistency with political independence, all the examples fall short because of the lack of an independently effective domestic government to serve as a source of consent to the international involvement or to administer the territory during the transitional period. Similarly, one struggles to see the consensual aspects or the domestic elements in the ITA as a comprehensive explanation for the international acceptance of the practice addressed.

If it was just administration of the territory, while still an infringement of the right to political independence, one might be more willing to accept the justification of the pursuit of international peace as sufficient. This is because the idea of international actors filling an authority vacuum can more readily be seen as being in the interests of international peace than when coupled with a reconstruction mandate. In the former, the impact on right to political independence is only for the period that the international actors remain. A reconstruction mandate, however, is more distant in terms of international peace; there is certainly no immediate benefit for peace. Further, it represents the actual exercise of the right to political independence, meaning it has a permanent impact on the right to political independence. Accordingly, the reconstruction aspect is not only less securely attached to the

¹³¹ For discussion of the contemporary relevance of the concept of suspended sovereignty in international law, see A. Yannis, 'The Concept of Suspended Sovereignty in International Law and Its Implications in International Politics', (2002) 13 *EJIL* 1037.

pursuit of international peace but also represents a more substantial infringement of the value of self-determination. It is this latter aspect, which also affects the value of international peace, that is most problematic when contemplating comprehensive explanation for international acceptance. Such acceptance, it is premised, would not have been forthcoming for reconstruction by ITA had there not been more convincing efforts to address the value of self-determination than this section has revealed.

3. Reconstruction by ITA

In light of the findings of the last section, similarities with the position of ITA and belligerent occupiers, addressed in Chapter 4, are apparent. This is in the sense of the lack of attachment to the will of the state and the people that would allow the administrators to reconstruct in a manner consistent with the right to political independence. The law of occupation responds to the foreign nature of the occupier by severely curtailing what can be changed and developed. However, in all the examples of ITA, reconstruction of the state and civil infrastructure is undertaken. Given the fact of international acceptance, it is necessary to consider attempts to reduce further impact on the right to political independence. This would help to move towards consistency with the value of self-determination, but it would not address the impact that the ITA in itself has been argued to represent. Accordingly, it is also necessary to consider additional attempts to accommodate the values of self-determination and international peace as explanation for international acceptance.

A. Reconstruction and Political Independence

Across all the examples, conflict, amongst other factors, introduced a need for reconstruction of the state and civil infrastructure. A survey of the examples reveals varying levels of reconstruction being undertaken. The essence of each approach correlates with the importance that would likely be accorded to the right to political independence, set out above.

In relation to Cambodia, the approach to reconstruction was the most deferent to political independence. The essence of the reconstruction aspects of the transitional period can be found in the Declaration on Reconstruction and Rehabilitation of

Cambodia attached to the Paris Agreements. This set out a series of principles on how reconstruction should have occurred. It stresses that '[t]he main responsibility for deciding Cambodia's reconstruction needs and plans should rest with the Cambodian people and government formed after free and fair elections.'¹³² Accordingly, while UNTAC's mandate indicated a role in a range of areas, such as co-ordinating with the United Nations High Commissioner for Refugees (UNHCR) the repatriation of over 370,000 refugees,¹³³ it did not have a specific reconstruction mandate. Instead, UNTAC was given tasks of rehabilitation: short-term assistance rather than long-term structural change. To this end, UNTAC established a rehabilitation component,¹³⁴ which sought to address the urgent needs of Cambodia – identified as humanitarian aid, resettlement and demobilisation, and restoration of physical infrastructure.¹³⁵ Similarly, the domestic element of the government, the SNC, as a signatory of the Paris Agreements was also expected to delay reconstruction. It did, though, still legislate and sign internationally binding treaties, including the ICCPR and ICESR,¹³⁶ and passed a new penal code, encouraged by UNTAC.¹³⁷ The main area where reconstruction choices were not delayed was in the form of the government. The Paris Agreements required constitutional democracy to be the form of government subsequent to the transitional period.¹³⁸

For Bosnia, Dayton introduced some major changes in the state infrastructure, far beyond what was agreed upon in Paris for Cambodia. The contrast is typified by the fact that Annex 4 provided the 'Constitution' for the state, unlike in Cambodia where it was left to the body emerging following elections to draft the new constitution. Guarantees of representation in government were a central concern for the three main Bosnian groups at Dayton, and this helps explain to willingness to reorganise the state infrastructure in a significant manner prior to a newly elected body being in place.

One sweeping change was the introduction of a highly decentralized state structure, with powers, other than those retained by the central state machinery, split

¹³² 1991 Declaration on Reconstruction, para. 2.

¹³³ 1991 Comprehensive Settlement Agreement, Annex 4.

¹³⁴ See Report of the Secretary General, 19 February 1992, paras. 150-157.

¹³⁵ Report of the Secretary General, *op. cit.*, fn. 134, para. 153; see also Doyle, *op. cit.*, fn. 22, p. 50.

¹³⁶ Doyle, *op. cit.*, fn. 22, p. 84

¹³⁷ See Doyle, *op. cit.*, fn. 22, p. 42; Keller, *op. cit.*, fn. 31, p. 165; T. Findlay, *Cambodia: The Legacy and Lessons of UNTAC* (1995) 64.

¹³⁸ 1991 Comprehensive Settlement Agreement, Article 12; see also Doyle, *op. cit.*, fn. 22, p. 29.

between the two newly created entities of the Federation Bosnia and Herzegovina (the Bosniac-Croat construct) and the Republika Srpska (RS).¹³⁹ The composition and procedures for governance within these areas also received close attention.¹⁴⁰ As with Cambodia, Bosnia was to be a democratic state.¹⁴¹ In terms of areas of authority, the Constitution lists those areas where the state would prevail,¹⁴² and the entities are left with the rest.¹⁴³ This means that subject to adherence to the broad guiding principles of the Constitution,¹⁴⁴ Dayton deferred to the domestic government on how change and development away from fundamental aspects of the state infrastructure was to precede.

There was, of course, international involvement in significant Bosnian institutions. Two international representatives, for example, were appointed to a Commission on Public Corporations.¹⁴⁵ This Commission was 'to examine establishing Bosnia and Herzegovina Public Corporations to operate joint public facilities, such as for the operation of utility, energy, postal and communication facilities, for the benefit of both Entities.'¹⁴⁶ However, as with the international involvement in general, which was intended to end after a year,¹⁴⁷ it was hardly intended to have a direct governance role. The most significant international body, in terms of governance, was the OHR. The OHR's role as envisaged at Dayton was, essentially, to monitor the peace settlement and coordinate the civilian aspects of the international involvement.¹⁴⁸ The OHR was, though, identified as 'the final authority in theater regarding interpretation of this Agreement [GFAP] on the civilian implementation of

¹³⁹ Constitution of the Federation of Bosnia and Herzegovina, Article 1, para. 3.

¹⁴⁰ See Constitution of the Federation of Bosnia and Herzegovina Ch. IV (b), Article 2, Article 4, Ch. IV (a).

¹⁴¹ See Dayton GFAP, Annex 3 (preamble).

¹⁴² Constitution of the Federation of Bosnia and Herzegovina, Article 1, Para. 3: as (a) Foreign policy. (b) Foreign trade policy. (c) Customs policy. (d) Monetary policy as provided in Article VII. (e) Finances of the institutions and for the international obligations of Bosnia and Herzegovina. (f) Immigration, refugee, and asylum policy and regulation. (g) International and inter-Entity criminal law enforcement, including relations with Interpol. (h) Establishment and operation of common and international communications facilities. (i) Regulation of inter-Entity transportation, (j) Air traffic control.

¹⁴³ '[E]conomic, cultural, and educational policies, their own social security and health care systems, different judicial systems, and control over their own police forces', Zaum, *op. cit.*, fn. 6, p. 90.

¹⁴⁴ The Constitution in its preamble indicates guiding principles such as respect for human dignity, liberty, and equality; dedication to peace, justice, tolerance, and reconciliation; promotion of general welfare and economic growth through the protection of private property and the promotion of a market economy; and guidance from the purposes and principles of the Charter of the United Nations.

¹⁴⁵ On the Commission on Public Corporations see Annex 9, Article 1, para. 2.

¹⁴⁶ Annex 9 of GFA on establishment of Bosnia and Herzegovina Public Corporations Article 1 para. 1.

¹⁴⁷ See, on expected length of involvement, Bildt, *op. cit.*, fn. 44, pp. 306-8.

¹⁴⁸ Annex 10, Article 2.

the peace settlement.’¹⁴⁹ And, as is well known, things did not go according to plan, leading the OHR to assume a much greater governance role through a reinterpretation of its powers. Nonetheless, while fundamental change in state infrastructure was agreed to, the parties at Dayton closely link this to the solution to the conflict, and the less contentious majority of the reconstruction is to be left to a domestic government. Thus one can still read the approach to reconstruction as intended to limit, where feasible, the impact on political independence.¹⁵⁰ Of course, those international actors called upon to assist will, through financial and technical influence, likely have a significant impact on policy choices made.¹⁵¹ This, less obvious, form of encroachment on the right to political independence is returned to in Chapter 6.

Thinking about Kosovo, the level of discretion that the Secretary General was accorded by Resolution 1244 does not suggest a concern for minimising neglect of political independence. Essentially, from Resolution 1244, it was up to the Secretary General how the mission would progress to achieve its responsibilities: the building of democratic institutions of self-governance, and transferring authority to them.¹⁵² The connection of the ITA’s role with the search for a political settlement on Kosovo’s future status helps to explain the lack of a time limit. However, it does not account for why discretion in relation to reconstruction was not, at least, more regulated, given the ITA’s lack of connection to the territory or its people.

Change and development of Kosovo governance and civilian infrastructure has been provided for in the vast number of legally binding regulations that have been issued by UNMIK.¹⁵³ The Regulations remain in force until ‘repealed by UNMIK or superseded by such rules as are subsequently issued by the institutions established under a political settlement’.¹⁵⁴ Through such regulations, Kosovo has undergone significant change and development, which is characterized by the theory that it can all be repealed after the eventual political settlement. A point exemplified by emphasising that the constitutional arrangements for self-government are of a

¹⁴⁹ Annex 10, Article 5.

¹⁵⁰ For example, existing laws, provided they are consistent with the constitution, should remain in effect until otherwise determined by a competent government, Annex 2 of the Constitution para. 2.

¹⁵¹ See S. Woodward, Z. Hertz, and A. Sapcamin, ‘Bosnia and Herzegovina’, in S. Forman and S. Patrick (eds.), *Good Intentions: Pledges of Aid for Postconflict Recovery* (2000) 315 at 339-42.

¹⁵² SC Res. 1244 (1999) para. 10.

¹⁵³ The first confirmed the power to do so by defining the nature of the authority that would be exercised, Regulation No. 1999/1, UNMIK/REG/1999/1, 25 July 1999, Sec 1.

¹⁵⁴ Regulation No. 1999/1, UNMIK/REG/1999/1, 25 July 1999, Sec 4.

provisional nature.¹⁵⁵ The stress on the temporary nature can be read as concern about consistency with the right to political independence. However, it is a fiction to believe that a province/state can be reconstructed so that it functions in an effective manner and that this can all be dismantled when the international actors leave. The change and development of a temporary nature thus affects the rights to decide in the same way that an explicitly permanent change.¹⁵⁶

The approach to reconstruction in East Timor, as with the aspects addressed in Section 2, was similar to that found in Kosovo. The fact that the future status of East Timor was certain might explain the slightly more detailed mandate that UNTAET received. By Resolution 1272 UNTAET was instructed, with a view to the development of local democratic institutions,¹⁵⁷ to:

- (a) To provide security and maintain law and order throughout the territory of East Timor; (b) To establish an effective administration; (c) To assist in the development of civil and social services; (d) To ensure the coordination and delivery of humanitarian assistance, rehabilitation and development assistance; (e) To support capacity-building for self-government; (f) To assist in the establishment of conditions for sustainable development.¹⁵⁸

Again, as with Kosovo, the extensive authority and discretion afforded in these areas suggests no particular concern for political independence. In this respect, the use of the terms ‘assist’ and ‘support’ in relation to areas that will require reconstruction is interesting. One might explain this language on the view that there will be other international actors, as well as East Timorese, involved in projects. However, one cannot help but be struck by the contrast that UNTAET will ‘provide security’ but ‘assist’ and ‘support’ with matters of change and development. Will it not, for example, direct the development of the civil and social services, who is it going to assist in this respect? This attempt to project UNTAET as assistor clearly does not match the plenary authority given to it.

In practice, UNTAET displayed an initially cautious approach to reconstruction. This stemmed from the broad nature of UNTAET’s discretion that meant it was

¹⁵⁵ UNMIK/REG/2001/9 of 15 May 2001; on the nature of local involvement in its formulation, including a lack of Serbian consent, see Brand, *op. cit.*, fn. 88, p. 32.

¹⁵⁶ For support of this, see discussion on the reconstruction that is permissible under the law of occupation in the interests of preservation of the right to political independence, Chapter 4 of this study.

¹⁵⁷ SC Res. 1272 (1999) para. 8.

¹⁵⁸ SC Res. 1272 (1999) para. 2.

difficult to know how to go about implementing the mandate,¹⁵⁹ a lack of capacity to implement reform,¹⁶⁰ and from a lack of co-operation by local leaders with authority.¹⁶¹ Once it managed to function, there was the complete overhaul of the judicial system,¹⁶² and a struggle to reconstruct the Civil Service,¹⁶³ which counter any signs of a particular concern for political independence. Still the idea that reconstruction was following what was a necessity was portrayed by indicating that reforms which were not pressing were being held back prior to an elected government being in place, such as in relation to citizenship.¹⁶⁴ In the context of a devastated state and civil infrastructure there is a need for massive reconstruction. Thus only pursuing what is necessary is little protection for the right of political independence. Instead, it reiterates the taking away of political independence for international peace, which neglects the value of self-determination, which in turn threatens international peace.

Across all the examples, then, one can identify attempts to further reduce the impact on political independence in the approach to political independence. This was mainly by delaying aspects of the reconstruction until there was an elected domestic government. While most obvious in Cambodia, even in Cambodia there was agreement on the nature of governmental reform before an elected body was in place. Thus the approaches to political independence, while making gestures towards its importance, are far from consistent with its maintenance.

International peace was clearly a prime factor in the approaches to reconstruction agreed upon in relation to Cambodia and Bosnia. It was the nature of the conflicts, which Dayton and the Paris agreements sought to end, which meant that aspects of the reconstruction of the state infrastructure needed to be agreed upon prior to the elected government emerging. In relation to Kosovo and East Timor, there is also an international peace explanation for the pursuit of reconstruction, peace is better served by a functioning governing infrastructure. But, as was noted above, to neglect

¹⁵⁹ See S. Vieira de Mello, 'How Not to Run a Country: Lessons from Kosovo and East Timor', UNITAR-IPS-JIIA Conference to Assess the Report on UN Peace Operations, Singapore, February 2001, cited by the Conflict Security Development Group (CDSG, KCL), *A Review of Peace Operations: A Case for Change – East Timor Study* (2003) para. 291, note 303.

¹⁶⁰ Zaum, *op. cit.*, fn. 6, pp. 187

¹⁶¹ Chopra, *op. cit.*, fn. 110, p. 31.

¹⁶² See H. Stromeyer, 'Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and in East Timor', (2001) 95 *AJIL* 46.

¹⁶³ See CDSG (East Timor), *op. cit.*, fn. 159, para. 311-312.

¹⁶⁴ See V. Tanaja, 'East Timor: Debate over Constituent Assembly Election Process', (14 March 2001) available at <<http://www.greenleft.org.au/2001/440/26494>>.

political independence also neglects the value of self-determination, which is important in its own right, but also affects international peace. The accommodation of self-determination is thus an essential element of the explanation for international acceptance. In respect of the value of self-determination, it is the pursuit of democratic reconstruction, across all the examples, now turned to, which stands out as the means for accommodation of the value of self-determination in light of the neglect for political independence.

B. Reconstruction and the Value of Self-Determination

Recalling Chapter 3, democratic reconstruction is the obvious means for addressing the values of self-determination and international peace in situations of reconstruction without an independently effective domestic government. A survey of the examples reveals the prominence of democracy in relation to the reconstruction activity that is inconsistent with the right to political independence.

In relation to Cambodia, from the outset of the negotiations at Paris, elections were identified as the means for Cambodians to exercise their right to self-determination.¹⁶⁵ It was agreed that reconstruction, and choices about it, were to be delayed until there was an elected body to make the choices. The importance of the elections is witnessed in the fact that only in this respect was UNTAC permitted to legislate and not restrained by the complex governance formula that made it, formally at least, subordinate to the SNC.¹⁶⁶ However, this was not the case with regards democratic government. Annex 5 of the Comprehensive Settlement Agreement stresses essential aspects on which the new constitution should be founded, including that:

Cambodia will follow a liberal democracy, on the basis of pluralism. It will provide for periodic and genuine elections. It will provide for the right to vote and to be elected by universal and equal suffrage. It will provide for voting by secret ballot, with a requirement that electoral procedures provide a full and fair opportunity to organise and participate in the electoral process.¹⁶⁷

¹⁶⁵ Organization of Work, Text Adopted by the Conference at its 4th Plenary Meeting, on 1 August 1989, Paris Conference on Cambodia Document, CPC/89/4; see also Ratner, *op. cit.*, fn. 17, pp. 3-5.

¹⁶⁶ 1991 Comprehensive Settlement Agreement, Article 13, Annex 1, Section D; see also Doyle, *op. cit.*, fn. 22, pp. 51-58.

¹⁶⁷ 1991 Comprehensive Settlement Agreement, Annex 5 Declaration on Constitutional Principles, para. 4.

The specification of democratic government was clearly seen as somehow different from other aspects of reconstruction, almost as if it was part of the right to self-determination.

In Bosnia, the main focus of the reconstruction before elections was the changes to the state infrastructure. This practice did not sit well with political independence. However, this was reconstruction designed to provide democratic self-government, which stands for genuine rule by the people, thus fears about inconsistency with self-determination are assuaged. Similarly, as the elected government remained dependent on international military presence for effectiveness, its commitment to democracy buttresses the claim of its reconstruction activity to consistency with self-determination. The importance of democracy for justifying involvement inconsistent with the right to political independence is also seen with regards the OHR's assumption of authority from the elected government.

The dominance of the three main groups in Bosnia in the multiparty elections for parliamentary and executive office at the state level in September 1996,¹⁶⁸ and the consociational arrangements in place,¹⁶⁹ resulted in stalemate on many of the issues vital to the reconstruction of Bosnia.¹⁷⁰ Thus the international military and civilian presences were extended, eventually indefinitely.¹⁷¹ Moreover, at the meeting of the PIC in Bonn in December 1997, a more expansive interpretation of the OHR's function in relation to interpretation of GFAP was endorsed. It was established that binding decisions on interim measures were within his powers when local parties were unable to agree. Moreover, obstructive local officials could be dismissed, legislation reviewed, amended, and imposed. The OHR essentially stepped in to lead rather than observe the reconstruction of Bosnia. By 2002, the OHR 'had eight departments (excluding its own administration and the press office), covering all major aspects of statebuilding'.¹⁷²

This transformation of the role of the OHR has received considerable attention in political and legal literature, in which it has been depicted as a modern day form of

¹⁶⁸ See F. Friedman, 'Dayton, Democratization and Governance: Electoral Dilemmas in Bosnian Peace and Security', (2000) 15 *International Relations* 22 at 24-26, on the nationalist domination at the local level, 26-28; see also International Crisis Group (ICG). *Elections in Bosnia and Herzegovina* (1996).

¹⁶⁹ See below.

¹⁷⁰ See Zaum, *op. cit.*, fn. 6, p. 92.

¹⁷¹ SC Res. 1088 (1996) para. 18; see also Zaum, *op. cit.*, fn. 6, p. 83.

¹⁷² Zaum, *op. cit.*, fn. 6, p. 86

imperialism,¹⁷³ and its legal accountability questioned.¹⁷⁴ Certainly, the manner in which it gets its legal basis (through an extensive interpretation of clause in the Dayton Accord that was signed in a manner inconsistent with political independence), the powers that it has removed from the elected government, and the change and development it has introduced, are reason for this.¹⁷⁵ Nonetheless, the OHR has managed to continue, the position has not been made untenable by responses of the population or wider international society. Crucial in this respect must be the projection, by the OHR, that his role is to introduce reforms so that Bosnia can operate as a democratic state. Bosnia has an elected government, but one that could not manage to operate as a government and thus introduce the reforms thought necessary for a peaceful democratic future in Bosnia.¹⁷⁶ If it had assumed the powers with no intention of returning them, or returning them to any entity it pleased, then the OHR would not survive, its ability to shrug off charges of imperialism would be severely impeded. There is the broader goal of international peace, in terms of avoiding slipping back into conflict. Still, to pursue international peace without concern for self-determination would be counter-productive. The pursuit of democracy allows the OHR to continue to claim consistency with the value of self-determination even when authority is taken from the domestic government.¹⁷⁷

In both Kosovo and East Timor, the ITA has been responsible from the outset for the reconstruction, but has not limited this to democratic government or aspects of the state infrastructure linked to democracy, as was noted in respect of Cambodia and Bosnia. Rather, democratic government has been posited as a central aim from the outset, with the rest of the reconstruction surrounding it helping to build a state in which a democratic government will be able to govern effectively. Thus the discretion accorded the ITA appears necessary for the eventual realisation of genuine rule by the people. The pursuit of democracy also appears to have been an essential tool for justifying the ITAs' retention of authority in the light of competing domestic claims.

¹⁷³ See e.g., G. Knaus and F. Martin, 'Travails of the European Raj' (2003) 14 *Journal of Democracy* (2003) 60.

¹⁷⁴ See e.g., Wilde, *op. cit.*, fn. 114.

¹⁷⁵ A. Orakhelashvili, *Peremptory Norms in International Law* (2006) 451.

¹⁷⁶ See P. Ashdown, 'What I Learned in Bosnia', *New York Times*, 28 October 2002.

¹⁷⁷ On whether the OHR is actually conducive to the development of an autonomous democratic state, see D. Chandler, *Bosnia: Faking Democracy after Dayton* (2000).

When there was no elected central Kosovar governing body, the need for UNMIK authority to be retained in the interests of democracy would be a viable excuse that could project accommodation of the value of self-determination. However, once there was an elected central Kosovar governing body, in line with the Constitutional Framework for Provisional Self-Government promulgated as a regulation in May 2001,¹⁷⁸ such logic is clearly dampened. Accordingly, making the quality of the democracy that was practiced a condition for talks on the future status of Kosovo,¹⁷⁹ also offered a basis for UNMIK to explain continuing to withhold power from an elected Kosovar institution.¹⁸⁰

In East Timor, as was also the case in Kosovo, there was an immediate need to engage with the domestic actors that carried the authority of the people if progress in governance and reconstruction was to be made. As UNTAET struggled to get set up and exercise effective authority, the CNRT had reorganized and was the effective governmental authority in many areas.¹⁸¹ The SRSG thus sought out the CNRT as a major, but unofficial partner of UNTAET to help adopt policy that would be accepted by the East Timorese. In light of the control that the CNRT enjoyed it would have been in line with the logic of the effective control test to give them a formal governance role as a measure to improve consistency with political independence. The SRSG, however, is said to have justified not doing this in the interests of the democratic process.¹⁸² Democracy is thus called upon to justify withholding authority from a body with a strong claim to be the embodiment of the rights of the people.

In sum, one cannot avoid the prominence of democracy in relation to activity inconsistent with the right to political independence. Across all the examples democracy clearly has a role in relation to peace, it offers a means of

¹⁷⁸ Regulation 9/2001, On a Constitutional Framework for Provisional Self-Government, of 15 May 2001; See Report of the Secretary-General on the United Nations Interim Administration in Kosovo, UN Doc. S/2001/565 (7 June 2001), para. 20 *et seq.*

¹⁷⁹ See, e.g., UNMIK, Kosovo Standards Implementation Plan (31 March 2004), available at <http://www.unmikonline.org/pub/misc/ksip_eng.pdf, at 8>; some progress in May 2005 is described in Doc. S/2005/335 of 23 May 2005, para. 8; persistent difficulties include sustainable refugee return, minority protection and freedom of movement see UN Doc. S/2004/907 of 17 November 2004, and UN Doc. S/2005/88 of 14 February 2005, para. 13.

¹⁸⁰ Such an approach, progressively transferring authority back, has been conceptualised as earned sovereignty, see, e.g., P. R. Williams, 'The Road to Resolving the Conflict over Kosovo's Final Status', (2003) 31 *Den. J. Int'l L. & Pol'y* 387.

¹⁸¹ CSDG (East Timor), *op. cit.*, fn. 159, para. 293; see also Chopra *op. cit.*, fn. 110, p. 32; Chopra (2002), *op. cit.*, fn. 115, p. 990; Caplan, *op. cit.*, fn. 88, p. 96.

¹⁸² CSDG (East Timor), *op. cit.*, fn. 159, para. 294.

accommodating divergent views, which form the source of conflict, in one government. But, crucially, it also addresses the value of self-determination. Building on top of the other factors which help address self-determination (consent, delay in reconstruction, domestic involvement in governance), democracy projects a reorientation in relation to the value of self-determination: political independence is obscured and the international involvement cast as necessary for the realisation of genuine rule by the people. If democracy is to be an essential part of the explanation for the international acceptance of a practice that neglects political independence, then, as argued in Chapter 3, there should be a basis for regulation and accountability of democracy to help ensure the genuine rule by the people, which it promises and makes it of such utility. Thus the next section turns to how democracy was in fact treated in the examples of ITA.

4. Democracy in Reconstruction by ITA

Some commentators have identified the trend for democracy to be a central reconstruction aim in the practice of ITA as relevant for the existence of democracy as a legal concept.¹⁸³ One must, however, be careful of confusing trend for legal development. A significant amount of international democracy promotion in the normal run of things does not have to entail a legal concept;¹⁸⁴ neither does the prominence of democracy in state reconstruction. The crucial distinction being that legal development hinges on *opinio juris*, a belief that law required a certain course of action.¹⁸⁵ In this respect, one struggles to find a commentator with evidence of such *opinio juris* for even a minimal concept of democracy as free and fair elections, not to mention the more expansive understanding that Chapter 3 termed genuine democracy.

¹⁸³ See, e.g., J. d'Aspremont, 'Post-Conflict Administrations as Democracy-Building Instruments', (2008) 9 *Chicago Journal of International Law* 1 at 13; M. Cogen and E. De Brabandere, 'Democratic Governance and Post-Conflict Reconstruction', (2007) 20 *LJIL* 669; M. Salamun, *Democratic Governance in International Territorial Administration* (2005) 59; Fox, *op. cit.*, fn. 6, pp. 142-173; L. Carlowitz, 'UNMIK Lawmaking between Effective Peace Support and Internal Self-Determination', (2003) 41/3 *Archiv des Völkerrechts* 336 at 360-364.

¹⁸⁴ Cf. Fox, *op. cit.*, fn. 6, p. 154-156.

¹⁸⁵ *North Sea Continental Shelf*, ICJ Reports 1969, p. 3 at p. 44; see also M. Akehurst, 'Custom as a Source of international Law', (1974 - 5) 47 *BYIL* 1; R. Cryer, 'Of Custom, Treaties, Scholars and the Gavel: the Influence of the International Criminal Tribunals on the ICRC Customary Law Study', (2006) 11 *JCSL* 239.

At the present time, the best that can be hoped for, from the perspective of the value of self-determination, is that democracy will have been treated as a legal concept along the lines of that sketched out by the HRC in its General Comment on Article 25 ICCPR. And, to give this legal regulation some bite, in terms of accountability, it will have been treated as part of the right to self-determination, and, consequently, as the basis of governmental authority in the absence of an independently effective domestic government. This would permit challenge to authority were it not adhered. However, recalling Chapter 3, it is clear that there is not necessarily a need for democracy to be treated as a legal concept for it to, at least, portray accommodation of the value of self-determination. This is because even as a loose political concept democracy promises the realisation of genuine rule by the people; despite that the type of democracy pursued might in no way be consistent with the democratic ideal that gives some substance to the claim of genuine rule by the people. Accordingly, in the interests of the value of self-determination, this section addresses how democracy was treated in the sense of a loose political or legal concept. It also addresses why the particular approach was chosen and how it might have been improved in terms of consistency with the value of self-determination.

A. The Nature of Democracy in ITA

By Annex 5 of the Comprehensive Political Settlement Agreement Cambodia was legally committed to be constituted, to use its terms, as a 'liberal democracy'.¹⁸⁶ Thus it is required that the new constitution will provide for government based on pluralism, for periodic and genuine elections, the right to vote and to be elected by universal and equal suffrage, voting by secret ballot, with a requirement that electoral procedures provide a full and fair opportunity to organize and participate in the electoral process.¹⁸⁷ The constitution is also required to have a declaration of fundamental rights including the right to life, personal liberty, security, freedom of movement, freedom of religion, assembly and association including political parties and trade unions, due process and equality before the law, protection from arbitrary deprivation of property or deprivation of private property without just compensation,

¹⁸⁶ Ratner, *op. cit.*, fn. 17, pp. 27-28.

¹⁸⁷ 1991 Comprehensive Settlement Agreement, Annex 5, para. 4.

and freedom from racial, ethnic, religious or sexual discrimination.¹⁸⁸ These rights are not directly, at least, linked to the concept of democracy. Democracy is therefore understood in procedural terms, the process for identification of the government, which does not address the actual substantive conduct of the government. Still, even if a wider definition of democracy had been adopted in the Paris Agreement, the Agreement lacks provisions for supervision or enforcement of governance that would give the regulation meaning. In this respect, there is nothing in the agreement to suggest that the legal right of self-determination required democratic government be constituted. Rather, democracy was chosen in act of self-determination by the SNC at Paris.

By Article 1 para. 2 of Annex 4 (Constitution for Bosnia), Bosnia is committed by Dayton to be ‘a democratic state, which shall operate under the rule of law and with free and democratic elections.’ There is no further effort to define democracy, or to link its choice to a legal requirement of self-determination. Indeed, in the preamble to the constitution the choice of democracy is stressed for its importance in relation to peace: ‘[c]onvinced that democratic governmental institutions and fair procedures best produce peaceful relations within a pluralist society’.

Making the ECHR directly applicable with priority over all other law indicates the importance of a Bosnian government committed to international human rights law.¹⁸⁹ This, because of the Convention’s protection of key rights identified as an emerging human right to democracy, encourages belief that governance will be conducted in accordance with the emerging consensus on democracy as a human right. Still, the European Convention, as was noted in Chapter 3, is weak in terms of its provision on rights to participation in government. Moreover, it does not change the fact that democracy is treated as a loose political concept chosen in an act of self-determination by the parties to Dayton, rather than a legal concept of democracy required by the right of self-determination in light of a lack of independent effectiveness on behalf of the government. This means that governmental authority is not affected by a failure to commit to the democratic ideal. Consequently, flexibility is retained with respect to how the government conducts and constitutes itself and for the international actors in terms of who they will accept as a representative of the will of the state and its people. For example, the government once elected might act

¹⁸⁸ 1991 Comprehensive Settlement Agreement, Annex 5, para. 2.

¹⁸⁹ Constitution, Article II, para. 2.

without regard for the participation of people in government, there might be avenues to challenge the conduct in the domestic court, but there is no basis for challenging the actual authority of the government even though it is only effective because of the international military presence.

With Kosovo, Resolution 1244 charges the international civil presence (UNMIK) with '[o]rganizing and overseeing the development of provisional institutions for democratic and autonomous self-government pending a political settlement, including the holding of elections'.¹⁹⁰ There is no further effort to define democracy in the Resolution. By paragraph 11 (a), though, UNMIK is required to promote 'the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo, taking full account of Annex 2 and of the Rambouillet accords'. Annex 2 is the acceptance by the FRY of the principles set forth in points 1 to 9 of the paper presented in Belgrade on 2 June 1999 for a solution to the crisis (the Ahtisaari principles). The Ahtisaari principles simply note that the interim administration is 'to provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions'.¹⁹¹ Rambouillet provides, as part of its framework principles, that: '[a]ll authorities in Kosovo shall fully respect human rights, democracy, and the equality of citizens and national communities.'¹⁹² And that:

Citizens in Kosovo shall have the right to democratic self-government through legislative, executive, judicial, and other institutions established in accordance with this Agreement. They shall have the opportunity to be represented in all institutions in Kosovo. The right to democratic self-government shall include the right to participate in free and fair elections.¹⁹³

Rambouillet is more forthcoming than the other two documents in terms of a definition of democracy, but the looseness of the concept identified as democracy reduces the significance of a 'right to democratic self-government' and, of course, the terms of Rambouillet are substantially different to what was constituted under Resolution 1244, and while signed by Kosovo leaders were not signed by the FRY in February 1999. At no point in any of the documents is there a link to the right to self-

¹⁹⁰ SC Res. 1244 (1999) para. 11(c).

¹⁹¹ S/1999/649, para. 5

¹⁹² Framework, Article 1, para. 3, Interim Agreement for Peace and Self-Government in Kosovo, Rambouillet, France, February 23 1999.

¹⁹³ Framework, Article 1, para. 4, Interim Agreement for Peace and Self-Government in Kosovo, Rambouillet, France, February 23 1999.

determination. Instead, the pursuit of democracy is stressed for its importance in relation to peace.¹⁹⁴ Thus there is a legal obligation to pursue democratic government by Resolution 1244, but it is far from clear what would be required to satisfy this or the consequences of not pursuing it.

For East Timor, Resolution 1272 stressed ‘the need for UNTAET to consult and cooperate closely with the East Timorese people in order to carry out its mandate effectively with a view to the development of local democratic institutions’.¹⁹⁵ There was no further effort to define democracy or to link it to the right of self-determination. In March 2001, UNTAET issued Regulation 2001/2, which provided the legal framework for the constitution-making process.¹⁹⁶ This set out an extensive procedure for the creation of an elected Constituent Assembly composed of 88 members, 75 of whom were to be elected in a nationwide election, and the remaining 13 were to be elected in regional constituencies. Section 2.1 requires the Constituent Assembly to ‘prepare a Constitution for an independent and democratic East Timor’. While Section 1.1 provides that convening the Assembly should contribute to the goal of ‘protect[ing] the inalienable human rights of the people of East Timor including freedom of conscience, freedom of expression, freedom of association and freedom from all forms of discrimination’, as Dann and Al-Ali note, ‘this is less an explicit mandate and more a general description of the purpose of the Assembly. Any further specifications as to the structure of government or other aspects of the constitutional system were avoided.’¹⁹⁷ Thus with democracy clearly cast as a loose political concept the Constituent Assembly was left with, formally at least, a great deal of discretion in terms of the structure of the government that was to be pursued.

Across all the examples, then, there is a legal obligation that a democratic government be constituted. This obligation, however, is specific to the circumstances either from an agreement or SC chapter VII resolution. Moreover, the utility of the legal obligation, in terms of helping to guarantee genuine democracy, is severely reduced by the lack of effort to define democracy. In this respect, the Paris Agreement is most forthcoming and even then it is heavily focused on the procedure for identification of the government. Moreover, no provisions are made for challenge

¹⁹⁴ SC Res. 1244 (1999) para. 10.

¹⁹⁵ SC Res. 1272 (1999) para. 8.

¹⁹⁶ UNTAET/REG/2001/2 of 16 March 2001, available at:

<<http://www.un.org/peace/etimor/untactR/r-2001.htm>>.

¹⁹⁷ P. Dann and Z. Al-Ali, ‘The Internationalized *Pouvoir Constituant* – Constitution-Making Under External Influence in Iraq, Sudan and East Timor’, (2006) 10 *Max Planck UNYB* 423 at 433.

of the authority of any of the governments that is given effectiveness through an international military presence should it abandon the pursuit of the democratic ideal. There is therefore little to safeguard the pursuit of the democratic ideal which gives meaning to the promise of genuine rule by the people. Consideration of the reason why democracy was treated in the way it has been is an opportunity to show how the accommodation of the value of self-determination could have been improved.

B. Understanding and Improving the Approach to Democracy in ITA

In relation to all the examples, the fact that democracy, as discussed in Chapter 3, is so well attached to the idea of genuine rule of the people is a crucial factor that means there was not a need, in terms of international acceptance, for a legal concept of democracy as part of the right to self-determination. There are also various other factors that help to explain why such proposed law was not likely to be encouraged by those involved. Here it is contended that, if justified in relation to international peace, these could be accommodated in the law proposed in Chapter 3; a move which would address some of the negative consequences for the value of self-determination that arise from treating democracy as a loose political concept.

In Cambodia, a limited and unaccountable democratic obligation suited all involved in negotiations at Paris. The Western states saw elections as a means of avoiding giving the budgetary support that reconstruction would require to a former enemy government, as the SOC still administered the majority of the state prior to Paris.¹⁹⁸ The satisfaction with the plan to remove the substantial international military and administrative aspects almost directly following the elections and creation of new constitution fits with the view that an end to the conflict was the primary motivation of the international actors;¹⁹⁹ with democracy an incidental goal that could be left to sink or swim. This is further supported by the fact that it was the Cambodian factions that were pushing for inclusion of the of liberal democracy terminology as a means of gaining Western contacts.²⁰⁰ Further, the factions saw a vote as a means for them to get all power, rather than share with the other factions in

¹⁹⁸ See Uphoff Kato, *op. cit.*, fn. 22 p. 191.

¹⁹⁹ On the circumstances surrounding the end of the involvement see Findlay, *op. cit.*, fn. 137, pp. 97-98.

²⁰⁰ It was Prince Sihanouk who came up with the term liberal democracy, Ratner, *op. cit.*, fn. 17, p. 27 note 163.

the SNC.²⁰¹ Accordingly, there was little reason for any of the parties to want to encourage a wider legal concept of democracy linked to the right to self-determination which would, at least, introduce a greater onus for the international actors to monitor the constitution making process. Although, given the history of a 'single party, highly centralized state that controlled all aspects of public life and left no space for a genuine civil society' hiding behind the façade of a democratic constitution,²⁰² this would be far from sufficient in terms of safeguarding the promise of genuine rule by the people, it would have had some utility.

During the constitution making process, Prince Sihanouk attempted to stage a constitutional coup by setting up his own government.²⁰³ Yet, in the eventual constitution, significant powers, such as declaring war, remain vested in the King despite non-election.²⁰⁴ If a legal concept of democracy had been identified as part of the right to self-determination, given the lack of independent effectiveness, there would have been a basis for challenging this as a lack of commitment to genuine rule by the people. As well as for contesting the smaller aspects in the constitution which suggest a willingness to let the democratic ideal slide, shown, for example, in the exclusion of naturalised Cambodians from election to Parliament.²⁰⁵ Instead, the international actors that remained the source of effectiveness on the territory during the constitution making process were impotent, in terms of safeguarding democracy and with it the value of self-determination.

In relation to Bosnia, flexibility in the governance arrangements was vital for the deal struck at Dayton. Dayton followed a series of structural proposals that had failed to satisfy the complex tensions between the three main groups inside Bosnia and the international mediators.²⁰⁶ Szasz notes that the Bosniacs desired a centralised, democratic, and united Bosnian state that they would dominate because of greater numbers and faster growth; the Serbs wanted no part of a common state with the

²⁰¹ Doyle, *op. cit.*, fn. 22, p. 69.

²⁰² S.P. Marks, 'The New Cambodian Constitution: from Civil War to a Fragile Democracy', (1994) 26 *Colum. Hum. Rts. L. Rev.* 45 at 54-55.

²⁰³ See Findlay, *op. cit.*, fn. 137, p. 91

²⁰⁴ S. P. Marks, *op. cit.*, fn. 202, pp. 67 – 68.

²⁰⁵ For an extensive review of the rights included in the Constitution in comparison with the earlier constitution see S. P. Marks, *op. cit.*, fn. 202.

²⁰⁶ See, for an account of the different proposals, P. C. Szasz, 'The Quest for a Bosnian Constitution: Legal Aspects of Constitutional Proposals Relating to Bosnia' (1995) 19 *Fordham International Law Journal* 363.

other two groups; the Croats probably preferred a decentralised state system.²⁰⁷ The sponsoring international powers preferred keeping the state together but were flexible about whether it be centralised or decentralised in its emphasis.²⁰⁸ Agreement was thus dependent on guarantees that each of the main groups would be sufficiently represented in government following elections. Consequently, predetermined consociational democracy was agreed upon.²⁰⁹ Four central features identify this model: the sharing of authority, proportionality in public life, minority veto, and segmental authority.²¹⁰ The model introduced is typified by the Presidency, the highest institution of the state, which consists of one Bosniac, and one Croat directly elected from the Federation, and one Serb directly elected from the RS.²¹¹ Decisions are taken by consent, only in exceptional circumstances by majority.²¹² And, if by majority, the minority has a right of veto if vital interests of their entity at stake, which then must be confirmed within 10 days by a two third majority vote of the ethnic group representatives. This predetermined consociational democracy, is not, in the words of Wheatley:

compatible with the human rights of political participation,²¹³ in particular when taken with the non-discrimination norm.²¹⁴ A constitutional requirement that the holder of a given political office be a member of a certain national, ethnic, cultural, religious or linguistic group is an act of direct discrimination, prohibited by international human rights instruments.²¹⁵ A state constitution may require that a plurality of identities be represented in the executive, but it cannot specify that the President or the Prime Minister should be a member of a particular group.²¹⁶ Moreover, exclusion of smaller groups, like the Roma of Bosnia, 'is not compatible with the right of all citizens to political equality.'²¹⁷

²⁰⁷ Szasz, *op. cit.*, fn. 52, p. 762.

²⁰⁸ International Conference on the Former Yugoslavia, Statement on Bosnia, Document Ad-adopted at the London Conference, Doc. No. LC/C5 (Final), reprinted in (1992) 31 *ILM* 1537.

²⁰⁹ See S. Wheatley, *Democracy, Minorities, and International Law* (2005) 161.

²¹⁰ A. Lijphart, Self-Determination versus Pre-Determination of Ethnic Minorities in Power-Sharing Systems in W. Kymlichka (ed.), *The Rights of Minority Cultures* (1995) 275 at 278; on the wider debate about power sharing models and accommodation of ethnic minorities, see D. Horowitz, 'Comparing Democratic Systems', (1990) 1 *Journal of Democracy* 73; see also Wheatley, *op. cit.*, fn. 209, pp. 161-177.

²¹¹ Constitution, Article V.

²¹² Constitution, Article V 2.

²¹³ ICCPR, Article 25.

²¹⁴ ICCPR, Article 2(1) and 26.

²¹⁵ Persons may not be excluded from the rights of political participation on 'unreasonable or discriminatory' criteria such as 'decent': Human Rights Committee, General Comment No. 25, 'Article 25', para. 15.

²¹⁶ Wheatley, *op. cit.*, fn. 209, pp. 163-164, footnotes included.

²¹⁷ Wheatley, *op. cit.*, fn. 209, p. 164; on consociational arrangements and human rights, generally, see H. J. Steiner, 'Ideals and Counter-ideals in the Struggle over Autonomy Regimes for Minorities', (1991) 66 *Notre Dame Law Review* 1539 at 1547-1548.

In light of this finding, one can appreciate why it would not be in the interests of those seeking to bring the parties to agreement to bind them to a legal concept of democracy, especially not one linked to the right of self-determination.²¹⁸ However, as was suggested in Chapter 3, it would make sense for there to be exceptions to the legal concept of democracy which would permit reasonable derogation in interests of international peace. In this way there could still be a consociational arrangement, but if the conduct of such a government did not demonstrate a commitment to the democratic ideal this could result in a challenge to the authority of the government. Further in relation to Bosnia, a legal notion of democracy as a part of the right to self-determination could have provided a legal basis for the assumption of authority by the OHR from the elected government. It could also serve as a basis for a requiring an explanation from the OHR as to why authority has not been returned and when it will be.

Kosovo, given how sensitive the self-determination issue is, was never likely to be an occasion in which any conceptual potential for a legal notion of democracy to be linked to the right of self-determination would be utilised. Indeed, given that the ITA was to be conducted against a backdrop in which the future status of Kosovo had still not be resolved, a more detailed legal concept of democracy would not be in the international actors interests. This is because it could have served as a basis for the Kosovars to call for authority to be transferred on the basis of their meeting the specific criteria. Left as a vague concept the international actors have been able to subjectively determine when the Kosovars are sufficiently democratic for more authority to be transferred. The fact that there is a freely elected government that power is being withheld from can be more readily evaded.²¹⁹ Moreover, greater specificity might have led to assessment of the standard of government of UNMIK itself, and, as Stahn has noted, the concentration of power in the hands of the UN is hardly commensurate with principles of democratic governance.²²⁰ However, if democracy is to be an essential part of the excuse for the neglect of political independence, there is a good reason for the Kosovar authorities to be able to require more authority be transferred on the basis of evidence of a commitment to a set of

²¹⁸ Similarly it might not be in the interests of those international actors who it is said actively worked to block certain candidates, see Friedman, *op. cit.*, fn. 168, p. 26.

²¹⁹ See Caplan, *op. cit.*, fn. 88, p. 122

²²⁰ C. Stahn, 'Consitution Without a State? Kosovo Under the United Nations Constitutional Framework for Self-Government', (2001) 14 *LJIL* 531 at 561.

criteria which reflect the democratic ideal. Likewise, there is no reason why UNMIK should not be assessed by those standards that are appropriate, subject to reasonable exceptions in the interests of international peace.

The utility of avoiding a legal concept of democracy for the international actors in Kosovo seems to be well encapsulated in how the recent declaration of independence actually came about.²²¹ On the one hand, status talks were delayed because Kosovar institutions, as noted above, were not yet democratic enough.²²² But then when the Kosovo Assembly declared independence without a referendum on 17 February 2008,²²³ without the type of debate that one would associate with a democratic society, the same international actors were quick to recognise statehood,²²⁴ with a democratic process apparently unnecessary for those states that recognised.²²⁵ The Special Envoy of the Secretary General found anything but independence for Kosovo, in light of the failure of negotiations with Serbia, to be impossible,²²⁶ but there was still a debate to had, and for the people to express their opinion in a vote following it. Indeed, in light of the great stress that both the Special Envoy recommendations and the Kosovar declaration of independence place on Kosovo pursuing democracy,²²⁷ the pursuit of democracy continues to be the element which addresses the value of self-determination while the government remains dependent on an international military presence for effectiveness, and subject to the authority of UNMIK.²²⁸ Thus it would seem necessary to seek consistency with the democratic

²²¹ At the time of writing (August 2008) 46 States had formally recognised Kosovo as an independent sovereign state, see <<http://www.kosovothanksyou.com/>>; while the level of recognition remains far from overwhelming, there is a debate to be had about its actual status as a matter of international law, see on the creation of states Chapter 1 of this study.

²²² See, e.g., UNMIK, Kosovo Standards Implementation Plan (31 March 2004), available at <http://www.unmikonline.org/pub/misc/ksip_eng.pdf>, at 8.

²²³ Kosovo Declaration of Independence, Assembly of Kosovo, 17.02.2008 available at <<http://www.assembly-kosova.org/?krye=documents&docid=45&lang=en>>.

²²⁴ See 'U.S. and EU Powers Recognise Kosovo as Some Fear Precedent', *International Herald Tribune* 18 February 2008, available online at <<http://www.iht.com/articles/reuters/2008/02/18/europe/OUKWD-UK-KOSOVO-SERBIA.php>>.

²²⁵ Although the Netherlands delayed, wanting assurances in relation to commitment to democracy, see 'The Netherlands Recognizes Kosovo', *New Kosova Report* (4 March 2008), available online at <<http://www.newkosovareport.com/20080304694/politics/-The-Netherlands-recognises-Kosovo.html>>.

²²⁶ Report of the Special Envoy of the Secretary-General on Kosovo's Future Status, UN Doc. S/2007/168 (2007), para. 6-14.

²²⁷ See Comprehensive Proposal For the Kosovo Status Settlement, Article 1, S/2007/168/add.1 (2007) available at <http://www.unosek.org/docref/Comprehensive_proposal-english.pdf>; Kosovan Assembly, Kosovo Declaration of Independence, Preamble.

²²⁸ See, on the continued authority of the international civilian presence, Article 146 and Article 147 of the Constitution for Kosovo, and Annex IV Article 2 of Special Envoys Settlement; on the continued military presence, see Article 153 of the Kosovo Constitution.

ideal when it comes to matters such as the declaration of independence. Without a legal concept of democracy linked to the right to self-determination, flexibility about when it suits to champion democracy is retained, but clearly the inherent lack of safeguard for democracy undermines the actual accommodation of the value of self-determination.

East Timor was the only example where the initiation of ITA had not been accompanied by an element of domestic, in the sense of East Timorese, consent to democratic reconstruction. In respect of all the other examples, it is possible to make a case that the choice of democracy represented an act of self-determination, in Kosovo through Rambouillet, for example. This can, then, perhaps explain why the terminology in relation to governmental reconstruction was particularly vague, with meaning made dependent on consultation with the East Timor people. Similarly, that a constitution-making process was not expressly part of the UNTAET mandate.

Unlike with UNMIK, there was no particular interest for UNTAET in hanging onto authority once there was an elected body. This can help to explain why the commitment to democracy on behalf of UNTAET was very much simply to hold elections. There is said to have been little cause of controversy in the drafting of the constitution for East Timor, which was based on that of Mozambique, and the passage was something of a formality given the majority that Fretilin held.²²⁹ It introduced a 'a semi-presidential arrangement in which a premier and cabinet exercise day-to-day executive power while the president can veto legislation and also enjoys the power to dismiss and appoint governments'.²³⁰ Still, as the theory of autonomous decision in relation to elections is challenged because of the likelihood of voting for the party that has proved itself popular with the international actors, there is at least one reason why there should have been wider legal concept of democracy pursued. This is especially so when one considers the level of ill feeling that continued in relation to those parties that had resisted independence and which would likely represent a minority in any elected government, indeed, there were calls that parties that opposed independence should be excluded.²³¹

²²⁹ A. L. Smith, 'East Timor: Elections in the Worlds Newest Nation', (2004) 15 *Journal of Democracy* 145 at 153.

²³⁰ Smith, *op. cit.*, fn. 229, p. 153.

²³¹ See J. Morrow and R. White, 'The United Nations in Transitional East Timor: International Standards and the Reality of Governance', (2002) 22 *Australian Yearbook of International Law* 1 at 15.

Moreover, as was with Cambodia, the inclusion of the rights that form the foundation of the emerging consensus on democracy as a human right in the constitution, while of symbolic importance, is little protection against a government that seeks authoritarian rule; a threat that, while apparently minimal in East Timor, still remains.²³² Further, a concern expressed in the literature about the overly harsh and criminal law based defamation law, which operates as a curb on freedom of expression, is an example of the weakness of international human rights law on their own terms as a means of actually securing the democratic ideal.²³³ A legal concept of democracy as part of the right to self-determination, as a legal impetus, could have helped reassure of a determined effort on the part of the government to achieve the democratic ideal. Arguably, such an idea retains relevance even today as the government of East Timor persistently struggles to exercise control of the territory without an international military presence some 6 years since the declaration of independence and the end of ITA.²³⁴

There are, then, across all the examples reasons related to international peace for a legal concept of democracy as part of the right to self-determination not being encouraged. However, there is little reason why predetermined consociational arrangements, for example, could not be accommodated as reasonable exceptions to the proposed law. By treating democracy as a legal concept and as part of the right to self-determination there would have been a basis for regulation and accountability for those that come to governance in pursuit of democracy, either international actors or domestic government which remains dependent on international actors for effective control. Such law, even based on a high standard of persistent neglect before any challenge to authority could be made, would have helped guarantee and encourage realisation of the standards which have some claim to reflect the democratic ideal both in terms of procedure for identification of the government and conduct of governance: thus helping to better guarantee the value of self-

²³² See discussion in Smith, *op. cit.*, fn. 229.

²³³ See Cogen and Brabandere, *op. cit.*, fn. 183, pp. 690-691.

²³⁴ Independence and status as a sovereign state was recognised most noticeably by the process leading to admission to the UN as a Member State in September 2002 under the title Democratic Republic of Timor-Leste SC Res. 1414 (23 May 2002); GA Res. 57/3 (27 Sept 2002); the ITA ended in May 2002, following the declaration of independence (as Timor-Leste), and was replaced by a more partial administrative role, see Zaum, *op. cit.*, fn. 6, p. 193; on the continuing international involvement see, e.g., SC Res. 1704 (25 August, 2006).

determination and also confirming the commitment of the international actors to seeing democracy realised.

The key reason why such law has not emerged, despite the range of years that the practice considered represents, is that it is not required for international acceptance, yet. Democracy as a loose political concept continues to have the hortatory power to convince that there is a commitment to genuine rule by the people, even though there is little to safeguard this promise. Scholars that are more convinced in the present strength of the emerging concept of democracy in international law clearly help to sustain international acceptance by reassuring that there is legal regulation of the democratic excuse. This, however, is not the case, and one must wonder how long it will be before the hortatory power of democracy starts to wane, particularly in light of examples such as Cambodia.

In Cambodia, the human rights provisions in the constitution have appeared ineffectual, as the tendency for autocracy has crept back into governance.²³⁵ But the international actors that were essential for laying the foundations for the present situation have hardly responded.²³⁶ Of course, one might argue that present conditions are far better than what existed at the time of Paris, and effectiveness in Cambodia has not been dependent on an international military presence for a considerable length of time, but that is not the present point. The core point is that if democracy is to be an essential element of the excuse for neglecting the right to political independence, there has to be a meaningful commitment to achieving the democratic ideal. And this requires regulation and accountability, at least while the government remains dependent on an international military presence, because at this stage it is not possible to judge if the government has the allegiance of the people. If not, the ability of democracy to plug the gap with regards the value of self-determination will reduce where a real commitment is not forthcoming. In this respect, legal regulation and accountability represents a means of helping to secure democracy's utility as a device for galvanising international acceptance of practice of reconstruction inconsistent with the right to political independence.

5. Other Thoughts on Democracy in ITA

²³⁵ R. B. St John, 'Cambodia's Failing Democracy', *Foreign Policy In Focus*, 23 January 2006, available at < <http://www.fpif.org/fpiftxt/3079/>>.

²³⁶ *Ibid.*

There are a couple of recent studies which have also touched upon how ITA relates to the right to political independence and the relevance of democracy in the explanation for international acceptance, which it is useful to address in order to clarify the findings of this study in these respects.

Zaum, in his study on the policymaking of the international administrations in Bosnia, Kosovo, and East Timor, argues that it is the pursuit of a collection of values which bind the international community, represented in the 'standard of civilisation', that explains why international actors are willing to compromise the right of self-government. The 'standard of civilisation' identified by Zaum encompasses democracy, human rights, the rule of law, effective government, and a free market economy.²³⁷ It is read as legitimising the authority of local political institutions and thus strengthening their capacity to fulfil sovereign responsibility. Zaum refers to the fact that the right to self-government or, as this study prefers, right to political independence, is compromised to create a government that fulfils its sovereign responsibility, as the sovereignty paradox.

For Zaum, the standards before status policy in Kosovo can be read as 'a contestation about different norms: the norms associated with the standard of civilization [including democracy] on one hand, and the norm of self-determination on the other.'²³⁸ This approach implies a transition from the inter-sovereign relations paradigm of the international legal system, which prioritises the preservation of political independence in the interests of self-determination and international peace amidst a pluralist international society, to a system where the strength of common values of an international community about the internal constitution of states overrides the right to political independence. Alternatively, one might take the view, as this study does, that the idea of international community still struggles to be seen as more than an additional route for international actors to seek wider international acceptance of their involvement, which struggles to fit within the confines of the inter-sovereign relations paradigm; on the basis that its rhetoric projects a greater strength of unity on the importance of international involvement than where the action is taken because of the interests of particular states. Indeed, were the international community so convinced in the importance of the 'standard of

²³⁷ Zaum, *op. cit.*, fn. 6, p. 277.

²³⁸ Zaum, *op. cit.*, fn. 6, p. 143.

civilisation' then surely it would have sought to encourage a legal concept of democracy as a means of safeguarding the realisation of the values that bind it.

In another very recent study, focusing on Kosovo, Bosnia, East Timor and Eastern Slavonia, Fox seeks to answer, why has the international community taken the extraordinary step of governing national territory? To which he answers that it has been in an effort to hold existing states together, the only way for this to occur in territories subject to violent conflict was for ITA. And, what is the legal justification for the missions? The consent of the target state, a UN SC chapter VII resolution, and the international law of occupation, are addressed by Fox by as the standard explanations. As these justifications are found wanting, Fox develops the thesis that the SC is not limited by state-centric rules like the law of treaties, law of occupation, or *jus cogens* when it acts for the collective interest, because then it is not state v. state thus the state based rules become an anachronism. With ITA, Fox argues that the SC has acted in the collective interest of keeping states together and ensuring that they are democratic which serves the democratic peace thesis.²³⁹ The implication is that the combination of a SC resolution in line with a collective vision takes away the importance of the right to political independence for the UN system. Certainly SC authorisation and endorsement is an important part of the matrix, which induces international acceptance of the practice, but it alone does not bring international acceptance for an activity that goes beyond what was reasonably contemplated with the creation of the UN charter in terms of activity to address a threat to international peace and security.

Crucially, both Zaum and Fox overlook the relevance of the efforts to keep the practice within the existing structures of the inter-sovereign relations paradigm - the search for consent, the delay in reconstruction, the domestic elements in the governance structures, as well as the emphasis that sovereignty is not affected in key resolutions. These factors indicate a desire to have the practice seen as consistent with the right to political independence. That they fall short requires one to think about how the values that underpin the legal protection of political independence in the normal run of things have been addressed, as satisfaction of these is an obvious route for engendering international acceptance in a society of states that still

²³⁹ See Fox, *op. cit.*, fn. 6, pp. 1-13.

subscribes to these values. Democracy is, as was set out in Chapter 3, the obvious answer.

Moreover, there have been a large number of other examples where large-scale international involvement was necessary to restore effectiveness, thereby keeping the state together, but ITA was not pursued. The SC has identified the conditions as a threat to international peace and security but has not sought to assume administration of the territory; it has not explicitly compromised self-government to pursue the standards of civilisation or a collective vision of the state. A key reason for this must be precisely because ITA is so offensive to the right to political independence. Had political independence and the attendant values been insignificant, as both Fox and Zaum imply in different ways, surely ITA would have been followed in at least some of the examples that are turned to in Part 3 of this study as examples of the assistance model of state reconstruction. The choice of approach in these examples is to be argued as a key element in maintaining consistency with the right to political independence.

6. Conclusion

Across all four examples there has been significant reconstruction of state and civil infrastructure without an independently effective domestic government to administer the process. The restoration of independent effectiveness on the territory has been prioritised over the preservation of the right to political independence in the interest of international peace. This, though, puts at stake the value of self-determination the neglect of which, in a pluralist international society, risks sparking conflict and threatening international peace. Accordingly, there have been efforts to maintain consistency with the right to political independence.

In the two whole sovereign state examples (Cambodia and Bosnia), the underdeveloped rules on the expression of the will of the state and its people have been taken advantage of to find a source of valid state consent. In the other two examples (Kosovo and East Timor), the uniqueness of the situations has meant that consent has been possible from absent sovereigns. The weakness of this as a legal basis, regardless of consistency with the right to political independence, is supported by the fact of a chapter VII basis which was not required with the whole sovereign state examples. In the two whole sovereign state examples, the delay in

reconstruction pending a domestic government, except for what was necessary for resolution of the conflict, helps maintain greater respect for the right to political independence, than in the other two examples – where stressing the temporary nature or that the changes introduced were only those considered necessary in light of mass destruction is less convincing. Similarly, domestic involvement in government helps maintain consistency with political independence, but does not reconcile the situation when authority rests with the international actors and control remains dependent on an international military presence. Such efforts indicate a concern to remain within the confines of the inter-sovereign relations paradigm of the international legal system.²⁴⁰ But do not in fact reconcile the practice with the right to political independence, primarily because of the lack of an independently effective domestic government. Given that the primary motivation for the international involvement is international peace, how the other value put at stake by the neglect of political independence, the value of self-determination, is addressed can be cast as the determining factor for international acceptance. If efforts are not made to address the value of self-determination then there is the risk of conflict and the international involvement becomes counter-productive. The essential element in this respect is the pursuit of democratic self-government as a central reconstruction aim of all the examples. The hortatory power of democracy to promise genuine rule by the people takes the emphasis away from the infringement of the right to political independence and casts the international involvement as necessary for the realisation of self-determination.

If, however, democracy is to be an essential element in the excuse for the neglect of the right to political independence it has been argued that it must be about procedure and substantive conduct of government, which is what is suggested by the term, and that there must be a basis for regulation and accountability of its realisation. In all of the examples, democracy has, essentially, been treated as a loosely defined political concept. As a consequence, there is little basis for regulation or accountability of its realisation. Thus the claim it suggests in relation to the value of self-determination is far from guaranteed. Its ability to plug the gap with regards the value of self-determination will reduce where a real commitment is not forthcoming. Legal regulation and accountability represents a means of helping to

²⁴⁰ In this respect, see, e.g., SC Res. 668 (1990) preamble, noting the consistency of the Paris process with Cambodian sovereignty.

secure its utility as a means of addressing the value of self-determination and, consequently, for galvanising international acceptance in future efforts. The next part of this study will consider how reconstruction by an otherwise ineffective government, dependent on international involvement for the ability to introduce change and development, relates to the right to political independence.

Part Three

STATE RECONSTRUCTION BY INTERNATIONAL ASSISTANCE

Chapter 6

The Assistance Model of State Reconstruction and the Right to Political Independence

1. Introduction

The continued existence of states without effective government affects the efficacy of international law,¹ leads to human suffering,² and has been identified as a source of security threats for international society.³ Thus it is logical for international actors to want to assist with the immediate restoration of effectiveness on the territory through a military presence, and with the reconstruction of the state and civil infrastructure to try and help ensure future independent effectiveness. Such efforts, however, encounter a significant paradox. The legal framework that ensures the continuation of an ineffective state operates to preserve the political independence of a state and its people in the interests of self-determination of peoples and international peace; two of the core values of the UN system.⁴ However, political independence is clearly brought into question by large-scale international involvement in state reconstruction. Moreover, traditional international legal doctrine identifies the agent for the rights and obligations of the state and its people as the government in effective control of the territory.⁵ How, then, can large-scale international involvement in the reconstruction of an ineffective state occur without disregard for political independence? The previous part of this study has outlined how reconstruction by foreign governance is not easily reconciled with the right of the target state and its people to political independence. In respect of which, it was argued the pursuit of democracy has been an essential part of the explanation for international acceptance because of its ability to at least go some way towards

¹ G. Sorensen, 'An Analysis of Contemporary Statehood: Consequences for Conflict and Cooperation', (1997) 23 *Review of International Studies* 253 at 258.

² G. Kreijen, *State Failure, Sovereignty and Effectiveness* (2004) 87.

³ UN High-level Panel on Threats, Challenges, and Change, *A More Secure World: Our Shared Responsibility*, UN Doc. A/59/565 (2004), p. 25.

⁴ Article 1 (2), UN Charter; see also N. D. White, *The United Nations System: Toward International Justice* (2002) 47-72.

⁵ B. Roth, *Governmental Illegitimacy in International Law* (1999) 137-42; D. Wippman, 'Treaty-Based Intervention: Who Can Say No?', (1995) 62 *University of Chicago Law Review* 607 at 612 and references therein at note 26.

accommodating the value of self-determination. The most common model for state reconstruction without an independently effective domestic government is what this study terms the assistance model of state reconstruction. Unlike with occupation and ITA, solely a domestic government administers the reconstruction in the assistance model. Accordingly, one's initial impression might readily be of consistency with the right to political independence.

Prominent examples, with contextual differences but a core of common features which is what this chapter identifies as the assistance model, are found in the recent past of Haiti (1994 – 1997; 2004 –), Sierra Leone (1998 – 2005), Liberia (2003 –), Afghanistan (2001 –), and in Iraq following the formal end of the belligerent occupation (2004 –). There are also signs it will be pursued in Somalia, following the establishment and international recognition of a transitional government.

The assistance model involves an otherwise ineffective domestic government to all intents and purposes gaining legal capacity through recognition by other states. This allows it to provide valid consent for an international military presence and capacity building assistance from an array of international actors. Treated as a continuum, the international involvement makes the government effective and puts it in a position to administer state reconstruction. This presents a further troubling paradox. International recognition creates the notional authority that permits an ineffective government to authorise the international involvement that makes the notional authority a reality. Can this be consistent with the preservation of the rights of the target state and its people to political independence? The apparent international acceptance and lack of attention given to this aspect of the reconstruction process in the scholarly literature might lead one to believe that it at least does not neglect political independence in a way which poses any threat to core values of the UN system.

In an attempt to draw attention to the nature of the assistance model and its significance for the UN system, this chapter, by an exploration of the key features of the assistance model and the legal issues which revolve around it, conceptualises the model and addresses how it relates to the political independence of the target state and its people. The main argument to be pursued is that while the assistance model appears unremarkable, in fact it offers little protection for the political independence of the target state and its people and, as a consequence, puts at risk the core values of

the UN system of self-determination of peoples and international peace. It is further contended that international acceptance rests on a number of factors, including the pursuit of democracy, that help towards consistency with the right to political independence and/or accommodation of the attendant UN system values.

To identify the points of commonality in the approach taken by international actors to restore effectiveness and reconstruct the target states, the chapter begins with an overview of the situations present in each of the examples. Having identified that the examples share common features, the focus is on how, despite the international involvement being from a variety of international actors, the model does not manage to evade the problem posed by the paradox; how to have large scale-international involvement while maintaining the political independence of the target state and its people. Subsequently, in an attempt to identify whether international acceptance and the absence of scholarly attention is because of a lack of significance for the UN system, further sections explore how key legal issues – the international recognition of the assisted government, state consent, chapter VII aspects, and the pursuit of democracy – explain the position of the assistance model in relation to political independence and the attendant values of the UN system.

2. Conceptualising the Assistance Model: The Ineffective Government

As a model for the short-term and hopefully long-term restoration of effective control on a territory, the assistance model is far less striking than some of the alternatives. A key distinction from belligerent occupation or international territorial administration is that a domestic government administers the reconstruction process.⁶ In light of this, one might readily imagine that the assistance model does not encounter the paradox of state reconstruction or, more specifically, that political independence is not put at risk. Hence it is necessary to consider how it is that queries about consistency with political independence are in fact raised.

The assistance model has been prominent in the recent past of Haiti, Sierra Leone, Liberia, Afghanistan, and in Iraq following the formal end of the belligerent occupation. There are contextual differences across this selection of examples. It is

⁶ On belligerent occupation, see E. Benvenisti, *The International Law of Occupation* (1993); on the concept of international territorial administration, see R. Wilde, 'From Danzig to East Timor and Beyond: The Role of International Territorial Administration', 95 *AJIL* (2001) 583 at 584-586.

possible, though, to identify a set of common features in relation to the process for restoring effective control on the territory, which, when taken as a whole, prompt one to query how the model relates to the preservation of political independence. This and subsequent sections survey the examples to extract these common features for analysis in relation to the right to political independence. This section introduces the examples and identifies commonality in the level of control that the government without international assistance was able to exert, and the fact of large-scale international involvement.

A. Haiti

In 1994, Haiti had a government that was able to retain a degree of control over the state. Cedras' government had come to power by a military coup in 1991 and maintained control by a reign of terror. Thus there was widespread international support for the international intervention that led Cedras to step down and reinstalled the still internationally recognised government of Aristide.⁷ This was the start of the first assistance effort to restore governmental effectiveness in Haiti.

The success of the first effort in Haiti was seriously hindered by a lack of cooperation from the Aristide government and a series of political crises.⁸ After some improvement, the security situation worsened and successive governments struggled for control of the state.⁹ In February 2004, with Haiti in an anarchic condition, President Aristide, after being elected for a second time, stepped down, noticeably encouraged by some of the same international actors that had returned him to power in 1994.¹⁰

President Alexandre, following the departure of Aristide, requested the second assistance effort in Haiti.¹¹ Alexandre was Aristide's successor but with the establishment of a transitional government the President's role became ceremonial. The Transitional Government was selected rather than elected. A three-member council, which consisted of a representative of Aristide's party, one from the main opposition party, and one international representative, selected seven eminent

⁷ See Roth, *op. cit.*, fn. 5, p. 377.

⁸ D. M. Malone and S. von Einsiedel, 'Haiti', in M. Berdal and S. Economides (eds.), *United Nations Interventionism 1991 – 2004* (2007) 168 at 178-179.

⁹ See Report of the Secretary General on Haiti, UN Doc. S/2004/300 (16 April 2004).

¹⁰ Malone and von Einsiedel, *op. cit.*, fn. 8, p. 184.

¹¹ UN Doc. SC. Res. 1529 (2004) para 2.

persons to identify a Prime Minister. The Council selected Gérard Latortue as Prime Minister from a short list of three candidates. Subsequently in 2004, Prime Minister Latortue selected his government, which agreed to work towards elections within two years.¹² Political authority was passed to an elected government in February 2006. A significant international military presence remains in Haiti and international support continues for the purpose of reconstruction.

B. Sierra Leone

During 1998 – 2005, assistance to an existing but ineffective government was also the approach adopted in Sierra Leone.¹³ As Kabbah has broadcast ‘it is widely acknowledged that my Government inherited an almost completely collapsed state’.¹⁴ Kabbah was then overthrown by a rebel and military led coup and went into exile in Guinea.¹⁵ Sierra Leone was in an anarchic condition at the time when the exiled President Kabbah was reinstated by a Nigerian-led ECOMOG (ECOWAS Monitoring Group) force in February 1998.¹⁶ The level of international involvement in the state increased overtime.¹⁷ Stability has been sustained in Sierra Leone without an international military presence since 2005,¹⁸ while considerable international support continues for reconstruction projects.¹⁹

C. Liberia

¹² For an account of events see 2004 Interim Cooperation Framework for Haiti, available at <<http://haiticci.undg.org/>>.

¹³ See A. Adebajo and D. Keen, ‘Sierra Leone’, in M. Berdal and S. Economides (eds.), *United Nations Interventionism 1991 – 2004* (2007) 246.

¹⁴ Broadcast to the Nation by H. E. President Ahmad Tejan Kabbah, Friday 26 May 2000 (on file with author).

¹⁵ See Chapter 7.

¹⁶ Kabbah had been removed from office by a military coup in 1997. The coup was said to have had the shape more a mutiny than a revolution Roth, *op.cit.*, fn. 5, p. 407; see also Adebajo and Keen, *op.cit.*, fn. 13, p. 255; J. Hanlon, ‘Is the International Community Helping to Recreate the Preconditions for War in Sierra Leone?’ (2005) 94 *The Round Table* 459 at 460; Chapter 7 of this study.

¹⁷ At its height the UN peacekeeping force numbered some 17, 000, and UNAMSIL was described as ‘indispensable’ for the extension of state administration throughout the country, Second Report of the Secretary General Pursuant to Security Council Resolution 1270 (1999) on the United Nations Mission in Sierra Leone, UN Doc S/2000/13, 11 January 2000, para. 44.

¹⁸ See, e.g., Fourth Report of the Secretary General on the United Nations Integrated Office in Sierra Leone S/2007/257, 7 May 2007, at 3.

¹⁹ For an overview of the progress made and the challenges which remain see Report of the Peacebuilding Commission, A/61/901–S/2007/269, 14 May 2007.

Liberia, like Sierra Leone, suffered with conflict throughout the 1990's.²⁰ An insurrection led by Charles Taylor in 1990 was halted by an ECOMOG military intervention, but ECOMOG only secured the capital Monrovia, with Taylor in control of the rest of Liberia.²¹ A series of agreements between Taylor and ECOWAS led to Taylor's internationally monitored election in 1997.²² Taylor, however, ran the country 'as a personal fiefdom',²³ and was eventually removed from office by rebel forces. An initial ceasefire agreement between the three main parties indicated scope for resolution of the conflict.²⁴ Commitment to move away from civil and political turmoil in Liberia was evidenced with the signing of the Comprehensive Peace Agreement (CP Agreement) by all the main political parties in August 2003.²⁵ This agreement provided a framework for the reconstruction of the state under the auspices of a transitional government.²⁶ The warring factions parties to the internationally backed peace agreement nominated the transitional government, which operated on the basis of a temporary constitution and pursuant of a reconstruction mandate, set out in the CP Agreement, until elections.²⁷ An international military presence supported the transitional government and continues to support the government that was elected in 2005.²⁸ There has also been and

²⁰ See J. Levitt, *The Evolution of Deadly Conflict in Liberia* (2005).

²¹ See D. Wippman, 'Military Intervention, Regional Organization, and Host State Consent', 7 *Duke J. Comp. & Int'l L.* (1996) 209; on the international efforts to help with reconstruction during this time see 'Assistance for the Rehabilitation and Reconstruction of Liberia', Report of the Secretary-General, A/51/303, 23 August 1996.

²² The monitors judged them free and fair, see, though, J. Stromseth, D. Wippman and R. Brooks, *Can Might Make Rights? Building the Rule of Law After Military Interventions* (2006) 100.

²³ International Crisis Group (ICG), *Liberia: The Key to Ending Regional Instability*, 24 April 24 2002, at 13.

²⁴ Agreement on Ceasefire and Cessation of Hostilities between the Government of the Republic of Liberia and Liberians United for Reconciliation and Democracy and the Movement for Democracy in Liberia, Accra (Ghana), UN Doc. S/2003/657, 17 June 2003, para. 7 requested an international stabilisation force.

²⁵ Peace Agreement between the Government of Liberia, the Liberians United for Reconciliation and Democracy, the Movement of Democracy in Liberia and the Political Parties (CP Agreement), UN Doc. S/2003/850, 18 August 2003.

²⁶ International Crisis Group (ICG), *Liberia Security Challenges*, November 3, 2003, at 2.

²⁷ CP Agreement, *op. cit.*, fn. 25, Article XXXV 1(e). 'All suspended provisions of the Constitution, Statutes and other laws of Liberia, affected as a result of this Agreement, shall be deemed to be restored with the inauguration of the elected Government by January 2006. All legal obligations of the transitional government shall be inherited by the elected government.'

²⁸ See Eleventh progress report of the Secretary-General on the United Nations Mission in Liberia (9 June 2006) S/2006/376; SC Res. 1509 (2003); see also Stromseth, Wippman, and Brooks, *op. cit.*, fn. 22, p. 101.

continues to be massive international involvement with the reconstruction of the state.²⁹

D. Afghanistan

In Afghanistan in October 2001, responding to the attacks of 11 September 2001, a US-led coalition toppled the Taliban regime and in doing so created a governmental and security vacuum.³⁰ A UN-backed conference in Bonn in November 2001 brought together a selection of eminent Afghans to work out the arrangement for the future of Afghanistan.³¹ The participants selected, in December 2001, the Interim Authority with whom political power would initially rest.³² The Bonn agreement set out a framework for the political development of Afghanistan and requested UN assistance with the maintenance of security.³³ An Emergency Loya Jirga was convened after 6 months and this led to the creation of the Transitional Authority (TA) - with the head of state elected by some 1,500 delegates that had been selected or elected from throughout the regions - which held power until free and fair elections were held in October 2004.³⁴ Governmental effectiveness throughout the territory remains dependent on an international military presence, and the reconstruction process continues to be fuelled by international assistance.³⁵

²⁹ For an overview of the key priorities for Liberia, and strategies for achieving them, including the key international actors who have been or will be involved through financial, technical, or resource assistance, see United Nations and World Bank, *Liberia Joint Needs Assessment Synthesis Report* February 2004, available at <<http://www.undg.org/index.cfm?P=149#s6>>; for a summary of World Bank involvement between 2003-2005 in economic management, community empowerment, infrastructure, and institutional capacity-building, see World Bank, *World Bank Program in Liberia* (December 2005) available at <<http://go.worldbank.org/OD88RUW6K0>>.

³⁰ See, M. Sedra, 'Security Sector Reform in Afghanistan: The Slide Towards Expediency', (2006) 13 *International Peacekeeping* 94 at 94.

³¹ See Human Rights Watch, *Afghanistan's Bonn Agreement One Year Later: A Catalog of Missed Opportunities*, 5 December 2002, available at

<www.hrw.org/backgrounders/asia/afghanistan/bonn1yr-bck.htm>, participants included Afghan military commanders, ethnic group leaders, expatriate Afghans, and representatives of the exiled king.

³² Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions (Bonn Agreement), UN Doc S/2001/1154, 5 December 2001, in particular: Section III Interim Administration A. Composition. 3; see also C. McCool, *The Role of Constitution Building Processes in Democratisation*, International IDEA (2004) at 8.

³³ See S. Chesterman, *You the People: The United Nations, Transitional Administration and State-Building* (2004) 89-90.

³⁴ See for an overview of this process CSDG (Kings College), *A Review of Peace Operations. A Case for Change: Afghanistan* (2003) at 26-30.

³⁵ See International Crisis Group (ICG), 'Security in Afghanistan', available at <http://www.crisisgroup.org/home/index.cfm?id=3071&l=1&gclid=CJ_oqLCqvZUCFQznlAod7x1qQg>, last accessed 3 September 2008.

E. Iraq after Belligerent Occupation

It was international intervention by a US-led coalition and the removal of the effective government of Saddam Hussein in 2003, which produced the political and security vacuum in Iraq. Initially, rather than find a domestic government to support, the coalition established its own, at first military, and then civilian administration, which governed until June 2004. This approach meant that for this period the law of occupation applied as a source of legal restraint and obligation on the coalition administration, and this period was addressed in Chapter 4. The transfer of authority to an interim government in June 2004, selected on ‘the basis of wide scale consultations with all segments of Iraqi society’,³⁶ was the point at which the law of occupation ceased to apply. The interim government, however, and the elected government, which has followed, have both relied heavily on an international military presence for stability and security,³⁷ and continue to receive support in the building of the security sector and across the spheres of governance.³⁸

F. Commonality

Across all these examples there is the common feature that the government, which will be assisted to reconstruct the state, does not have independent effective control of the state. Whatever control the government has is dependent on international actors. There are modalities in terms of how the government has been identified, either an existing but ineffective government, or selected by eminent persons/warring factions, but the essential point remains that on the basis of traditional international legal doctrine they would not be identified as the agent of the state or the people. Before addressing whether the type of international involvement actually affects the right to political independence, and the type and relevance of legal justifications, to help clarify the significance of these common features it is useful to comment on why some similar examples have been excluded.

³⁶ Transitional Administrative Law, Article 62

³⁷ See, e.g., United States Government Accountability Office, *Stabilizing Iraq, An Assessment of the Security Situation*, Monday 11th September 2006, GAO-06-1094T available at <www.gao.gov>.

³⁸ See International Crisis Group (ICG), *Crisis Watch*, 1 September 2008, no. 61, p. 11, available at <<http://www.crisisgroup.org/home/index.cfm?id=1200&l=1>>.

3. Other Examples Surveyed

In the examples cited above, there has been a complete lack of independent effective governance on the territory. In the interests of clarity it is useful to explain why some other examples that might be thought to reflect the same paradigm, because of an apparent lack of effectiveness and significant international involvement, are not included.

A. El Salvador

One example close to the subject matter of this study is the international involvement in El-Salvador in response to the civil war around 1990. In this instance, the insurgents were not strong enough to topple the government, but were strong enough to win significant concessions from it. These concessions took the form of institutional reforms that were implemented with the help of the UN.³⁹ The main distinguishing point that explains why this instance is not addressed in this study is that the government had managed to retain a significant degree of effective control without international involvement; it then extended that control through engagement with insurgents. Thus there was not complete dependency on international actors for effective control of the territory.

B. Albania

One might also think of the situation in Albania in 1997, where civil disorder grew at a rapid rate in response to the collapse of a number of pyramid financial schemes, as relevant for this study. However, with the deployment of a multinational protection force, order was rapidly restored and the international military presence soon left. There was thus no need for a long-term international military presence to provide the government with effective control of the territory.⁴⁰

C. Solomon Islands

³⁹ See J. S. Kreilkamp 'UN Postconflict Reconstruction', (2003) *NYU Journal of International Law and Politics* 619 at 627.

⁴⁰ See P. Tripodi, 'Operation Alba: A Necessary and Successful Preventive Deployment', (2002) 9 *International Peacekeeping* 89.

The law and order situation in the Solomon Islands, an archipelago of over 1000 islands to the north east of Australia, was in decline throughout the 1990's.⁴¹ Factors in the decline include, widespread governmental corruption, ethnic conflict, and rapid population growth.⁴² A coup in 2000 worsened the situation.⁴³ The Townsville Peace Agreement of October 2000 helped to contain some of the violence, but 'the situation in the Solomon Islands continued to spiral downwards.'⁴⁴ By 2003, the state was considered by Australia to be on the verge of failure.⁴⁵ Rather than wait until all control was lost, it was at this point that Prime Minister Kemakeza indicated his support for comprehensive Australian involvement.⁴⁶ The international involvement has been based on agreement with the government of the Solomon Islands.⁴⁷ The Solomon Island's recognition of Taiwan as a state, in light of implications for the relationship with China, is said to have led the government to withdraw its request for UN assistance.⁴⁸ The President of the SC did subsequently endorse the international involvement, but offered no legal base.⁴⁹ Today, the

⁴¹ See E. Wainwright, 'Responding to State Failure – the Case of Australia and the Solomon Islands', (2003) 57 *Australian Journal of International Affairs* 485; D. McDougall, 'Intervention in the Solomon Islands' (2004) 93 *The Roundtable* 213; R. Ponzio, 'The Solomon Islands: the UN and Intervention by Coalitions of the Willing' (2005) 12 *International Peacekeeping* 173; G. Peake and K.S Brown, 'Policebuilding: The International Deployment Group in the Solomon Islands', (2005) 12 *International Peacekeeping* 520.

⁴² McDougall, *op. cit.*, fn. 41, pp. 215 – 216;

⁴³ McDougall, *op. cit.*, fn. 41, pp. 215, particularly with regards the economy, as the newly elected Prime Minister Sogavare drained the government's finances attempting to bring peace by compensation payments to both sides.

⁴⁴ McDougall, *op. cit.*, fn. 41, pp. 216; Ponzio, *op. cit.*, fn. 41, pp. 174-175, notes how the Townsville Peace Agreement, which 'included measures to demilitarize the warring factions, promote reconciliation, facilitate greater political autonomy for the two provinces of Malaita and Guadalcanal, and help the many Solomon Islanders who were displaced, lost family members and saw their property damaged or stolen', was not implemented effectively.

⁴⁵ See speech of Australian Prime Minister John Howard outlining the case for intervention to the Australian Parliament: 'A failed state would not only devastate the lives of the peoples of the Solomons but could also pose a significant security risk for the whole region.' Transcript, 12 Aug. 2003, quoted by Ponzio, *op. cit.*, fn. 41, p. 178 (note 17)

⁴⁶ On 17 July 2003 the Solomon's parliament unanimously approved legislation giving authority for the intervention force to enter the country see McDougall, *op. cit.*, fn. 41, p. 218.

⁴⁷ See, e.g., 'Agreement between Solomon Islands Australia, New Zealand, Fiji, Papua New Guinea, Samoa and Tonga concerning the Operations and Status of the Police and Armed Forces and Other Personnel Deployed to Solomon Islands to Assist in the Restoration of Law and Order and Security'. Townsville, 24 July 2003, available at <<http://www.ramsi.org/node/10>>.

⁴⁸ Ponzio, *op. cit.*, fn. 41, p. 176.

⁴⁹ UN Security Council, 'Press Statement on Solomon Islands by Security Council President', Press Release SC/7853, 26 August 2003. The Security Council President, Fayssal Mekdad (Syria), expressed the hope 'that this important regional initiative will quickly lead to the restoration of normalcy and national harmony in the Solomon Islands'.

security situation is said to appear much improved, if still fragile,⁵⁰ and support continues for the purpose of reconstruction.⁵¹

The Solomon Islands is perhaps the example that, because the government had extreme difficulty holding onto any control of the state at the point of consent to international involvement, which clearly facilitated reconstruction of the state, one might most readily expect to be included in the study.⁵² Still, however minimal the difference between some and absolutely no effectiveness might be in practice, the distinction remains an important one for this study. This is because without any control whatsoever the traditional basis of the rules in international law on expression of the will of the state and the people is completely absent – effective control of the territory. Accordingly, international actors should, in the interest of the right to political independence, be required to develop new law. With some control, however, the traditional basis can be clung onto, the likelihood of new law is thus less, and this is why this study is interested in those examples where the government is completely lacking in anything like effective control at the time when the large scale international involvement commences.

4. Conceptualising the Assistance Model: The International Involvement

This section identifies common features of the international involvement and also the legal justifications for the international involvement, as a basis for evaluating the relationship between the assistance model and political independence in the next section.

⁵⁰ As civil unrest in Honiara in April 2006 is testament, see report at the website of the Solomon Islands' Department of Prime Minister and Cabinet <<http://www.pmc.gov.sb/?q=node/1431>> last accessed 04/09/08.

⁵¹ For an overview of the work of the Regional Assistance Mission to Solomon Islands (RAMSI) with respects the 'machinery of government', 'economic governance' and 'law and justice' see RAMSI Performance Assessment Advisory Team, Annual Performance Report 2005/2006 (July 2006) at 14-19, available at <<http://www.ramsi.org/node/110>>; see also Report of the Pacific Islands Forum Eminent Persons Group, A Review of the Regional Assistance Mission to Solomon Islands (May 2005) available at <<http://www.pmc.gov.sb/>>; S. Dinnen, 'State-Building in a Post-Colonial Society: The Case of Solomon Islands', (2008) 9 *Chicago Journal of International Law* 51.

⁵² Another example where the government hardly retained effective control over all the territory but still retained a modicum control, is found in relation to the circumstances of the Democratic Republic of Congo in recent times, see the judgment of the ICJ *Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda)*, ICJ Reports 2005, p. 1, at p. 45, para. 109, wherein the lack of control of the government in the area where Uganda forces were stationed, formed a key tenet of the circumstances which led to case being brought to determine legality of Uganda's activity.

A. Haiti

In Haiti in 1994, there was a 20,000 strong multinational force followed by a series of UN peacekeeping missions; the remnants of the UN military presence left in November 1997.⁵³ In Haiti from 2004, a multinational force followed by UN peacekeeping, which remains today, have operated.⁵⁴

In 1994, the UN peacekeepers were further mandated under chapter VII to assist the restored government of Aristide with certain security-related matters, focused on the recruitment and training of the police force.⁵⁵ Some prominent examples of the wider international support in relation to Haiti in 1994, include US support for legal reform to a model based on the US legal system,⁵⁶ as well as a significant amount of conditioned funding for economic reform.⁵⁷

From 2004, Resolution 1529 authorized the Multinational Interim Force to establish stability and assist with the development of the security sector.⁵⁸ Resolution 1542 mandated the UN peacekeeping mission under chapter VII with assisting the Transitional Government in a variety of ways with security, political process, and protection and promotion of human rights.⁵⁹ A mass of international actors worked with the Transitional Government to draft the 2004 Interim Cooperation Framework for Haiti.⁶⁰ This mapped out how Haiti would be changed and developed over the next two years throughout all sectors and was the basis for a donor conference to gain funding and assistance to see it through.⁶¹ Subsequently, the US, for example, is involved across a number of different spheres, including economic growth and job

⁵³ See Malone and von Einsiedel, *op. cit.*, fn. 8, p. 177, and at p. 181 noting that almost all the US soldiers had left by January 2000.

⁵⁴ See J. Leininger, 'Democracy and UN Peace-Keeping – Conflict Resolution through State Building and Democracy Promotion in Haiti', (2006) 10 *Max Planck UNYB* 465 at 521.

⁵⁵ UN Doc. SC. Res. 940 (1994) para. 9.

⁵⁶ Which after being pursued for a short time was rejected, see L. Hagman (Rapporteur), *Lessons Learned: Peacebuilding in Haiti*, International Peace Academy, Seminar Report 23 -24 January 2002 (New York) p. 5 (on file with author).

⁵⁷ Which gradually dwindled, amidst a lack of cooperation from the government, Hagman (IPA), *op. cit.*, fn. 56, pp. 8-9.

⁵⁸ UN Doc. SC. Res. 1529 (2004) para. 2.

⁵⁹ UN Doc. SC. Res. 1542 (2004) paras. 7 and 8.

⁶⁰ Led by the Inter-American Development Bank, the European Commission, the World Bank, and the United Nations System, see *Interim Cooperation Framework for Haiti*, *op. cit.*, fn. 12, p. 7.

⁶¹ A number of countries and institutions pledged a total of \$1.085 billion, see World Bank, News Release 2005/27/LAC available at <<http://econ.worldbank.org/>>.

creation, health and human services, infrastructure budget support, and security and legal reform.⁶²

As well as a chapter VII justification for the security involvement, there has also been a consent justification for the involvement. In Haiti in 1994, Resolution 940 takes note of letters from Aristide requesting assistance⁶³ and repeatedly refers to the Governors Island Agreement as the framework for international involvement. The Governors Island Agreement was reached between Cedras (who was in effective control of Haiti) and Aristide to allow for the return of the latter.⁶⁴ In Haiti in 2004, Resolution 1529 acknowledged the request for assistance from President Alexandre.

The wider international involvement has been called for in broad terms in the various chapter VII resolutions that authorise the international military presence; such as Resolution 940, in 1994, which reiterated the need for ‘the international community to assist and support the economic, social and institutional development of Haiti’.⁶⁵ And Resolution 1542, in 2004, which:

Emphasizes the need for Member States, United Nations organs, bodies and agencies and other international organizations, in particular OAS and CARICOM, other regional and subregional organizations, international financial institutions and non-governmental organizations to continue to contribute to the promotion of the social and economic development of Haiti, in particular for the long-term, in order to achieve and sustain stability and combat poverty⁶⁶

This wider involvement has not, though, been provided with a chapter VII basis. Instead, the legal basis for the involvement is founded on state consent. This, of course, involves working with the domestic government, and the government of Aristide and the Transitional Government of 2004 were both criticised for not being sufficiently compliant with the wishes of those assisting them.⁶⁷

⁶² US Bureau of Public Affairs, The United States and Haiti: Helping Haitians Build a Better Life, Press Release, August 5 2004, available at <<http://www.state.gov/r/pa/ei/rls/34980.htm>>.

⁶³ Taking note of the letter dated 29 July 1994 from the legitimately elected President of Haiti (S/1994/905, annex) and the letter dated 30 July 1994 from the Permanent Representative of Haiti to the United Nations (S/1994/910).

⁶⁴ UN Doc. SC. Res. 940 (1994) preamble, notes how the government of Cedras repeatedly failed to comply with its provisions.

⁶⁵ SC. Res. 940 (1994) preamble.

⁶⁶ SC. Res. 1542 (2004), para. 13.

⁶⁷ On Aristide, see Eleventh Report of the Multinational Force in Haiti, S/1995/149, 21 February 1995; on the Transitional Government, see International Crisis Group (ICG) memorandum sent to the Members of the United Nations Security Council Mission in Haiti ‘Update on Haiti’, 8 April 2005 (on file with author).

B. Sierra Leone

In Sierra Leone since 1998, and up until 2005, an international military presence, with varying levels of ECOMOG, UN and British units, was in place. At its height, the UN peacekeeping force numbered 20,000 and was described as ‘indispensable’ for the extension of state administration throughout the country.⁶⁸ As Chesterman has noted, ‘[f]or the duration of the mission, UNAMSIL [United Nations Mission in Sierra Leone] claimed to operate in support of Sierra Leonean authorities rather than in their stead. As various functions were assumed by default, this proved to be operationally disingenuous.’⁶⁹

The initial resolution establishing the UN military presence mandated the United Nations Mission in Sierra Leone to assist the government with disarmament, demobilization and rehabilitation, implementation of the Lomé-peace agreement and to generally have a presence.⁷⁰ The chapter VII aspect of the mandate was limited to the use of force in self-defence and the protection of civilians in imminent danger.⁷¹ A subsequent resolution mandated a much stronger security presence in assistance to the Sierra Leone government under chapter VII.⁷²

In Sierra Leone, there has been a significant amount of wider international involvement.⁷³ The World Bank, for example, was central amongst efforts by development partners to support the government’s efforts to rehabilitate community schools, health clinics, markets, and roads.⁷⁴ It was also crucial in creating a financial package that enabled private contractors to resume work on a hydroelectric dam crucial to meeting the electricity needs of Sierra Leone.⁷⁵ The UK, in particular, has a long term commitment to Sierra Leone, and the UK DfID effort has been concentrated on reforming the civil service, the security sector, the judiciary,

⁶⁸ Second Report of the Secretary General Pursuant to Security Council Resolution 1270 (1999) on the United Nations Mission in Sierra Leone, UN Doc S/2000/13, 11 January 2000, para. 44.

⁶⁹ Chesterman, *op. cit.*, fn. 33, p. 87.

⁷⁰ SC. Res. 1270 (1999).

⁷¹ SC. Res. 1270 (1999) para. 14.

⁷² SC. Res. 1289 (2000) para 10.

⁷³ See, for a detailed account of the various actors involved and the nature of the involvement, The Government of Sierra Leone, Development Assistance Coordination Office (DACO), Development Assistance to Sierra Leone 2004 – 2005 (2005) available at < <http://www.daco-sl.org/report.htm>>.

⁷⁴ International Development Association (IDA), Sierra Leone: Recovering from Years of Conflict, February 2007, at 3, available at <www.worldbank.org/ida>.

⁷⁵ IDA, *op. cit.*, fn. 74, p. 6.

and stimulating the private sector.⁷⁶ The dependency on international actors was stressed by Brooks in 2003 who wrote: “[I]n Sierra Leone the fragile indigenous government relies heavily on UN administrators and peacekeeping troops to preserve the still tenuous peace and help with everything from education, health care, and food aid to legal and judicial reform.”⁷⁷

With regards legal justifications, a series of peace agreements between the government and rebel forces stress that the government will request an international military presence.⁷⁸ The wider international involvement has been called for in SC Chapter VII resolutions, such as SC Res. 1436 (2002) which:

Emphasizes that the development of the administrative capacities of the Government of Sierra Leone, particularly an effective and sustainable police force, army, penal system and independent judiciary, is essential to long-term peace and development, and therefore urges the Government of Sierra Leone, with the assistance of donors and of UNAMSIL, in accordance with its mandate, to accelerate the consolidation of civil authority and public services throughout the country, and to strengthen the operational effectiveness of the security sector.⁷⁹

This wider involvement is, though, based on state consent.

C. Liberia

A multinational ECOWAS-led force was authorised under chapter VII in SC Res. 1497 (2003) to establish and maintain security and facilitate the implementation of the initial ceasefire agreement between the warring factions.⁸⁰ The requests for international assistance were repeated and expanded upon in the CP Agreement.⁸¹ SC Res. 1509 established UNMIL under chapter VII with a wide-ranging mandate of

⁷⁶ See FCO country profile available at <<http://www.fco.gov.uk>> last accessed 12.07.08; the UK has had a major involvement in the reconstruction process and has a memorandum of understanding (November 2002), which outlines conditional support of an annual 40 million until 2012, see discussion in Chapter 7.

⁷⁷ R. E. Brooks, ‘The New Imperialism: Violence, Norms, and the Rule of Law’, (2003) 101 *Michigan Law Review* 2275 at 2279.

⁷⁸ Lomé Agreement - Government of Sierra Leone and RUF (July 1999) part four; Abuja Agreement – Government of Sierra Leone and RUF (November, 2001) para. 4.

⁷⁹ SC. Res. 1436 (2002) para. 7.

⁸⁰ SC Res. 1497, para. 1, (1 August 2003); Agreement on Ceasefire. *op. cit.*, fn. 24, para. 7.

⁸¹ CP Agreement, *op. cit.*, fn. 25, Part 9 Article XXIX para. 4.

assistance – including, implementation of the peace process, and security sector reform – to the transitional government.⁸²

General international support to help Liberia restore itself as a functioning state was also encouraged in the various UN resolutions, for example, Resolution 1509 ‘[c]alls on the international community to consider how it might help future economic development in Liberia aimed at achieving long-term stability in Liberia and improving the welfare of its people’.⁸³ An international donor conference in February 2004 gained pledges of US\$520 million and technical assistance to finance and enable the reconstruction of Liberia.⁸⁴ Such wider international involvement has been on the basis of the consent of the government.⁸⁵ The World Bank, for example, along with involvement in core areas related to the economy and governance, has also provided funding and technical assistance for the development of the infrastructure for agriculture activity.⁸⁶ Examples of the extensive US involvement include the funding, along with South Africa, for the retirement of over 4000 regular members of the armed forces recruited before the conflict,⁸⁷ and the lead role in the training and restructuring of the Liberian Armed Forces.⁸⁸

D. Afghanistan

In Afghanistan, the Bonn Agreement requested UN and general international support with establishing security and reconstructing the state.⁸⁹ SC Res. 1386 (2001) endorsed the Bonn process, and an International Security Assistance Force (ISAF) was authorised under chapter VII to assist the Afghan Interim Authority in the

⁸² SC Res. 1509 (2003) para. 3, pursuant to the framework for establishment of a longer-term United Nations stabilization force to relieve the ECOMIL forces, as set out in SC Res. 1497 (2003).

⁸³ SC Res. 1509 (2003) para. 15.

⁸⁴ International Reconstruction Conference on Liberia, 5 - 6 February 2004, Trusteeship Council Chamber, United Nations New York, Organized by the United States, World Bank and the UN Development Group with support from a core group of donors

⁸⁵ See, e.g., the Governance and Economic Management Assistance Program (GEMAP) 9 September 2005, which conditions aid on certain legal and administrative steps ‘to improve financial and fiscal administration, transparency and accountability’; see also R. Sannerholm, ‘Legal, Judicial and Administrative Reforms in Post-Conflict Societies: Beyond the Rule of Law Template’. (2007) 12 *JCSL* 65 at 86-93.

⁸⁶ See The World Bank's Engagement in Liberia <<http://go.worldbank.org/03L26ZL4Q0>>.

⁸⁷ See Ninth progress report of the Secretary-General on the United Nations Mission in Liberia, S/2005/764, p. 7, 7 December 2005.

⁸⁸ See Sixteenth progress report of the Secretary-General on the United Nations Mission in Liberia, S/2008/183, 19 March 2008, p. 7.

⁸⁹ Bonn Agreement, *op. cit.*, fn. 32, Annexes I – III.

maintenance of security in Kabul and its surrounding areas.⁹⁰ The resolution further called upon those contributing to the ISAF 'to help the Afghan Interim Authority in the establishment and training of new Afghan security and armed forces'.⁹¹ Wider international involvement has also been called for in relevant resolutions such as SC Res. 1419 (2002) which:

Stresses once again the importance of continued international support to complete the process according to the Bonn Agreement, *calls upon* donor countries that pledged financial aid at the Tokyo conference to fulfil their commitments promptly and *calls upon* all Member States to support the Transitional Authority and to provide long-term assistance, as well as current budget support, for the current expenses of the Transitional Authority, and for the social and economic reconstruction and rehabilitation of Afghanistan as a whole.⁹²

The Afghan Government provides a consensual basis to the wider international involvement.⁹³ The funds and assistance pledged and provided to Afghanistan have far outstretched the other examples, aside from Iraq.⁹⁴ The US alone in the financial year 2004 provided some 2.2 billion US dollars, and amongst a variety of other projects trained thousands of Afghan soldiers and police.⁹⁵

E. Iraq after Belligerent Occupation

In Iraq, the transfer of political authority to the interim government signified the formal end of the occupation by the coalition forces.⁹⁶ In respect of the subsequent

⁹⁰ SC Res. 1386 (2001) para. 1.

⁹¹ SC Res. 1386 (2001) para. 10.

⁹² SC Res. 1419 (2002) para 10.

⁹³ See, e.g., the website of the U.S.-Afghanistan Reconstruction Council (US-ARC) a non-profit, non-partisan 501(C)(3) organization, with an extensive range of reconstruction projects at the local level, which stresses that '[a]ll of US-ARC's projects have been approved with a written authorization from the local Shuras (Councils) and government ministries.' Available at <<http://www.us-arc.org/about.asp>>

⁹⁴ See, e.g., The Afghanistan Compact, arising out of the London Conference on Afghanistan 31 January – 1 February 2006, outlining the various commitments of the government and various international actors; and Official Review of the Joint Declaration of an Enduring Relationship between the UK and Afghanistan: An Enduring Relationship Action Plan, 14 February 2007 both, available at <www.fco.gov.uk> (under Afghanistan county profile).

⁹⁵ Progress in Afghanistan's Reconstruction, Fact Sheet Office of the Spokesman, Washington, DC, 26 March 2004, available at <<http://www.state.gov/r/pa/prs/ps/2004/30803.htm>>.

⁹⁶ See comments from U.S. administrator Paul Bremer at the ceremony to hand over sovereignty as reported by Washington Post Foreign Service, Monday, 28 June 2004; 2:55 PM <www.washingtonpost.com>, 'You are ready now for sovereignty and we think it's an important part of our obligation as temporary custodian to return the sovereignty to you ... I have confidence that the Iraqi government is ready to meet the challenges that lie ahead.'

basis for international involvement, SC Res. 1546 (2004) is a key resolution.⁹⁷ The resolution sets out a detailed plan for procedures related to the reconstruction of Iraq, all under a chapter VII heading. It reaffirms the multinational force as a chapter VII authorised force, but also stresses that it is deployed at the request of the incoming interim government,⁹⁸ and accordingly will terminate the mandate if requested.⁹⁹ It provides the UN with a broad assistance mandate,¹⁰⁰ and acknowledges that the multinational force will also have a major role in security sector reform.¹⁰¹ Furthermore, it requests international assistance to be given to the interim government with the rebuilding of the economy,¹⁰² and welcomes such efforts at the request of the government with rebuilding administrative capacity.¹⁰³ Subsequent resolutions have followed a similar approach and the multinational force in Iraq today still benefits from chapter VII authorisation.¹⁰⁴ The vast array of international assistance that funds and facilitates the reconstruction of Iraq operates on the basis of the consent of the Iraqi government.¹⁰⁵

F. The Commonality in International Involvement and Legal Basis

Efforts at reconstruction require stability and order. The first aim in the assistance model has been to establish and maintain security throughout the state through an international military presence. The other emphasis of the assistance model is helping the government to develop the capacity to govern effectively in a sustainable manner. This has been through assistance that collectively facilitates the change and

⁹⁷ Actually passed 20 days before the interim government took office, see C. J. Le Mon, 'Legality of a Request by the Interim Iraqi Government for the Continued Presence of United States Military Forces' (2004) *ASIL Insights*, <www.asil.org/insights/>.

⁹⁸ SC Res. 1546 (2004) para. 8.

⁹⁹ SC Res. 1546 (2004) para. 12.

¹⁰⁰ SC Res. 1546 (2004) para. 7.

¹⁰¹ SC Res. 1546 (2004) para. 14.

¹⁰² SC Res. 1546 (2004) para. 20.

¹⁰³ SC Res. 1546 (2004) para. 19.

¹⁰⁴ See, e.g., SC Res. 1723 (2006) para. 1.

¹⁰⁵ See, e.g., International Compact with Iraq, 3 May 2007, available at <<http://www.iraqcompact.org/>>; the Compact is a framework for mutual commitments, p. 3, and has been referred to in SC Res. 1723 (2006) preamble, as 'an initiative of the Government of Iraq to create a new partnership with the international community and to build a strong framework for Iraq's continued political, security and economic transformation and integration into the regional and global economy, and *welcoming* the important role that the United Nations is playing by jointly chairing the Compact with the Government of Iraq.'

development of the state and civil infrastructure. There has been assistance right across the political, economic, legal, and civil sector spheres of the state. It has been financial support in the form of grants for specific projects, and loans, as well as the provision of technical assistance, resource, and physical construction work. It has come from an array of different international actors. Moreover, as well as providing security through their own continued presence, the military forces are also mandated to assist the respective governments develop the capacity to ensure security on departure of the international forces.

Across all the examples an international military presence has secured short-term effectiveness. The legal justification for this military presence is found in chapter VII resolutions as well as state consent. The wider international involvement, which has been essential for the change and development of state and civil infrastructure, has been called for in relevant chapter VII resolutions, but it rests on a consensual basis. The international involvement, viewed as a continuum, is intended to make an ineffective government effective. In light of effective control of territory being the traditional basis in international legal doctrine for the identification of the agent of the rights of the state and its people, there is good reason to be interested in how this practice relates to the right to political independence of the target state and its people.

5. The Assistance Model and Political Independence

The assistance model is a consequence of the realisation amongst policy makers that there is a need for a long-term commitment, rather than just a quick fix military solution, to conflict resolution. Thus the military presences have started to stay more long-term and wider international involvement has been called for to help reconstruct the state. Consequently, it is only relatively recently that the assistance model, to the extent witnessed in the examples addressed by this study, has become a common feature of the international arsenal for responding to ineffective states.

The assistance model consists of a variety of international involvement from a range of international actors, in this respect, and as a domestic government administers the process, the assistance model of state reconstruction is less striking than belligerent occupation or international territorial administration in terms of

impact on the right to political independence.¹⁰⁶ This can help to explain its popularity at a time when a core tenet for international order remains respect for political independence.

If one takes the wider international involvement on an individual basis, one might struggle to find reason for concern in relation to the right to political independence. For example, the level of impact that assistance with the redesign and construction of a road system has on the right of the people to decide on change and development of the state and civil infrastructure is hardly a concern in itself.¹⁰⁷ The fact that this wider involvement is from a range of international actors also helps obscure any thoughts that this involvement infringes the right to political independence. In other words, if one state were responsible for a vast array of the wider international involvement, suspicions that this was perhaps affecting the rights to decide of the target state and its people would be much more readily aroused. It is when one sees the international involvement as a continuum that the true impact on the right to political independence emerges.

The military intervention in the examples cited has been intended to bring order to the target territory. Had the government retained even a modicum of independent effective control one would have been reassured about the government's credentials as the agent of the state and its people. Accordingly, how it governed during the international military presence could be accepted as in accordance with the will of the state and its people. This is how the situation in El Salvador, highlighted above, for example, is understood by this study. However, without a modicum of independent effective control to begin with, the international military presence has a much greater influence on which political entity is able to exercise the governmental authority as the agent of the will of the state and its people. In other words, the more a government is able to exert control independently at the point when the international military presence arrives, the less impact the support provided to this government will have on any contests for governmental authority which might have

¹⁰⁶ In this respect, it is interesting to note that the prospect of international transitional administration in the sovereign state of Afghanistan was never seriously considered, see *The Situation in Afghanistan and its Implications for International Peace and Security: Report of the Secretary-General*, 18 Mar. 2002, para. 98, UN Doc. A/56/875-S/2002/278; see also Kreilkamp, *op. cit.*, fn. 39, p. 662.

¹⁰⁷ See, e.g., UN Press Release, *Liberian Government, World Bank and UN sign landmark agreement to rebuild key roads*, 30 November 2006, UNMIL, PR 139, available at <<http://unmil.org/article.asp?id=1840>>.

been fuelling conflict. Thus whether one views it as peacekeeping or peace enforcement,¹⁰⁸ and there has been a mixture, the point is that without the international military presence, in the examples of the assistance model, the government which has provided the consensual basis lacked even a modicum of effective control of the territory and consequently must struggle in terms of credentials for being treated as the agent of the rights of the state and its people.

If one views the wider international involvement with the military presence as a continuum, it is apparent that an ineffective government has been provided with the short-term effectiveness and the capacity to reconstruct the state. As the notional authority to consent to international involvement has come from international recognition, such practice clearly impacts upon the rights to decide, albeit in a less obvious manner than direct foreign governance. The circumstances that have played out in Haiti over the last two decades are a particular reason to be concerned about the neglect of political independence that appears to be involved in the assistance model of state reconstruction.

In Haiti in 1994, Aristide enjoyed overwhelming international support for his continuation in government despite effective control of the state being lost. In Haiti in 2004, Aristide again lost effective control. This time, rather than assist with the restoration of effective control, some of the same international actors that had previously helped secure international support encouraged Aristide to step aside. Now international support favoured a government that was selected by a prime minister who had been selected by seven eminent persons that had been identified by two prominent Haitian politicians and a representative of international society.

The obvious subjectivity of the international actors with regards the choice of government to place in effective control of the state is made all the more significant because the government is put in a position where it has the authority and the capacity to introduce significant reforms in state and civil infrastructure. Some examples from the most prominent common themes of extensive economic, security, and political restructuring include: in Haiti in 1994, Aristide disbanded the Haitian armed forces;¹⁰⁹ in Haiti from 2004, the armed forces were restored;¹¹⁰ in both Sierra

¹⁰⁸ See Chapter 2 for discussion of the distinctions, and relevance in terms of projected impact on the right to political independence.

¹⁰⁹ See Malone and von Einsiedel, *op. cit.*, fn. 8, p. 185.

¹¹⁰ World Bank, Haiti: Recent Progress in Economic Governance Reforms, October 2006 available at <<http://go.worldbank.org/PF8ERYHLA0>>.

Leone and Liberia there have been efforts to reorganize the diamond industry, a significant natural resource of these states;¹¹¹ in Sierra Leone, there have moves towards the devolution of political authority aimed at reactivating absent local government;¹¹² in Liberia, efforts continue with the reform of the judicial system;¹¹³ in Iraq, efforts continue with the refinement of a constitutional text;¹¹⁴ in Afghanistan the government continues to move towards a more market orientated-legal system.¹¹⁵ Thus the government is not only placed in control of the state by international actors, it exercises the rights to decide. Accordingly, there is a more permanent impact on the design of the state and civil infrastructure than if the internationally supported government were simply charged with the practical tasks of administration, such as ensuring payment of civil service workers.

It is readily apparent that the underdeveloped rules on the expression of the will of the state in international law have been essential in enabling international actors to find an agent for the rights of the state and its people. The core element in this process has been the ability of international recognition to establish the status of a government, in the sense of international law, where there is no effective government. As was noted in Chapter 2, while it makes practical sense that such a government should be able to offer valid consent to activity which does not affect sovereign rights, such as a postal treaty, it does not follow that the same should be true for activity which touches upon sovereign rights. The key concerns with the assistance model in relation to the right to political independence are about the credentials of the otherwise ineffective domestic government to be treated as the agent of the right of the state and its people to political independence. And, thinking about the discussion in Chapter 2 of attempts at surreptitious circumvention of the law of occupation by fictitious consent, there is reason to be concerned about the

¹¹¹ See Partnership Africa Canada and the Network Movement for Justice and Development, 'Diamond Industry: Annual Review', (January 2004) available at <www.pacweb.org>.

¹¹² See International Bank for Development and Reconstruction, 'Sierra Leone: The Role of the Rapid Results Approach in Decentralization and Strengthening Local Governance', *Findings Report 261* April 2006 (on file with author); Statement by his Excellency Alhaji Ahmad Tejan Kabbah, President of the Republic of Sierra Leone at the Special United Nations Conference on Sierra Leone held at the United Nations, New York, on 30 July 1998 (on file with author).

¹¹³ See Sixteenth progress report of the Secretary-General on the United Nations Mission in Liberia, S/2008/183, 19 March 2008, p. 10, para. 44.

¹¹⁴ See The International Compact with Iraq A New Beginning, Annual Review May 2007-April 2008, p. 16, para. 2.1.3, available at <<http://www.iraqcompact.org>>.

¹¹⁵ See the website of the Afghan Ministry of Commerce and Industry for details of the moves towards establishing a legal and regulatory framework necessary for the functioning of an efficient free market economy <<http://www.commerce.gov.af/Minister-Farhang-004.asp>> last accessed 05/05/08.

ability of an otherwise ineffective government to resist the designs of the international actors, either explicit or implicit, as to how the state should be reconstructed. The apparent neglect of political independence puts at risk the values of self-determination and international peace, and one, given the importance of these values for international order, is thus led to wonder about what underlies international acceptance of the model.

6. The Portrayal of the Assistance Model as Unremarkable

The legal justifications for the assistance model operate without a particular concern for the credentials of the government as an agent for the rights of the state and its people. Thus the law permits a government with little attachment to the state or its people to be put in effective control of the state. Furthermore, in relation to the preservation of political independence, one imagines that such a government would have difficulty resisting the designs of the international actors in relation to the reconstruction of the state and civil infrastructure. Still, the scholarly literature on state reconstruction through assistance is dominated by policy recommendations on how to improve the success of the international efforts.¹¹⁶ Moreover, where the subject of legality is broached, commentators tend not to look beyond the identification of a valid legal basis for international involvement.¹¹⁷ Does this mean that the assistance model is of little significance in relation to the core UN system values of international peace and self-determination of peoples, which are put at risk by a neglect of political independence?

In order to establish whether the assistance model of state reconstruction is in fact a practice to be concerned about, it is necessary to address some of the legal issues that revolve around the assistance model and which can help project the risk to political independence and the attendant values as unremarkable for the UN system.

A. International Recognition

¹¹⁶ See e.g., Stromseth, Wippman and Brooks, *op. cit.*, fn. 22.

¹¹⁷ See, e.g., B. Oswald, 'Model Codes for Criminal Justice and Peace Operations: Some Legal Issues', 9 *JCSL* (2004) 253 at 253; Stromseth, Wippman and Brooks, *op. cit.*, fn. 22, p. 51.

The lynchpin for the legality of assistance model is sufficient international recognition of the ineffective government. While international recognition remains evidence of status rather than the source, without international recognition there would be little else to base the status of the respective governments on. How, though, does international recognition help the assistance model?

In the first place, the international legal significance that flows from international recognition, making a government the agent of the rights of the state and its people, could easily lead one to assume that recognition must be based on objective legal criteria; criteria that would guard against the international actors simply choosing whichever government they preferred, by requiring some meaningful attachment to the target state and its people.

Secondly, even if one appreciates that there are no objective legal criteria to structure international recognition policy, an overwhelming international consensus that a particular ineffective government is worthy of recognition tends to suggest that the government is in fact worthy of its status as agent for the rights of the state and its people.

The circumstances of the assistance model in Haiti indicate key reasons for being doubtful about the way international recognition portrays the assistance model as unremarkable in relation to political independence. With Aristide, in respect of Haiti in 1994, there was massive international support for the continued recognition of status.¹¹⁸ With regards the 2004 Haiti Transitional Government, support was not so unanimous. The Caribbean Community (CARICOM) refused to recognise the Transitional Government¹¹⁹ but crucially, key SC resolutions backed it and thus secured its status.¹²⁰ The subjectivity and legally unbound nature of recognition policy is emphasised when one contrasts the difference in approach to Aristide's elected government in 1994 and then in 2004.¹²¹ This indicates that it is the opinion of international actors not the people of the state that counts, which hardly helps to

¹¹⁸ See, e.g., the Organization of American States (OAS), '[t]o recognize the representatives of the Government of President Jean-Bertrand Aristide as the only legitimate representatives of the Government of Haiti', MRE/RES. 1/91 Corr. 1, OEA/Ser.F/V.1. 3 Oct. 1991, para. 3; endorsements from a wide variety of states at the Security Council meeting of 3 Oct 1991 UN Doc. S/PV. 3011.

¹¹⁹ Malone and von Einsiedel, *op. cit.*, fn. 8, p. 185.

¹²⁰ See, e.g., SC. Res. 1542 (2004) para. 7; on the significance of the endorsement of key international organizations for status see M. J. Peterson, *Recognition of Governments: Legal Doctrine and State Practice, 1815-1995* (1997) 42.

¹²¹ On the subjectivity of recognition policy see S. D. Murphy, 'Democratic Legitimacy and the Recognition of States and Governments' (1999) 48 *ICLQ* 545 at 572-73.

reassure one of the worthiness of the government even where there is international consensus.

The approach of CARCICOM, in contrast to other international actors in Haiti in 2004, shows the scope for disagreement amongst international actors about which government is worthy. And that, for governmental status when effectiveness is missing, it is the international majority, or the opinion of the stronger states, that makes the degree of recognition sufficient.¹²² It is thus not clear how many international actors must be in agreement before the recognition is sufficient to confer legal capacity on a government. Not only, then, is the matter of governmental status taken out of the hands of the people, but it is done so in a manner that defers to hegemonic tendencies in international society. This hardly makes one confident that there will be absolute agreement across international society on the worthiness of the assisted government, which would likely help reduce the threat to international peace, although, clearly not the value of self-determination. Indeed, the fact that Charles Gyude Bryant, former Chairman of the National Transitional Government of Liberia, stands charged with economic sabotage for misappropriating \$1.3 million during his tenure is a further illustration of the inherent risk that the international involvement will put a self-interested government in control of the state in question.¹²³

B. State Consent

All the international involvement in the assistance model, regardless of whether it is mandated under chapter VII, has a consensual basis.

The consensual basis removes any question of the law of occupation applying. The law of occupation applies when a state comes into uninvited effective control of the territory of a third state.¹²⁴ The law of occupation is a legal framework which guides the administration of the occupied territory. Its rationale is the preservation of

¹²² In this respect see Peterson, *op. cit.*, fn. 120, p. 42.

¹²³ See Sixteenth progress report of the Secretary-General on the United Nations Mission in Liberia, S/2008/183, 19 March 2008, p. 2, para. 6.

¹²⁴ The vast majority of the law of occupation is found in the 1907 Regulations Annexed to the Hague Convention No. IV Respecting the Laws and Customs of War on Land, in particular Articles. 42-56, and the 1949 Geneva Convention No. IV Relative to the Protection of Civilian Persons in Time of War, in particular Articles 27-34 and 47-78; the rules on application are found in Art. 42 (Hague Law) and common Art. 2 (Geneva Law); see also Chapter 4 of this study.

the occupied states' sovereignty and the humanitarian well-being of the people,¹²⁵ accordingly, there is a strict emphasis on conservation of the state and civil infrastructure.¹²⁶ That it does not apply in the assistance model can help project the international involvement as benevolent and of little threat to political independence because, one might reason, if there were a threat to political independence, surely the law of occupation would apply?

Similarly, by precluding the wrongfulness of the international involvement one might readily assume that the assistance model must be consistent with the rights of the state and the people — if not, surely it would be wrongful? In this respect, international recognition and valid consent are closely related; the fact that they are separate — that recognition does not necessarily entail valid consent — means that the validity of consent reinforces how the international recognition helps the assistance model in relation to the worthiness of the credentials of the government to be assisted.

The consensual basis is most significant because it portrays the government as being in charge of the change and development of the state and civil infrastructure. Thus, notwithstanding doubts about the attachment of the government to the state and the people, it suggests consistency with political independence. However, in a context where the legal status is the result of the recognition by international actors, rather than on the basis of objective legal criteria, and all effectiveness both present and in the near future appears dependent on international actors, it is far from guaranteed that the government could resist the desires of the international actors, explicit or implicit, as to how the state and civil infrastructure is developed. One might query, for example, how much leverage the Haiti Transitional Government had when developing the Interim Co-operation Framework in partnership with the international actors that would finance and enable the reconstruction it envisaged to be implemented.

That there is at least some uneasiness from some of the international actors about the government's status as an agent of the rights of the state and its people might be suggested from the fact of the double legal justification for military intervention.¹²⁷

¹²⁵ See A. Roberts, 'Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967', (1990) 84 *AJIL* 44 at 46.

¹²⁶ See E. Benvenisti, 'The Security Council and the Law on Occupation: Resolution 1483 on Iraq in Historical Perspective', (2003) 1 *Israeli Defense Forces Law Review* 19 at 20-1 and 23-7.

¹²⁷ See, making a similar point, Wippman, *op. cit.*, fn. 5, p. 672 note 225.

If the government is competent to consent to international involvement that puts it in control of the state then surely this should apply across the board, so why supplement consent with a chapter VII basis?

7. The Importance of Chapter VII for the Assistance Model

The UN SC's competence to create superior legal obligations and authorise activity that would otherwise be wrongful without contemporary consent, in the pursuit of international peace and security, is of huge significance for international law.¹²⁸ Not only does the SC have the ability to provide legal justification for activity that would otherwise be wrongful, but also, because of its position at the apex of the UN collective security system, it is able to confer certain activity with a degree of legitimacy that cannot be found from elsewhere.¹²⁹ This last point is sustained whether the activity is explicitly authorised in a chapter VII resolution or merely endorsed.

In the assistance model, only the security aspects are chapter VII authorised. This addresses any lingering doubts about whether such intervention on the basis of consent alone would be legally justified. But it also might be taken as a signal that all assistance to the government that benefits from the military intervention is legitimate □ a point made explicit in the relevant resolutions which call for wider assistance to the otherwise ineffective government to help it sustain effectiveness once the international military presence leaves.¹³⁰ Thus concerns about the effect of the assistance model on the political independence of the target state are assuaged because it is in pursuit of international peace and security and the most authoritative voice on the matter, the SC, has deemed it as such. However, there are reasons why it is not prudent for the SC to be blasé about the preservation of political independence.

One possible reason for relying solely on consent for the wider assistance is that this helps to present the actual process of reconstruction as an internal matter of the target state. If the SC authorise the wider assistance, this would take the choice of

¹²⁸ Article 2 (7), UN Charter, makes enforcement measures under chapter VII the exception to the prohibition on UN involvement with matters within the domestic jurisdiction of any state, see Chapter 2 of this study.

¹²⁹ E. Milano, *Unlawful Territorial Situations in International Law* (2006) 274.

¹³⁰ See, e.g., in relation to Haiti from 2004, SC. Res. 1542 (2004) para. 13.

whether to accept the assistance out of the hands of the domestic government, it would be internationally obligated to accept the assistance. Thus it would be harder to square with the idea that the only assistance that is received is that which the government desires, and, accordingly, with preservation of political independence. Should the SC be concerned with political independence if it is acting in the interests of international peace?

The SC has a significant ability to legitimise and thereby make tolerable activity that might otherwise be questionable in relation to core values of the UN system. However, if this ability is misused to confer legitimacy where it is not deserved, then the strength of its power in this respect will weaken.¹³¹ The SC should therefore use its authority in a responsible manner. In this respect, for the sake of its own legitimacy, even if not legality, there are certain international legal principles of such fundamental importance that the SC even under chapter VII should seek to abide by.¹³²

The apparent desire of the SC to render the assistance model consistent with political independence by limiting its chapter VII authorisation to the military aspects and overlapping this with state consent can be seen as evidence of the argument about adherence to fundamental legal principles. Yet, as noted, the consensual basis of the assistance hardly improves the situation in relation to the preservation of political independence. What this means is that both legal justifications benefit from the chapter VII □ state consent composite. The SC benefits because the dominance of state consent as a legal justification for the assistance model as a whole presents the operation as more consistent with political independence. State consent benefits from endorsement in a chapter VII resolution because of the inherent reassurance that, regardless of the credentials of the government, it is in the interests of international peace that this government receives international support to enable it to remain in control of the target state.

Does this projection render the neglect of political independence unremarkable in reality? One might be more inclined to accept the neglect of political independence as insignificant if it were just a right of the state to political independence at stake. This is because the rights of the state are obtained through a display of effectiveness.

¹³¹ Milano, *loc. cit.*, fn. 129.

¹³² N. D. White, 'The Will and Authority of the Security Council after Iraq', 17 *LJIL* (2004) 645 at 672.

Thus the ethical argument for protecting them is solely in the interests of peace, and, as the actions of the SC are based on the pursuit of international peace and security, the SC aspect may more readily persuade one that any consequential neglect of political independence is not of significance.

However, the assistance model also puts at stake the right of the people to political independence found in the legal right of self-determination, which exists regardless of effective control. The ethical strength of the people's right to political independence rests on the political value of self-determination, which stresses the importance of all peoples having the possibility of self-government. Its importance as a core value of the UN system is testified to by the fact of the continuation of the ineffective state as state for a prolonged period of time.¹³³ In light of this, one would be less inclined to tolerate neglect of political independence or expect international acceptance where its infringement was legitimated only by the pursuit of international peace. Not least, because neglect of the value of self-determination can pose a threat to international peace. One would thus expect widespread international acceptance to rest on attempts to address the value of self-determination beyond state consent where there is no independently effective domestic government.

8. The Role of Democracy in the Assistance Model

This study operates on the basis that the protection of political independence is important for the values of self-determination of peoples of international peace. Moreover, when the continuing status of the state is underpinned by protection of the people's right to political independence, to violate this right in the pursuit of state reconstruction would be to contradict the reason for the state remaining a state. Putting an ineffective government in control of the state brings political independence into doubt because of a lack of concern in the recognition-consent mechanism for the credentials of the government; and the influence that the international actors can have over an ineffective government in respect of how the state is reconstructed. A chapter VII aspect can assuage concerns in relation to international peace, but does nothing to improve the assistance model in relation to

¹³³ See Chapter 1 of this study.

the value of self-determination. In this latter respect, the pursuit of democracy appears significant.

As a political principle, President Wilson, a key proponent, saw self-determination as entailing democracy.¹³⁴ In an ideologically pluralistic international society, self-determination as a legal right has traditionally stood for the right of a political community to political independence. An effective government has been as far as consensus has reached on means for identifying the agent of the right. Recalling Chapter 3, since the early 1990s there has, though, been debate about the position of democracy in international law. Some have concentrated on the emerging consensus on democracy as human right, focusing in particular on the meaning of Article 25 of the International Covenant on Civil and Political Rights.¹³⁵ Others, by linking it to the legal doctrine of self-determination and the associated idea of popular sovereignty,¹³⁶ have identified implications in the emerging consensus on democracy as a human right for matters of general international law such as governmental status.¹³⁷

Hence in a situation where there is no effective domestic government, but there is felt a need to identify a domestic government, the pursuit of democracy is the natural response for efforts that seek to accommodate the value of self-determination. Accordingly, in the examples of the assistance model cited, the governments assisted have either possessed democratic credentials or have promised to pursue democracy in the very near future. This helps project a reorientation in relation to the value of self-determination, the neglect of political independence is obscured and the international involvement cast as a necessary for the realisation of genuine rule by the people.

In light of how democracy has been treated in the other paradigms for state reconstruction, and that the assistance model is ostensibly the most unremarkable in relation to political independence, one is not confident in anything other than democracy having been treated as a loose political concept. This would mean little scope for regulation or accountability of an essential part of the explanation for

¹³⁴ M. Pomerance, 'The United States and Self-Determination: Perspectives on the Wilsonian Conception', (1976) 70 *AJIL* 1 at 20.

¹³⁵ See, e.g., S. Wheatley, *Democracy: Minorities and International Law* (2005) 135-150.

¹³⁶ See Chapter 1 of this study.

¹³⁷ See e.g., T. Franck, 'The Emerging Right to Democratic Governance' (1992) 86 *AJIL* 46; G. H. Fox, 'The Right to Political Participation in International Law' (1992) 17 *Yale Journal of International Law* 539.

international acceptance in light of the core values of the UN system, which the assistance model, through neglect of political independence, puts at stake. Nonetheless, it remains important to clarify how democracy has in fact been treated. This is because, with the prominence of discussion of democracy in international law, there is a danger that one might be led to assume a legal concept of democracy has been adopted, with false hope of legal regulation and accountability. Moreover, if it can be demonstrated that the domestic and international actors involved are aware of the central role that democracy plays in justifying the practice in terms of the core values of the UN system, then there is more likelihood of a legal concept being adopted, if not to date, then in future efforts; in light of the advantages of a legal concept, that this study has revealed. The present circumstances in Somalia help to illustrate why such an investigation is particularly pertinent at the time of writing.

9. Somalia, the Assistance Model in Waiting

In 1991, President Barre, leader of Somalia for 21 years, was finally ousted from office and Somalia descended into clan based civil war.¹³⁸ Peace talks were held in Djibouti in early summer 1991 but General Aideed, leader of a major faction, rejected the proposed accord.¹³⁹ The plight of the Somalian people received substantial international attention. SC Resolution 733 (1992) imposed an arms embargo under Chapter VII and identified a threat to international peace and security on the basis of the 'heavy loss of human life and widespread material damage resulting from the conflict ... and ... its consequences on the stability and peace in the region'.¹⁴⁰ UNOSOM I deployed in April 1992 as a peacekeeping mission with the consent of the two main factions, one of which represented the side that had been the government.¹⁴¹ As Gray notes, 'it was the consent of the government, even though it was no longer in effective control of the whole territory, that was relied on in the SC resolutions establishing and deploying the United Nations Operation in

¹³⁸ See Kreijen, *op. cit.*, fn. 2, pp. 67-68, Barre died in exile in Nigeria in 1995.

¹³⁹ *UNYB* (1992) 198-9.

¹⁴⁰ SC Res. 733 (1992) preamble.

¹⁴¹ 1992 Mogadishu Ceasefire Agreement; by SC Res. 746 (Mar 17, 1992) the Council noted that the ceasefire agreement included 'agreements for the implementation of measures aimed at stabilising the ceasefire through a UN monitoring missions'; see also SC Res. 751 (1992).

Somalia (UNOSOM I) peacekeeping force.’¹⁴² A lack of local co-operation meant UNOSOM I was unable to complete its mandate.¹⁴³ On 3 December 1992 the Council ‘Acting under Chapter VII ... authorises the Secretary General and Member States cooperating to implement the offer [from the United States to lead an operation] to use all necessary means to establish as possible a secure environment for humanitarian relief operations in Somalia.’¹⁴⁴ US-led UNITAF (Operation Restore Hope) was then deployed in December 1992, with an enforcement mandate but a humanitarian focus.¹⁴⁵ A UN-led enforcement mission, UNOSOM II, was created to takeover from UNITAF in March 1993,¹⁴⁶ which it eventually did in May 1993. With a realisation that a short-term military presence would not cure the anarchy that plagued Somalia the Secretary General was authorised to offer ‘assistance to the people of Somalia in rehabilitating their political institutions and economy and promoting political settlement and national reconciliation.’¹⁴⁷ In such conditions, however, who do you help reconstruct the state?

In March 1993, the Secretary General facilitated the conference of range of Somali parties in Addis Abba to, essentially, create a government and acquire a consensual basis for the international involvement. The Transitional National Council (TNC) was created and was identified as the ‘repository of Somali sovereignty’. The process, with no independent effective control on behalf the TNC, hardly sits well with the right to political independence. However, there was the chapter VII backing for the international involvement which stresses the importance for international peace and there was accommodation of the value of self-determination in that the goal was a ‘constitutional phase in which the institution of democratic governance, rule of law, decentralisation of power, protection of human rights and individual liberties, and the safeguarding of the Somali Republic are all in place.’¹⁴⁸ Osinbajo has noted how it is difficult to classify Somalia in terms of

¹⁴² C. Gray, ‘Host- State consent and United Nations Peacekeeping in Yugoslavia’, (1996) 7 *Duke J. Comp. & Int’l L.* 241 at 244.

¹⁴³ *UNYB* (1992) 208.

¹⁴⁴ SC Res. 794 (1992).

¹⁴⁵ See Chesterman, *op. cit.*, fn. 33, p. 143.

¹⁴⁶ SC Res. 814 (March 26 1993).

¹⁴⁷ SC Res. 814 (March 26 1993).

¹⁴⁸ Addis Ababa Agreement concluded at the first session of the Conference on National Reconciliation in Somalia, 27 March 1993, Section IV, available at <http://www.usip.org/library/pa/somalia/somalia_03271993.html>.

precedents for international involvement in a foreign territory.¹⁴⁹ From the perspective of this study, in 1993, Somalia looked like being the first effort at the assistance model of state reconstruction. An ineffective government was to be made effective and put in a position to reconstruct the state. However, as Fox notes, 'those holding real power in Somalia were unwilling to cede authority to the TNC, and the well-known collapse of the Somalia mission put an end to Council efforts to promote that body as the center of a democratic nation-building enterprise.'¹⁵⁰

Somalia, then, was left to the mercy of the warlords, and this, to a large extent, is how it has remained, with the exceptions of Somaliland and Puntland where there has been relative peace and stability.¹⁵¹ In August 2002, an assembly of elders elected a Transitional National Government, it struggled to gain any control and was described as without 'power, capability or support from the people.'¹⁵² At peace talks in Kenya in October 2002 Kreijen describes how it was treated as merely one of many Somali factions.¹⁵³ More recently, however, the prospect of another attempt at an assistance model of state reconstruction in Somalia has started to look more likely.

In 2004, a new transitional government was set up in exile in Nairobi. In exile the government had no control over the territory. And the only election was of the President by the parliament appointed by the participants in attendance at the 2004 Inter-Governmental Authority on Development (IGAD) political conference where it was set up. Still the government is treated by international actors and considers itself as the total agent of the rights and obligations of the state and its people in international law.¹⁵⁴ This point is borne out by the international recognition and the toleration of Ethiopia's, January 2007, military intervention in Somalia at the request of that government, against contestants who controlled far more of the population and territory. While it continues to promise to be pursuing democratic elections, international support for the Transitional Government looks like it will continue.¹⁵⁵ It

¹⁴⁹ Y. Osinbajo, *Legality in a Collapsed State: the Somali Experience* (1996) 45 *ICLQ* 910 at 911.

¹⁵⁰ G. Fox, 'Democratization', in D. M. Malone (ed.), *The U.N. Security Council: From the Cold War to the 21st Century* (2004) 69 at 75; see also Osinbajo, *op. cit.*, fn. 149.

¹⁵¹ For an overview of Somalia after the UN left, see Kreijen, *op. cit.*, fn. 2, pp. 66-73.

¹⁵² G. El Koury, 'Somalia: Black Hawk Down No More. A Field Report', issued by the Public International Law and Policy Group (2002) 4.

¹⁵³ Kreijen, *op. cit.*, fn. 2, p. 73.

¹⁵⁴ See 2004 Transitional Federal Charter of the Somalia Republic, Article 1.1.

¹⁵⁵ See, e.g., answer of the UK Secretary of State for Foreign and Commonwealth Affairs, Hansard Written Answers, 16 Jan 2007, Col. 986w: 'We fully support Somalia's Transitional Federal

is, though, not yet receiving the massive international military presence that it would need to be put in effective control of the state and to allow for meaningful reconstruction.¹⁵⁶ Given the international toleration of the Ethiopian intervention there is a real prospect that such a military presence might not be chapter VII authorised. Even with chapter VII, an operation designed to put this transitional government in power and in a position where it can reconstruct the state would be the most strikingly inconsistent, in the sense of the right to political independence, example of the assistance model of state reconstruction to date. In such a context how the value of self-determination is addressed assumes monumental importance for international law, a promise to pursue a loose political concept, which can easily be reneged upon, would appear woefully insufficient.

10. Conclusion

While the consensual basis and the fact of domestic administration portray consistency with the right to political independence, it has been argued that the assistance model of state reconstruction neglects political independence of the target state and its people. This is because of concerns about the credentials of an ineffective government to be put in control of the change and development of the state and civil infrastructure, as well as its ability to resist the designs on the international actors that keep it in authority.

It is the under-developed rule of the expression of the will of the state, that become subservient to subjective international recognition in the absence of an effective government, which make the preclusion of wrongfulness possible. However, without further effort to address the values of self-determination and international peace that are put at stake by the neglect of the right to political

government and Institutions in their efforts to find a lasting and inclusive political settlement, and to become an effective governing authority. The Transitional Federal Charter sets out a roadmap for a constitutional process and eventual transition to a democratically elected government. This is the framework within which the Transitional government should pursue a political process in Mogadishu. We are working with the Transitional government and Institutions, and our international partners, to help stabilise Somalia through the early deployment of a regional security force, restore governance through an inclusive political process, and rebuild Somalia through increased international assistance.'

¹⁵⁶ See J. Gettleman, 'Somalia Town Falls to Insurgent Raid', *International Herald Tribune*, 1 April 2008 available at <<http://www.ihf.com/articles/2008/03/31/africa/31somalia.php>>.

independence it has been argued that international acceptance of the model would be far less likely.

While chapter VII endorsement provides important reassurance that the process is in the interests of international peace it does not, however, address the value of self-determination. Projection of the accommodation of the value of self-determination is found in the persistent desire to realise democracy, which suggests that the process is one that will provide genuine rule by the people. Looking at the present circumstances in Somalia, there is a clear need for clarification of how democracy has actually been treated in these examples. This is because, in circumstances where the government has so clearly been selected without any meaningful input from the people, as is the case with the Transitional Government of Somalia, a promise to pursue a loose political concept of democracy is hardly a sufficient excuse for the infringement of political independence that putting this government in control of the state would represent. There is a need for regulation and accountability of the government that exercises the rights to decide on the basis of the pursuit of democracy. This could be through a legal view of democracy linked to the right to self-determination. Accordingly, the next chapter surveys how democracy was treated in the process of reconstruction of Sierra Leone, to indicate more fully the essential importance of the pursuit of democracy for justification and international acceptance, in light of the UN system values at stake, of the assistance model. And, to search for evidence of democracy being treated as more than a loose political concept, in light of the discussions on the position of democracy in international law.

Chapter 7

Democracy in the Reconstruction of Sierra Leone

1. Introduction

All the examples of the assistance model have involved governments with democratic credentials or governments that at least promise to pursue democracy. Space and time do not permit an in-depth inquiry into the role of democracy in all the examples of the assistance model. Accordingly, to better clarify the importance of democracy for those involved as a justification for the international involvement, and, related to this, the likelihood of democracy being treated as a legal concept linked to the right to self-determination in future efforts, this chapter concentrates on just one example, Sierra Leone. The chapter asks, is there evidence to suggest that the domestic and international actors involved are aware that the pursuit of democracy, because of its ability to accommodate the value of self-determination, is an essential element in the excuse for the neglect of political independence? If so, there is a basis for hoping that a legal concept of democracy will have been adopted. In view of this, it further asks, is democracy treated as a loose political concept or a legal concept linked to the right of self-determination? And, as a means of highlighting the utility of a legal concept of democracy, how does the way in which democracy has been treated relate to the actual accommodation of the value of self-determination?

Sierra Leone is chosen as the focus for a couple of reasons. Firstly, it is the example of the assistance model that appears, in relative terms, to have been the most successful, both in terms of the realisation of independent effective control of the territory and a functioning democratic form of government. It is the example which best provides the complete cycle of lack of effectiveness, international intervention, reconstruction, and eventual independent effectiveness. This means the Sierra Leone example provides all the stages of the assistance model, and thus potentially offers the fullest picture of the utility of democracy as a device for engendering international acceptance of a practice that does not sit easily with the right to political independence. Secondly, a significant amount of scholarly comment

was generated about whether the military intervention to return the government of exiled President Kabbah heralded a right to restore democratic government through the use of force.¹ Regardless of the outcome of this debate,² the obvious importance placed on Kabbah's democratic credentials as a justification for returning him to power, suggests that if there was to be an example in which a legal approach to democracy linked to the right to self-determination was adopted, it would be this one. The fact that Sierra Leone occurred some years after the return of President Aristide to Haiti in 1994, the other example often addressed in terms of a right to use force to restore democracy,³ means that developments in relation to a legal concept of democracy and the link with the right to self-determination were more established. And, consequently, there is more chance of a legal concept of democracy being linked to self-determination in Sierra Leone, than Haiti 1994. Indeed, following the General Comment of the HRC on Article 25 ICCPR in 1996, Sierra Leone is the first example, of all examples of state reconstruction without an independently effective domestic government addressed by this study, where there was a readily identifiable emerging consensus on a legal concept of what Chapter 3 identified as genuine democracy.

The chapter argues that both the domestic government and international actors were aware of the importance of democracy as a means of accommodating of the value of self-determination. It is contended, however, that there is no evidence to suggest that democracy is treated as a legal concept linked to the right of self-determination. The flexibility that is necessary in the peacemaking context is argued to help explain why democracy as a political concept is preferred. However, it is argued that the value of self-determination would be better accommodated if a legal concept of democracy linked to the right to self-determination were adopted. This is primarily because the scope for regulation and accountability would provide an incentive for the government to continue to commit to the democratic ideal beyond elections, as well as a reason for the people to trust that they so committed. Furthermore, it is contended the flexibility that is necessary for the peacemaking

¹ See, e.g., K. Nowrot & E. W. Schabacker, 'The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS intervention in Sierra Leone' (1998) 14 *Am. U. Int'l L. Rev.* 321.

² See discussion in S. Chesterman, *You the People: The United Nations, Transitional Administration and State-Building* (2004) 88-109 and 157-159.

³ See M. W. Reisman, 'Haiti and the Validity of International Action', (1995) 89 *AJIL* 82.

process could be addressed, in the proposed law, through reasonable exceptions in the interests of international peace.

The chapter begins by outlining some of the recent political history of Sierra Leone, this is to indicate the context in which Kabbah was returned, to identify the period to be surveyed, and to show why it would be reasonable to expect a legal approach to democracy linked to the right to self-determination. Subsequent sections examine statements from the government and actual practice of governance in relation to democracy, so as to form a view on how the government saw democracy in relation to the value of self-determination, how it was treated in terms of political or legal concept, and how the approach might have been improved in terms of accommodation of the value of self-determination. Moving on, the next section examines the various peace agreements. This is to discover the relevance of democracy, how democracy was treated, and how a legal approach to democracy linked to the right to self-determination would relate to the process. To help glean a better view on how democracy is likely to be treated in future examples, the penultimate section surveys the international approach to democracy in Sierra Leone. This is both in terms of democracy's relevance and how it was treated while the government was otherwise, without international military assistance, ineffective. A final section draws together key themes and relates the findings to the study as a whole.

2. The History of Effective Control and Democracy in Sierra Leone

Sierra Leone was, up until 1961, a British colony, which had served as a home for freed slaves since the late Eighteenth Century.⁴ Political organisation in the territory had already made modest moves towards democracy before the granting of independence. This was through the progressive enlargement of the legislative council that was created in 1863. By 1957, most men could vote, along with women taxpayers or property owners, and there was more than one political party contesting the elections.⁵ The 1951 constitution was introduced as the framework for

⁴ See ECOWAS.info, *Country Profile for Sierra Leone: History* available at <<http://ecowas.info/slehist.htm>>, last accessed 02/09/08.

⁵ See, for an overview of political developments up to the granting of independence, Institute for Security Studies, *Profile of Sierra Leone: History and Politics* available at <<http://www.iss.co.za/af/profiles/SieraLeone/Politics.html>> last accessed 02/09/08; Commonwealth.

decolonisation. Local ministerial responsibility began in 1953, and constitutional talks in London, in 1960, led Sierra Leone to opt for a parliamentary system within the British Commonwealth.

In 1961, a new constitution was introduced and with it came independence on the 27 April 1961. The constitution provided for a unicameral parliament and Queen Elizabeth II as sovereign. The first general election with universal adult franchise was in May 1962.⁶

The elections of March 1967 saw the All Peoples Congress (APC) gain the controlling majority from the Sierra Leone Peoples Party (SLPP), with Siaka Stevens as Prime Minister. A series of short-lived coups followed, with Stevens and the APC restored to authority in 1968.⁷ A further attempted coup led Stevens to introduce a republican constitution, with himself made President in April 1971. Nationwide instability formed the backdrop to the adoption of a law that made Sierra Leone a one-party state in May 1978, the dominance of the APC in parliament obviously facilitated this.⁸ In 1985, Stevens was succeeded by his preference Major-General Joseph Momoh. Momoh won 99% of the vote as the only candidate.⁹

Momoh's reign struggled with allegations of corruption and bad management. An initial response was the passing of a Code of Conduct for Political Leaders and Public Servants,¹⁰ this was followed by the setting up of a constitutional review commission.¹¹ The Commission recommended a return to a multiparty democratic system, which Momoh eventually accepted in August 1991.¹² This did not stop Momoh being removed from power by an army coup led by Captain Valentine Strasser in April 1992, which suspended the constitution and set up the National Provisional Ruling Council (NPRC).¹³ In 1993, amidst public demand and a worsening security situation, a plan to hand over power to a civilian government in 1996 was announced, along with constitutional changes. These involved a reduction in the term of office of the president down to two four-year terms, an age

Sierra Leone Country Profile: History available at

<<http://www.thecommonwealth.org/YearbookInternal/145182/history>> last accessed 02/09/08.

⁶ US State Dept., *Sierra Leone: History*, available at <<http://www.state.gov/r/pa/ei/bgn/5475.htm>> last accessed 04.09.08.

⁷ Institute for Security Studies, *op. cit.*, fn. 5; US State Dept., *op. cit.*, fn. 4.

⁸ Institute for Security Studies, *op. cit.*, fn. 5.

⁹ Institute for Security Studies, *op. cit.*, fn. 5.

¹⁰ Institute for Security Studies, *op. cit.*, fn. 5.

¹¹ Commonwealth, *op. cit.*, fn. 5.

¹² See Institute for Security Studies, *op. cit.*, fn. 5; Commonwealth, *op. cit.*, fn. 5.

¹³ Institute for Security Studies, *op. cit.*, fn. 5.

requirement of 40, and two houses in parliament: a house of representatives to be elected for a term of five years and a senate made up of 25 regional representatives and five presidential nominees.¹⁴

Prior to the Valentine Strasser-led coup, the Revolutionary United Front (RUF), an opposition movement led by Foday Sankoh and financially backed by rebel leader, and future president of Liberia, Charles Taylor, had begun an armed insurgency.¹⁵ Following the coup, the insurgency continued in opposition to Strasser, and more territory fell out of governmental control. At one point in 1995 only the capital Freetown was under governmental control.¹⁶ The situation was improved somewhat by the hiring of the private security firm Executive Outcomes, this, with some 300 mercenaries, along with an uprising of civilian defence forces (Kamajors) managed to push the RUF away from the capital, back to enclaves along the border.¹⁷ Presidential and Parliamentary elections were conducted in February 1996, albeit subsequent to a coup in January 1996, led by Julius Maada Bio who ensured that the elections occurred on schedule.¹⁸

'Voters defied violence and sabotage by the RUF and army elements' to participate in the elections and return a coalition government.¹⁹ The SLPP was the most popular party, it gained 36.1% of the seats in the legislature, and 35.8% of the presidential votes went to Alhaji Ahmed Tejan Kabbah its candidate. At a run off on 15 March 1996, as no presidential candidate had made the required 55% share, Kabbah gained 59% of the votes to beat his closest rival Dr. John Karefa-Smart. Kabbah was sworn in as President on 29 March 1996, and reinstated the 1991 constitution in July 1996.²⁰

Efforts at reconciliation with the RUF, facilitated by ECOWAS and a UN envoy, resulted in the Abidjan Agreement of November 1996, which allowed the RUF to register as a political party and permitted it access to the media.²¹ There was, though,

¹⁴ Institute for Security Studies, *op. cit.*, fn. 5.

¹⁵ A. Adebajo and D. Keen, 'Sierra Leone', in M. Berdal and S. Economides (eds.), *United Nations Interventionism 1991 – 2004* (2007) 246 at 247; see also W. Reno, *Corruption and State Politics in Sierra Leone* (1996) 166.

¹⁶ Commonwealth, *op. cit.*, fn. 5; US State Dept., *op. cit.*, fn. 6.

¹⁷ See Adebajo and Keen, *op. cit.*, fn. 15, pp. 248 – 249; US State Dept., *op. cit.*, fn. 6.

¹⁸ See Commonwealth Secretariat, *Sierra Leone Presidential and Parliamentary Elections 14 May 2002: The Report of the Commonwealth Observer Group* (2006) 5-6.

¹⁹ Commonwealth Secretariat, *op. cit.*, fn. 18, p. 6.

²⁰ See Institute for Security Studies, *op. cit.*, fn. 5; Commonwealth Secretariat (2006), *op. cit.*, fn. 18, p. 6.

²¹ 1996 Abidjan Agreement, UN Doc. S/1996/1034.

little international support for the implementation of the Abidjan Agreement, 'either in terms of DDR or the provision of peacekeepers'.²² The UN at this stage was insisting on consent from all the parties to the conflict, not just the government, and this meant deference to the wishes of Sankoh the leader of the RUF, who would only permit a very limited number of UN observers.²³ Thus the government could do little to resist the military coup in May 1997 by soldiers of the Armed Forces Revolutionary Council (AFRC) led by Major Johnny Paul Koroma, who 'were joined with suspicious speed by the RUF rebels that they had ostensibly been fighting for the previous six years'.²⁴

Kabbah went into exile in Guinea. Koromah declared himself the new Chairman of the 20-member Armed Forces Revolutionary Council (AFRC), and Foday Sankoh of the RUF as the Vice-Chairman.²⁵ Fighting continued with the Kamajor and ECOWAS (primarily Nigerian) forces (the later was holding strategic positions with the consent of Kabbah) resisting the AFRC and RUF.²⁶ Reports suggest that Sandline International, a private military force, providing tactical and operational assistance services, assisted the Kamajors after being hired by Kabbah.²⁷ Such fighting prevented the coup from establishing order.²⁸ There was significant international condemnation and isolation of the rebel regime, and international recognition of Kabbah's government continued.²⁹

An ECOWAS brokered agreement with the coup leaders in Conarky, Guinea in October 1997 provided a 6-month framework for the return of Kabbah's government to authority in April 1998.³⁰ With signs that this agreement was breaking down, a Nigerian-led ECOWAS Ceasfire Monitoring Group (ECOMOG) used military force to bring to an end the military regime in February 1998.³¹ Kabbah returned to office in March 1998. And governance in accordance with the 1991 constitution resumed,

²² Adebajo and Keen, *op. cit.*, fn. 15, p. 254.

²³ D. Shearer, *Private Armies and Military Intervention* (1998), cited by Adebajo and Keen, *op. cit.*, fn. 15, p. 251.

²⁴ Adebajo and Keen, *op. cit.*, fn. 15, p. 249.

²⁵ Institute for Security Studies, *op. cit.*, fn. 5.

²⁶ B. R. Roth, *Governmental Illegitimacy in International Law* (1999) 405.

²⁷ Report on the Question of the use of Mercenaries as a means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination, submitted by the Special Rapporteur of the Commission on Human Rights, UN Doc. A/53/338 (1998) pp. 6-7.

²⁸ Roth, *op. cit.*, fn. 26, p. 408.

²⁹ See Roth, *op. cit.*, fn. 26, pp. 405 - 407.

³⁰ 1997 Conarky Agreement, UN Doc. S/1997/824.

³¹ On debate about legality, see D. Wippman, 'Pro-Democratic Intervention by Invitation', in G. H. Fox and B. R. Roth (eds.), *Democratic Governance and International Law* (2000) 293 at 303-5.

albeit with a state of emergency declared, which allowed detention without trial of suspected members and associates of the rebel regime and prohibited the possession of weapons and hoarding of food and fuel.³² The civil conflict was, however, far from over. Kabbah's authority was maintained through reliance on some 13,000, mainly Nigerian, ill-equipped ECOMOG peacekeepers.³³ The UN presence was at this stage limited to the UN observer mission established in July 1998, with some 40 observers.³⁴

News that Sanokh had been sentenced to death seems to have been the spark which led the RUF and AFRC rebels to move on Freetown again towards the end of 1998. Thousands were killed. ECOMOG, after some weeks of horrendous atrocities, forced the rebels out of Freetown.³⁵ Sanokh was released in April 1999, a ceasefire was declared in May, and in July 1999 the Lomé Peace Agreement was signed between the Kabbah Government and the RUF. At Lomé, the Government, faced with the draw-down of the Nigerian peacekeeping presence,³⁶ made major concessions including amnesties and power-sharing arrangements to try and secure peace.³⁷ With Nigeria seeking to withdraw its troops from Sierra Leone, the UN was forced to act to shore up the security vacuum.³⁸ The United Nations Mission in Sierra Leone (UNAMSIL) was created by SC Resolution 1270, and troops began to be deployed from November 1999. The response was, however, too slow and an ineffectual replacement for the Nigerian forces.³⁹ The rebels took advantage of this, advancing on Freetown in May 2000, killing and kidnapping UNAMSIL forces.⁴⁰ The tide started to turn when the British Government, in response to the kidnapping of British soldiers, sent in 300 paratroopers to assist with defending Freetown and driving back the RUF.⁴¹ Eventually there were some 1,200 British troops in Sierra

³² Commonwealth, *op. cit.*, fn. 5.

³³ Adebajo and Keen, *op. cit.*, fn. 15, p. 255.

³⁴ SC Res. 1181 (1998).

³⁵ Institute for Security Studies, *op. cit.*, fn. 5; fighting continued in the north, Commonwealth Secretariat, *op. cit.*, fn. 18, p. 7.

³⁶ See Adebajo and Keen, *op. cit.*, fn. 15, p. 257 and pp. 259-260.

³⁷ 1999 Lomé Agreement.

³⁸ On the issues surrounding the withdrawal of Nigeria, see Adebajo and Keen, *op. cit.*, fn. 15, p. 260; see also A. Abass, 'The Implementation of ECOWAS New Protocol and Security Council Resolution 1270 in Sierra Leone: New Developments in Regional Intervention', (2002) 10 *University of Miami International and Comparative Law Review* 177.

³⁹ On UNMASIL, see J. Hirsch, 'Sierra Leone', in D. Malone (ed.), *The UN Security Council: From Cold War to the 21st Century* (2004) 521.

⁴⁰ Commonwealth Secretariat, *op. cit.*, fn. 18, pp. 7-8.

⁴¹ Commonwealth Secretariat, *op. cit.*, fn. 18, p. 8; for further discussion of the British military involvement at this stage from an international legal perspective, see K. Samuels, 'Jus Ad Bellum and

Leone, under British, not UN, command.⁴² Recognising the need for a stronger commitment to maintain security in Sierra Leone, the number of troops under UN command peaked at some 17, 000.⁴³ The ceasefire agreed at Abuja in 2001 held, and Kabbah declared the war over in 2002. The gradual draw-down of the international military presence saw the last UN troops leave in 2005.⁴⁴

It is the period when President Kabbah was dependent on international actors for any sort of effective control over the territory of Sierra Leone that is of interest. Essentially, this is the period from 1998, when ECOWAS provided the security, up to 2004 – 2005, when the UN military presence was leaving and Sierra Leone became responsible for its own security. It is during this period that the normal international law assumption about a government being the embodiment of the will of the state and its people, because it manages to control the people, is not sustained.⁴⁵

3. The Treatment of Democracy by the Government of Sierra

Leone when Effective Control was Dependent on International Actors

Democracy is clearly central to the international justification for involvement. However, while Sierra Leone has a long history of attempts at democracy, democracy had hardly been established at the time of Kabbah's removal. An awareness of the importance of the pursuit of democracy for accommodation of the value of self-determination and, consequently, international acceptance of the whole process, might have been expected to lead to the encouragement, by Kabbah's government, of a legal concept of democracy. This would have sent a strong message about Kabbah's commitment to the democratic ideal. Additionally, a

Civil Conflicts: A Case Study of the International Community's Approach to Violence in the Conflict in Sierra Leone', (2003) 8 *JCSL* 315.

⁴² Adebajo and Keen, *op. cit.*, fn. 15, p. 263.

⁴³ Adebajo and Keen, *op. cit.*, fn. 15, p. 263.

⁴⁴ First Report of the Secretary General on the UN Integrated Office in Sierra Leone. S/2006/269. 26 April 2006.

⁴⁵ In this respect, it is interesting to note a defence argument that the Government of Sierra Leone lacked sufficient independent effective control to enter into agreement with UN Secretary General to create the Special Court for Sierra Leone in 2002. Raised by counsel for Norman, when contesting the constitutionality and jurisdiction of the Special Court in relation to the accused, the argument was brushed aside by the Court in light of a lack of evidence to substantiate the claim, *Kallon, Norman, Kamara*, SCSL-04-15-PT-059-I, 13 March 2004, Appeal Chamber, Decision on Constitutionality and Jurisdiction, at para. 72.

government in the position of Kabbah's might also encourage legal regulation in order to set a precedent for future examples, where it may be that a not so worthy government seeks to take advantage of the hortatory power of democracy without a genuine commitment to the democratic ideal. Moreover, a legal concept of democracy could help to protect the democratic ideal should elections bring to power a government intent on autocracy. Accordingly, it is useful to establish how Kabbah in fact saw the relevance of democracy and how democracy was treated in terms of a legal or political concept. A view on this can be gleaned from a review of official comments made by the government of Kabbah leading up to and during the process of state reconstruction.

The exiled President Kabbah appealed at the GA for international military assistance and long-term wider assistance on the basis that:

Only the speedy restoration of the democratically elected Government of Sierra Leone can provide a lasting solution to the crisis and enable the country to return to normalcy and to resume its place as a responsible member of the community of nations. This is no self-serving statement. To insist on the restoration of my Government is no more than to insist that the Government which the people of Sierra Leone freely and openly elected in the most closely invigilated election in the post-independence history of the country be restored to them.⁴⁶

Likewise at ECOWAS Kabbah stressed how:

for the citizen voters in the queues, these elections were more than an opportunity to replace a military regime with a democratically elected and accountable government. They saw them as an historic watershed, the one opportunity to make a new beginning; and judging by the impressive voter turnout, they intended to seize that opportunity with both hands.

Further, in light of this, Kabbah added that there was a need for '[t]he putting in place of a solid security system which will guarantee the security of all those who live within the borders of Sierra Leone.'⁴⁷ Essentially, the call to international actors was to give effectiveness to the government so that democracy can be realised. Democracy, then, rather than Kabbah's own importance, is clearly acknowledged as the central basis for the return of his government.

In terms of securing internal acceptance, from the outset, Kabbah relied on the fact of his democratic credentials to explain to the people why his government was

⁴⁶ GA Debates, 19th plenary meeting Wednesday, 1 October 1997, 10 a.m. New York, A/52/PV.19, p. 8.

⁴⁷ Ahmad Tejan Kabbah, Address at the ECOWAS Summit in Abuja, Nigeria, 27 August 1997, (on file with author).

worthy to be returned to power through an international military presence. In a Statement issued by the Office of the President on the 13 January 1998, prior to his return to office in March 1998, it was stressed that:

The people of Sierra Leone have demonstrated unequivocally that the junta has no mandate to represent or speak for them in any international meeting, nor to participate in any such meeting where the welfare of the people of Sierra Leone is being addressed, except with the consent or acquiescence of the democratically elected Government of President Tejan Kabbah.⁴⁸

Reference to the people demonstrating their preference, can be read as an implicit nod in the direction of the failure of the junta to establish effective control of the territory. Kabbah also did not have effective control, thus it is convenient for him to leave out explicit mention of this, and instead concentrate on the fact of democracy as the source of sovereign authority: 'President Kabbah's Government has the sovereign authority to set up radio facilities on any location within the territory of Sierra Leone to broadcast objective news and information to the people.'⁴⁹ While it is not explicitly mentioned that democracy is for the value of self-determination, this was strongly implied by statements such as that of Mr Jonah, representing Sierra Leone at a SC debate, '[w]e very much hope that the Security Council will not allow them to not only frustrate the will of the people of Sierra Leone, but to defy the world community.'⁵⁰

The weakness of a mere claim of commitment to democracy in the eyes of the people of Sierra Leone, in a context where the government previously had little opportunity to govern, in a historical context where democracy has often been a façade for dictatorship, paradoxically requires Kabbah to bolster his claim with reference to the international support that he has received based on the perception that he is who the people want:

the international community has reiterated that 'the Government of President Ahmad Tejan Kabbah is the sole and legitimate government of Sierra Leone'. In particular, the UN

⁴⁸ Government of Sierra Leone Public Affairs Unit, Statement Issued by the Office of the President His Excellency Alhaji Ahmad Tejan Kabbah on implementation of the Conakry Peace Plan, 13 January 1998 (on file with author).

⁴⁹ Government of Sierra Leone Public Affairs Unit, *op. cit.*, fn. 48.

⁵⁰ 3822nd Meeting Wednesday, 8 October 1997, 11 a.m. New York, S/PV.3822 Agenda: Situation in Sierra Leone (Sierra Leone sat to participate) (vote on adoption of SC Res. 1132, draft resolution initiated under the presidency of the UK)

Security Council, has also acknowledged the legitimacy of the Government of President Kabbah.⁵¹

In a context where the commitment to democracy is so clearly central to the justification for international involvement, one might reasonably expect a willingness to embrace legal regulation and accountability of democracy. That Kabbah had an understanding of sovereignty that could have led to a legal concept of democracy being linked to the right to self determination, thus serving as a basis for regulation and accountability, was made clear when he offered the view that authority comes from the people: '[a]s leaders, we all speak with pride, in defence of the sovereignty of our respective states. We must never forget, however, that in the final analysis sovereignty belongs to the people.'⁵² In other words: popular sovereignty. A survey of statements during the period of reconstruction when effectiveness was dependent on international actors can help to reveal how democracy was in fact treated.

With his return to office pending, on 10 February 1998 Kabbah addressed the nation, setting out what the approach to government would be like on his return to office. His opening remarks provided an opportunity to identify any international legal limits on government as a result of the lack of effective control in the interests of the right to self-determination. Instead, after identifying that his government would soon be in 'full and effective control of the affairs of the country, to exercise its legitimate and constitutional functions', Kabbah goes only so far as to stress that the government 'will be doing so [exercising its constitutional functions] with much greater vigour, taking into account the situation which has prevailed in the country since May 25th 1997'.⁵³ This concedes some need for special measures in light of the situation, but certainly envisages no particular international legal requirement that would limit and oblige the government in this situation.

Instead, the situation is used as justification for streamlining the government, concentrating power in the hands of a few:

⁵¹ Government of Sierra Leone Public Affairs Unit, *op. cit.*, fn. 48.

⁵² Address by the President of the Republic of Sierra Leone, H.E. Alhaji Dr. Ahmad Tejan Kabbah to the Millennium Summit of the United Nations, New York, Thursday 7 September 2000 (longer version that was placed on record) (on file with author).

⁵³ Address to the Nation by H.E. President Ahmad Tejan Kabbah on the Restoration of Democracy in Sierra Leone, 13 February 1998 (on file with author).

We must face the reality that the new situation requires changes. Among other things, there would have to be a restructuring, reorganization and down-sizing of the cabinet and other structures of government. More emphasis will be placed on professionalism and probity. Ours will be, essentially a government of technocrats. Within two weeks of my return, all cabinet ministers, and deputy ministers would be expected to submit their resignation. This should allow me the freedom, under the Constitution, to make the required changes in the structure of governance.⁵⁴

The emphasis on technocrats is an attempt to try and portray complete impartiality on behalf of the government, to stop it being challenged by other political parties, as the subsequent clause explains:

Within a short time, I shall present to Parliament my proposals – concrete and realistic proposals – which I intend to use in charting the course of rebuilding our nation. Of course, Parliament has, not just the constitutional function in this regard, but also an important obligation to the people, to place, as far as possible, the good of the nation above party politics. I believe that we have the ability to use our multi-party constitution and political pluralism as instruments of national unity.⁵⁵

Kabbah is here calling for trust to be placed in his government to make the right policy decisions and thus for others to resist objecting to changes. Implicitly the message is that peace, through the re-establishment of an effective system of government, involving state reconstruction, requires some dampening of normal participation in government. This is supported by the logic that trying to rehabilitate and reconstruct a state, when the clock on international involvement is ticking, requires quick decisions to be made.

There is, though, a contradiction in commitment to democracy being the reason for supporting this government, and then the government encouraging normal democratic procedure to be dampened in the process of reconstruction. This is especially pertinent given that broad-based nature of the government was one of the justifications raised by Kabbah at the GA as to why he should be returned to power.⁵⁶ The implication is that it is only for the period of reconstruction, and then normal democratic functioning can resume.⁵⁷ Thus the pursuit of an independently effective democratic state is projected as the reason for a short-term impediment on

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ GA Debates, 19th plenary meeting Wednesday, 1 October 1997, 10 a.m. New York, October 1st A/52/PV.19; p. 8 and p. 11.

⁵⁷ And in fact the reduction in the size of the government is suggested by Kabbah not to have affected its broad based nature, Address to the Nation by His Excellency the President of Sierra Leone, Alhaji Dr. Ahmad Tejan Kabbah, at the Siaka Stevens Stadium, Freetown, Tuesday 10 March 1998 (on file with author).

democracy, as well as the international involvement that provides the effectiveness and the ability to reconstruct.

The utility of democracy as a fix for decisions that impact upon the right of the people to decide on change and development is also witnessed when, speaking at the Special Conference of the UN on Sierra Leone, Kabbah justified the disbanding of the military on the basis that it would be replaced with one 'based on competence, professional integrity, loyalty to our democratic institutions, and patriotism.'⁵⁸ Hence, if one were concerned about the credentials of Kabbah to make such a decision, there is reassurance that it is in relation to the pursuit of democracy, and with it genuine rule by the people.

At the opening of Parliament in June 2000, Kabbah's speech reserved a section for the subject of democracy and good governance.⁵⁹ This speech identified democracy as the cornerstone of the whole process of reconstruction and rehabilitation: 'my Government is keenly aware that the very basis for our survival as a nation today is our people's firm commitment to democratic principles.' It aligned the understanding of democracy with emerging international consensus on what constitutes democracy by talking about 'grass-roots participatory democracy', as well as identifying 'popular participation in the governance of the state', and 'insistence on the right to freedom of expression' as cardinal elements of the democratic process. At the same time, though, the speech stressed that the situation in the state meant that not all these cardinal elements could be realised to the fullest extent at the time, when there was not yet a fully post-conflict situation. In this respect, one can understand why it would be convenient to project democracy as an aspiration with language like 'would wish to carry the citizenship with it', rather than talk of specific obligations which, given the circumstances, might be seen as a hindrance to progress in the restoration of effective control.

That it is democracy as a political aspiration rather than a legal concept that is in mind was latter implicitly stressed by Kabbah, 'the principles of democracy and

⁵⁸ Reported from the Special United Nations Conference on Sierra Leone, United Nations, New York, 30 July 1998, by Sierra Leone Web, '30 July, 1998, News Archive', available at <<http://www.sierra-leone.org/archives.html>>.

⁵⁹ His Excellency the President's Address on the Occasion of the State Opening of the Fourth Session of the First Parliament of the Second Republic of Sierra Leone, 16 June, 2000 (on file with author).

good governance are ideals that we all cherish.’⁶⁰ Nonetheless, such vocal commitment to a future democracy is obviously important to sustain the support of a people whose state is in the process of being reconstructed by a government whose tentative hold on the state is based on an international military presence.

Interestingly, when addressing ECOWAS, once established in office in December 2000, there is not the same stress that security is needed to protect democracy as there was when seeking to be returned to office. Rather the security is needed to protect sovereignty. At this point, Kabbah is actually appealing for support to protect the right to political independence: ‘[a]s President I will be remiss in my constitutional duty if I do not make provisions for the security of the nation, including the acquisition of essential military capability for its legitimate defence’.⁶¹ This could be read as a greater confidence in his government as the embodiment of the right of the state and its people to decide by this stage. It could also be read as an example of how, when seeking to encourage an activity that does not sit well with political independence, such as the return to power of an ineffective government, democracy is an essential tool for winning international support, as it eases concerns in relation to the value of self-determination. But, when the activity called for is more readily seen as protecting the right to political independence, for example, security to keep others out of the state, there is not the same need to stress democracy, because this aim is already about protection of the value of self-determination.

In such a context, as found in Sierra Leone, adopting a legal concept of democracy and making it part of the right to self-determination might serve to hinder some of the apparent flexibility required in the conduct of government, such as quicker decisions, through less consultation, during the process of reconstruction. Still it would help guard against a potential abuse of power and so help protect the right to decide. It would also have provided a stronger basis for Kabbah to resist the challenges of those opposed to his policy choices, rather than simple recourse to the fact of elections and calling for trust that he is doing the right thing: ‘let us all acknowledge that in a democracy, elected leaders are entrusted with the

⁶⁰ Statement by the President of Sierra Leone H.E. Alhaji Dr. Ahmad Tejan Kabbah to the Commission of Foreign Affairs of the Italian Parliament Rome, 12 June 2002 (on file with author).

⁶¹ Address by the President of the Republic of Sierra Leone His Excellency Alhaji Ahmad Tejan Kabbah to the Twenty-Fourth Ordinary Session of the Authority of Heads of State and Government of the Economic Community of West African States, 15 December 2000 (on file with author).

responsibility of making decisions on behalf of the people, with the best interests of the people in mind'.⁶² The suggested law could help reassure that it was not just trust alone that the reconstruction was proceeding on. Moreover, reasonable exceptions in the interests of international peace could have helped distinguish between what was necessary for peace and what was an abandonment of democracy.

4. Democracy and the Conduct of Governance

Consideration of how the actual conduct of governance relates to the emerging consensus on democracy as a human right provides an opportunity to indicate how the proposal of Chapter 3, to link this to the right to self-determination, responds to a context in which there is a likely need for derogation. The point is to show that better protection of the value of self-determination, which a legal concept of democracy would offer, need not be a cause of frustration for the reconstruction efforts. Moreover, such consideration allows for the identification of conduct in relation to which, if interested international actors had understood democracy as a legal concept linked to the right to self-determination, one would expect at least some international comment. The responses of the international actors are addressed in the penultimate section of this chapter.

The rights that constitute the legal concept of democracy, as was noted in Chapter 3, even though the HRC helps develop a more specific understanding, are still broad and designed for implementation by a government.⁶³ Thus, in the proposal from Chapter 3, it would not be a simple neglect of a component that would raise interest in the credentials of the government. Rather, it would be a persistent neglect of one or more of the components that could trigger a challenge to governmental authority. An example of this would be transforming the constitution so that it no longer accommodated this basic model of democracy. Accordingly, in considering governmental conduct in Sierra Leone during the period when the government lacked independent effective control, an important starting point is to establish whether the Sierra Leonean constitution required modification to accommodate the emerging consensus on democracy as a human right. For if it did and was not modified, this could signal a lack of commitment to the democratic ideal.

⁶² See, e.g., Broadcast to the Nation by H. E. President Ahmad Tejan Kabbah, Friday 26 May 2000.

⁶³ Sierra Leone ratified the ICCPR in 1996.

The Constitution, as noted above, was introduced in 1991 by a government seeking to win support from a people that were dissatisfied with the one party state system and the mismanagement and corruption. Chapter II of the Constitution on Fundamental Principles of State Policy indicates the policies that parliament should pursue when making laws, one of these is that the:

5. (1) The Republic of Sierra Leone shall be a State based on the principles of Freedom, Democracy and Justice.

The meaning of democracy in relation to a form of government is left to be spelled out in subsequent parts:

5. (2) (c) the participation of the people in the governance of the State shall be ensured in accordance with the provisions of this Constitution.

Chapter IV on the Representation of the People provides for a multiparty democracy with elections at regular intervals. Chapter V provides for the regular election of the President with no more than two terms of office. Chapter III details how fundamental human rights are to be secured; this includes non-discrimination, freedom of expression, freedom of association and assembly. In general, the constitution could accommodate interpretations in line with the emerging consensus on democracy as a legal concept. It is therefore consistent with the idea of emerging law under discussion here for the existing constitution to be retained. One is thus interested in whether the government conducted itself in a manner consistent with the emerging consensus, and what impact a legal approach to democracy linked to the right to self-determination would have had in relation to this conduct.

The US State Department makes available yearly reports on human rights in states around the world. Recourse to these reports provides a general idea of how core components of the legal concept of democracy were treated during the international involvement and reconstruction period. Central features of the emerging consensus are freedom of expression, association and assembly. Over the years in question, 1997 – 2005, there was little negative report on the government's treatment of freedom of association and assembly. A typical opening comment in the State Department reports is that of 2002: '[t]he Constitution provides for freedom of assembly, and the Government generally respected this right in practice.' As well as: '[t]he Constitution provides for freedom of association, and the Government

generally respected this right in practice.’⁶⁴ There were always isolated incidents, such as the banning of RUF rallies in 1999,⁶⁵ or the banning of a GRAO demonstration in Freetown, for which permission initially had been granted.⁶⁶ But these are justified on the grounds of a state of emergency and in the interests of security, respectively. More concerning is when the motivation appears political, such as when the Government denied the GRAO permission to hold a march to protest the Government's decision to extend its term in office. But it did permit a rally instead,⁶⁷ which helps to confirm a general commitment to freedom of association and assembly, circumscribing it only in the interests of security.

In relation to freedom of speech, the reports suggest a much more variable level of commitment. A typical introduction is: ‘[t]he Constitution provides for freedom of speech and of the press; however, the Government at times limited these rights in practice.’⁶⁸ This reflects that in general there appears to have been a commitment to the proliferation of outlets for free speech, without interference: ‘the written press and radio generally reported on security matters, corruption, and political affairs without interference’.⁶⁹ But this is marred by reports of isolated incidents such as:

the IMC ordered the editor of the African Champion newspaper to stop publication and cease editorial functions for 2 months in response to two articles printed on February 6 and 11 that accused President Kabbah's son of using a Consul's diplomatic status to escape import duties.’⁷⁰

Such incidents would of course send an implicit warning to all reporters to self-censure. Still, in light of the general commitment to freedom of expression, this would not be the type of incident that one would envisage as leading to a challenge of the government's authority as evidence of persistent neglect. Nonetheless, international actors that keep the government in control should be aware of such incidents and be willing to raise the matter with the government should a pattern start to emerge.

⁶⁴ 2002 US State Dept. Report, Section 2 b, all reports available at <<http://www.state.gov/g/drl/rls/hrrpt/>>

⁶⁵ 1999 US State Dept. Report, Section 2 b.

⁶⁶ 2001 US State Dept. Report, Section 2 b

⁶⁷ 2001 US State Dept. Report, Section 2 b

⁶⁸ 2002 US State Dept. Report, Section 2 a.

⁶⁹ 2002 US State Dept. Report, Section 2 a.

⁷⁰ 2002 US State Dept. Report, Section 2 a.

Another key element in the emerging consensus is the importance of the absence of discrimination. The 2002 Report notes how: '[e]thnic loyalty remained an important factor in the Government, the armed forces, and business. Complaints of ethnic discrimination in government appointments, contracts, military commissions, and promotions were common.'⁷¹ It might be hard to substantiate such a claim, but if non-discrimination in relation to participation in government were made a part of the right to self-determination, through its inclusion in a legal approach to democracy, then, with the threat of challenges to authority on this basis, one would expect a much greater willingness to eradicate such practice. Likewise, one would expect a more pro-active response in respect of the restraints in the Citizenship Act that restricts the acquisition of citizenship at birth to persons of 'patrilineal Negro-African descent.' This Act means that a large number of persons of Lebanese ancestry, who were born and resided in the country,⁷² could not vote throughout the period of a lack of independent effectiveness. Moreover, while the discrimination of women in Sierra Leone appears a deep-seated societal problem, one would expect a more pro-active stance to address it than one that appears to turn a blind eye, which is what the 2004 Report on the place of women in Sierra Leone society appears to suggest. Essentially, the legal approach to democracy linked to the right of self-determination would have helped encourage effective implementation of the constitutional provisions which prohibits discrimination against women and provides for protection against discrimination on the basis of race and ethnicity.⁷³

The respect for the right to political participation is the cornerstone of the legal concept of democracy. In practice, it appears to have been a hard one to fulfil. Its realisation was affected by the search for peace up to 2002. Local elections, scheduled for 1999, were repeatedly postponed in light of ongoing fighting.⁷⁴ It was in May 2004 that the first local elections in 32 years were held. International and domestic monitors judged them to be generally free and fair at the time, but then irregularities on all sides emerged. 'A UNAMSIL electoral consultant concluded, however, that fraud did not alter the outcome of the elections because it was equally spread across party lines.'⁷⁵ The important point, in light of the context, would

⁷¹ 2004 US State Dept. Report, Section 5.

⁷² 2003 US State Dept. Report, Section 3

⁷³ 2003 US State Dept. Report, Section 3

⁷⁴ 2000 US State Dept. Report, Section 3.

⁷⁵ 2005 US State Dept. Report, Section 3

appear to be that the elections were held. Had the postponement continued, it could start to be seen as evidence of a lack of a general commitment to democracy. The difficult point for international actors, in the normal run of things, is feeling confident to voice an opinion on such matters so as not to be seen as interfering in the internal affairs of the state. However, when the government has its effectiveness as a result of international actors, it clearly is interfering in the internal affairs of the state, and the idea of this study is that there is a need to question it. Seeing democracy as part of the right self-determination would have provided the framework for questioning. And this would demonstrate to the people that the realisation of democracy was not entirely dependent on the whims of the government.

In 2001, the Government extended its term to eventually around a year beyond the scheduled date for elections, citing the 'state of war'. This was much to the objection of opposition parties, who called for a coalition government to be formed in the meantime.⁷⁶ When the elections did occur, there was criticism for not introducing a broad based government, and accusations of vote rigging, and corruption.⁷⁷ A fear publicised by the International Crisis Group (ICG) was that, with the SLPP gaining a significant majority, Sierra Leone might slip back into the mindset of a one party state.⁷⁸ In this respect, a legal approach to democracy as part of the right to self-determination would have been a reassurance that there was a genuine commitment, and if not, that action would be taken to ensure the pursuit of democracy. As an aside, in the recent 2007 elections, the SLPP did not receive anything like the same level of support; with the international military presence gone, one can speculate about whether the people were now more willing to vote autonomously rather than so as to please the international actors, so that they will continue to provide support, by voting for the government that has proved itself favourable to international actors.

In sum, the government of Sierra Leone was faced with a very difficult task in respect of achieving a functioning democracy that matched up to the emerging consensus on international legal standards in conditions of ongoing conflict up until 2002. This helps to explain some of the failure to live up to the standards. After 2002, however, in light of the lack of independent control as evidence that it reflects

⁷⁶ 2001 and 2002 US State Dept. Report, Section 3.

⁷⁷ See International Crisis Group (ICG), 'Sierra Leone After Elections: Politics as Usual?', Africa Report N°49, 15 July 2002.

⁷⁸ *Ibid.*

the embodiment of the rights of the state and its people, the government should do all it can to live up to the international legal standards. For the main, from a tentative review of reports, there is evidence to support this, but at the same time there are instances which introduce doubt. In this context, were a legal approach to democracy part of the right to self-determination, one would expect the government to be more wary of allowing neglect; even if it would only be persistent neglect that would permit a direct challenge on the competence of the government by those providing effective control. Persistent neglect would take into account mitigating factors such as the search for peace as reasonable exceptions, and the potential for false accusations from opposition groups. It would, though, permit and encourage international actors to monitor closely the conduct of the government that was returned to power on the basis of a commitment to democracy, and to indicate shortcomings in relation to the right of self-determination, which if they persisted would result in more direct challenge.

At the UN, President Kabbah expressed a dislike for conditionality.⁷⁹ But when a government loses power, the people that it claims to represent have an interest in regulation and accountability of the basis for the government's return: genuine rule by the people. As international law, the conditions which the legal approach to democracy linked to the right of self-determination represent would carry far more legitimacy than the conditions which are thought up by the individual states or institutions providing assistance. Indeed, a government that was consistent with the suggested law would have a basis for resisting the imposition of wider conditions on the grounds that this consistency would enhance the claim to represent the will of the state and its people.

5. Democracy and the Peace Agreements

As has been noted, it was not until 2002 that the conflict in Sierra Leone was declared over by President Kabbah. Up until 2002, there were a series of attempts by Kabbah's government to come to agreement with the rebels on arrangements, including on governance, which would end the conflict. This section surveys how democracy was treated in the peace agreements and considers how this would relate

⁷⁹ Millennium Summit of the United Nations, *op. cit.*, fn. 52.

to the proposal of a legal approach to democracy as part of the right to self-determination. This is important because peace agreements are a regular feature of the contexts surrounding contemporary instances of state reconstruction. Accordingly, if the proposal would frustrate such efforts, protection of self-determination would be at the expense of peace, and one would thus be more reticent in advocating such an approach. Also, by seeing how the peace agreements relate to democracy, one gains a view on how those international actors that support the peace agreement view democracy in the context.

When Kabbah was initially calling for his government to return to power, it was to be in accordance with the terms of the Abidjan Agreement. The Abidjan Agreement had been entered into in 1996, before the exile of Kabbah. The preamble stresses that the parties are: '[c]ommitted to promoting popular participation in governance and full respect for human rights and humanitarian laws; [d]edicated to the advancement of democratic development and to the maintenance of a socio-political order free of inequality, nepotism and corruption.'⁸⁰ There is nothing in it to suggest that as part of self-determination a legal approach to democracy was required. However, the approach to governance is in line with the emerging consensus on democracy, stressing the need for civil and political rights of the people, including the rights 'freedom of conscience, expression and association, and the right to take part in the governance of one's country'⁸¹ be guaranteed and promoted. Moreover, there are no provisions for restructuring the apparatus of government that would hamper an interpretation in line with the emerging consensus on democracy as a human right. Indeed, it commits to electoral reform to ensure a level playing field amongst the parties to the agreement.

While the core concession from the government, with the Abidjan Agreement, was in the form of amnesties, this was not enough to satisfy the rebels, and Kabbah was forced into exile. With the UN not prepared to deploy a peacekeeping mission without the consent of all of the parties, there was a need for further negotiations to permit the return of Kabbah.

Closer to the time of Kabbah's return, in October 1997, it was the Conarky Accord negotiated between the RUF and a committee of states representing ECOWAS

⁸⁰ Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone, signed at Abidjan on 30 November 1996.

⁸¹ Article 19, Abidjan Agreement.

(Nigeria, Cote d'Ivoire, Liberia, Ghana and Guinea) that was to provide a framework, albeit with little detail, for the return of Kabbah. Kabbah was at the Commonwealth summit in Edinburgh when the Conakry Accord was agreed. He claimed he was satisfied with the peace plan,⁸² but then is reported to have indicated that he had not been consulted on the agreement with the AFRC, who he claimed had negotiated in bad faith.⁸³ In the Conakry Accord, there is no mention of democracy, rather it is the return of 'constitutional governance' that is provided for in the Accord. It reinstates the amnesties, which were revoked by Kabbah in December 1996; Kabbah is also said to have revoked the subsequent Conakry amnesties in November 1997.⁸⁴ In relation to the governance arrangements the provisions are so vague as to make further negotiation a necessity. The vagueness would make it possible to read the provisions in line with emerging consensus on democracy. However, the implication from terminology such as 'broadening of power base', 'efforts should be made to ensure that an all-inclusive government is evolved', and then referring back to this as '[a]ll the above power sharing formulas', which are linked, in Point 5 of the Accord, to enabling President Kabbah to exercise effective control when returned to office,⁸⁵ strongly suggests that there would be at least some infringement on democratic governance required to accommodate the interests of the junta. There is no evidence, on behalf of those negotiating, of a legal concept of democracy as a part of the right to self-determination, despite of circumstances where an international military presence to ensure effective control would appear inevitable.

As was noted, frustration with the junta led to ECOMOG military intervention and the restoration of Kabbah. When, even with the support of thousands of ECOMOG forces, the government's effectiveness could still not hold, another agreement was entered into with the RUF, this was the July 1999 Lomé Agreement. This agreement, in its preamble, emphasised the 'the conviction that sovereignty belongs to the people, and that Government derives all its powers, authority and legitimacy from

⁸² President Kabbah, statement, S/1997/886, 5 November 1997.

⁸³ UN Office for the Coordination of Humanitarian Affairs Integrated Regional Information Network for West Africa (IRIN), Background Briefing on the Conakry Peace Accord, 28.1.98 (on file with author)

⁸⁴ UN Office for the Coordination of Humanitarian Affairs Integrated Regional Information Network for West Africa (IRIN), *op. cit.*, fn. 83.

⁸⁵ Conakry Accord, Point 5.

the people'.⁸⁶ It reiterated the commitment to democracy and human rights as found in the Abidjan Agreement. Along with amnesties, which were again reinstated (although the UN Secretary General did not endorse this element),⁸⁷ a central point for the RUF was a lack of trust in Kabbah's government. This meant that a government arrangement without room for the RUF would not be accepted. Accordingly, Lomé provided for power sharing arrangement until the next elections, which were scheduled for 2001. Prominent features included provision for the appointment of Corporal Foday Sankoh, leader of the RUF/SL, as Vice President, answerable only to the President of Sierra Leone; and appointment of members of the RUF/SL to a broad-based cabinet.⁸⁸ Such an arrangement never came into being (the kidnapping of the UN staff and British intervention, essentially, saw the end of Lomé). Still, it was hardly consistent with the emerging consensus on democracy as a human right. Its justification is found in the pursuit of peace, and willingness to enter into such an agreement must be measured against the fact of Nigerian withdrawal and the vulnerable position this would leave Kabbah's government in, in terms of keeping control of what limited aspects of the territory it had at this time.

There is no suggestion that a legal concept of democracy was required as part of the right to self-determination by the parties or the international witnesses to the Lomé agreement.⁸⁹ Without it, the international actors that provide effectiveness are left to call for compliance with the agreement and with human rights standards, there is no room for a direct challenge to the authority of the transitional government if it governs with a neglect for core aspects of the democratic right or if it does not proceed to free and fair elections; the point that reconciles Lomé with the strive for the democratic ideal. Democracy as part of the right to self-determination, could, as an exception in the interest of peace, have allowed some reasonable impediment on

⁸⁶ Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, July 1999; this followed the ceasefire Agreement of May 1999.

⁸⁷ See S. Williams, 'Amnesties in International Law: The Experience of the Special Court for Sierra Leone', (2005) 5 *Human Rights Law Review* 271.

⁸⁸ Lomé, Part 2, Article V.

⁸⁹ His Excellency Gnassingbe Eyadema President of the Togolese Republic Chairman of ECOWAS; His Excellency Blaise Compaore President of Burkina Faso; His Excellency Dahkpanah Dr. Charles Ghankey Taylor President of the Republic of Liberia; His Excellency Olusegun Obasanjo President and Commander-in-Chief of the Armed Forces of the Federal Republic of Nigeria; His Excellency Youssoufou Bamba Secretary of State at the Foreign Mission in charge of International Cooperation of Cote d'Ivoire; His Excellency Victor Gbeho Minister of Foreign Affairs of the Republic of Ghana; Mr. Roger Laloupo Representative of the ECOWAS Special Representative; Ms. Adwoa Coleman Representative Organization of African Unity; Ambassador Francis G. Okelo Executive Secretary of the United Nations Secretary General; Dr. Moses K.Z. Anafu Representative of the Commonwealth of Nations.

democracy. It would, though, have provided a basis for international actors, that are called upon to provide effective control, to challenge the subsequent compromise government if it offered signs of persistent neglect of aspects of a legal concept of democracy. This would have been particularly relevant given how the junta, when Kabbah was in exile, had hardly shown signs of a commitment to democracy, and had persistently missed the deadlines for reintroduction of the elected government.⁹⁰

The Abuja Ceasefire Agreement, 10 November 2000, provided the basis for the peace that held. A brief document, it concentrated on key points necessary for peace to be sustained, such as 'UNAMSIL shall have full liberty to deploy its troops and other personnel throughout Sierra Leone including the diamond producing areas in the discharge of its responsibilities',⁹¹ rather than restructuring of state infrastructure. It did, though, reaffirm a commitment to the Lomé Peace Accord, albeit without mention of accommodation of the RUF in government. The agreement of the review meeting 2 May 2001, stresses the importance of facilitation of transformation of RUF into a political party as agreed to at Lomé, and the ability of the RUF to stand at the next election appears to have been agreed upon.⁹² Kabbah's government was thus left in control of the reconstruction, with effective control based on the massive international military presence.

Analysis of the peace agreements confirms that democracy was not seen as a legal concept linked to the right to self-determination by neither the parties nor the international witnesses. Departing from the emerging consensus has appeared essential in the interests of peace. One might see this as an argument against adopting the proposal of Chapter 3, because it might inhibit the chance of agreement. However, the Lomé deal was a transitional one, which would end with free and fair elections, during this time there should still be a requirement for conduct in line with the emerging consensus, and there is also the need for the elections to actually occur. In terms of the suggested law, reasonable exceptions in the interests of international peace could accommodate departures from the emerging consensus, provided they

⁹⁰ See UN Office for the Coordination of Humanitarian Affairs Integrated Regional Information Network for West Africa (IRIN), *op. cit.*, fn. 83.

⁹¹ Abuja Ceasefire Agreement between the Government of Sierra Leone and RUF, 10 November 2000 (on file with author).

⁹² UNAMSIL Press Release, 'Sierra Leone Ceasefire Review Meeting Concludes in Abuja' 3 May 2001; the Committee of Six of the ECOWAS Mediation and Security Council, the United Nations, the Government of Sierra Leone, and the Revolutionary United Front.

are temporary and intended as step towards the creation of conditions in which an unimpeded strive for the democratic ideal can resume.

6. International Actors and Democracy in Sierra Leone

The preceding sections have indicated how the government of Sierra Leone sought to justify its return to authority, its basis to speak for the rights of the state and its people, including the right to political independence, on democratic credentials. It has been shown how democracy was not treated by Kababh as a legal concept as part of the right to self-determination. This has been seen in statements that present democracy as a political concept; a failure to identify self-determination when discussing democracy; and, conduct which varies from the emerging consensus without an explanation. The likelihood of a legal concept in future examples of the assistance model is, though, best identified through the international approach, as it is these actors who will be central in future efforts. For that reason, this section is interested in how much importance the international actors, those that have been involved in keeping the government in power and facilitating reconstruction, have placed on democracy as justification for the international involvement. The more it is stressed, the more it becomes reasonable to expect that potential for legal regulation and accountability both should and will have been adopted. Accordingly, this section also considers whether democracy has been treated as a legal concept linked to self-determination as a basis for regulation and accountability.

To form an opinion on the importance and treatment of democracy by international actors, the section reviews some of the statements, declarations issued, and agreements that were entered into with the government of Sierra Leone, across the period of 1997 – 2005. The practice identified above indicates that if it were treated as a legal concept, there would be comment from international actors on instances like the Lomé Agreement, which appeared to at least delay aspects of the pursuit of genuine democracy in the interests of peace.

Debate at the UN, in the GA and SC, as well as key resolutions from these fora, are useful sources from which one can glean an idea of how a variety of international actors saw the right to political independence, and the role of democracy in relation to it, in the reconstruction process. That one would expect to find relevant material is readily apparent in light of the pivotal role of the UN in the reconstruction process

and the consequent impact on the right to political independence: the peak presence of some 17,000 UNAMSIL military personnel kept the government in control, and the calls for wider international involvement to assist the government with the actual process of reconstruction helped make such international involvement a reality.

In May 1997, the President of the SC made a statement on behalf of the Council. In it, the Council expresses that it ‘deplores this attempt to overthrow the democratically elected government and calls for an immediate restoration of constitutional order.’⁹³ It further ‘underlines the imperative necessity of implementing the Abidjan Agreement, which continues to serve as a viable framework for peace, stability and reconciliation in Sierra Leone.’ This is an early example of what would be the consistent international support that President Kabbah’s government received, despite not having anything like effective control of the state. It presents democracy as important for its own sake, which is about the value of self-determination; as well as vital for peace, through reference to the Abidjan Agreement that has democracy as its cornerstone. It is, though, democracy as a political concept, with no suggestion of any criteria – it could mean elected government, or could be more expansive and relate to conduct.

Significant UN action came with Resolution 1132 in October 1997. Under chapter VII the Council demanded that the military junta make way for the return of Kabbah’s government, and introduced sanctions prohibiting the sale and supply of petroleum and petroleum products, and arms and related *matériel* of all types to Sierra Leone.⁹⁴ At the meeting preceding the adoption of the resolution, states indicated the basis for the support of the return of President Kabbah.⁹⁵ The common message from the delegates in the debate is that the removal of democracy is itself the core threat to the peace; there can be no peace without a return to democracy. Although the value of self-determination is not explicitly mentioned, there are clear indicators that democracy is seen to address the value of self-determination, such as Egypt’s reference to ‘the will of the people of Sierra Leone’, and Guinea Bissau’s association of democracy with ‘exercise of power by the people’. And when South Korea noted ‘in the interests of peace and democracy in their own country, they

⁹³ SC Debates, 3781st Meeting, Tuesday, 27 May 1997, 5.25 p.m. New York, S/PV.3781 Agenda: Situation in Sierra Leone.

⁹⁴ SC. Res. 1132 (1997), 8 October 1997, para. 1 and 6.

⁹⁵ SC Debates 3822nd Meeting Wednesday, 8 October 1997, 11 a.m. New York, S/PV.3822 Agenda: Situation in Sierra Leone.

[military junta] should agree immediately to the restoration of the legitimate Government' one must ask why democracy is important in its own right separate from peace, and the only answer can be its connection with the value of self-determination. There is no suggestion of criteria for democracy. It is again democracy as a political concept that the comments refer to, with the same vagueness as was noted above. Only China did not put a stress on or even mention democracy. Instead, China emphasised its regret at the suffering of the Sierra Leonean people, and voted for the sanctions out of respect for the African countries' desire to have an early settlement.

Once Kabbah was back in office (sustained through the military presence of ECOWAS), there was debate at the SC, prior to a UN Special Conference for Sierra Leone to gain pledges of international involvement to keep Kabbah in power and to facilitate the reconstruction of the state. Given that such international involvement, as pledged at the Special Conference, is at the heart of the assistance model and its problematic relationship with the right to political independence, and that Kabbah is already dependent on an international military presence, it would be reasonable to expect some comment on the standards of government required. The delegates were keen to stress the progress in relation to democracy. Austria, speaking for the European Union, 'welcomes that the government has moved swiftly in order to re-establish an effective administration and the democratic process.' Likewise, the government is commended by the UK for doing its bit 'to re-establish effective administration and to reinforce democratic institutions and the rule of law', and it is on this basis that the UK call for 'greater support from the international community if this combined strategy [Government of Sierra Leone, ECOMOG and UNOMSIL] for peace and rehabilitation is to succeed.'⁹⁶ The implication is that the government is committed to democracy and that greater international involvement will help realise this goal. Thus, as democracy is the key to peace and the value of self-determination, the international involvement is projected as consistent with these values. But again there is no specific indication of whether this reference to democracy is only about the return of the elected government or about subsequent conduct.

⁹⁶ SC Debates, 3902nd Meeting Monday, 13 July 1998, 12.20 p.m. New York, S/PV.3902, Agenda: Situation in Sierra Leone, Fifth report of the Secretary-General on the Situation in Sierra Leone (S/1998/486 and Add.1).

Moreover, there is no suggestion that making a government effective is contrary to any values of the UN system, or that because of a lack of independent effectiveness there are any particular limits or obligations. Austria, on behalf of the EU, 'strongly encourage[s] the Government of Sierra Leone to keep to its resolve to adhere to international human rights standards'. Had the potential for a legal concept of democracy linked to the right of self-determination been adopted, the EU could have reminded the government that its status was dependent on keeping its resolve to adhere to the legal concept of democracy; this would have been a strong encouragement. Instead, the government is treated as a normal (effective) government would be, with human rights obligations but a discretion as to how they are implemented, and little that can be done in legal terms if they are not.

By the time of the Lomé Peace Agreement, which curtailed democracy by introducing non-elected elements into government, the government remained dependent on ECOWAS for effective control. Indeed, it has been suggested that it was the desire of Nigeria to remove its troops from Sierra Leone that encouraged Kabbah to agree to the power sharing arrangements that put democracy on hold. In the debate at the SC, which followed Lomé, putting democracy on hold in the interest of peace did not affect international support. In fact, the meeting included calls such as that of the UK for 'a full United Nations peacekeeping operation to assist in the implementation of the Peace Agreement and to help create a climate of confidence.'⁹⁷

Dabor, the representative for Sierra Leone, is aware that some international actors might not be expected to be happy with Lomé, because of the governance arrangements it introduces and the amnesties it grants: 'we call on the international community to support the people of Sierra Leone in their search for peace and not to do anything that would undermine the Peace Agreement which about six weeks was delicately negotiated by the parties in Lomé.'⁹⁸ A crucial factor in the continued support, along with the interest of peace that are served through the apparent ending of conflict, must be the commitments in Lomé, despite the obvious contrary practice in the governance arrangement, to resume the full strive for the democratic ideal when conditions permit. Without this, continued international support would have

⁹⁷ SC Debates, 4035th Meeting Friday, 20 August 1999, 11.15 a.m. New York, S/PV.4035, Agenda: Situation in Sierra Leone [after Lomé], Seventh Report of the Secretary-General on the United Nations Observer Mission in Sierra Leone (S/1999/836).

⁹⁸ *Ibid.*

been a major contradiction to the core reason for returning President Kabbah in the first place. That the commitment to democracy remained crucial for continued international involvement is seen in the comment of Argentina which stress that '[t]he implementation of the Agreement will require a clear commitment to the values of democracy, liberty and the rule of law', and that of Namibia: 'Sierra Leonean leaders need to continue to make a conscious effort to inculcate democratic values and belief in the worth and dignity of the human person and to diligently dispel temptations to take recourse to politics of revenge'.

With democracy treated as a political concept, there is the freedom to be creative with government arrangements in the interest of peace. It also, however, risks the value of self-determination, because there is no effective legal restraint on the government if it chooses to govern with neglect for the emerging consensus on democracy as a human right. In this situation, a legal approach would permit reasonable curtailment in the interest of peace, but it would also provide a basis for challenging the government if it should persistently neglect the emerging consensus. This latter point is particularly pertinent when one considers the source of authority of the Vice President of Sierra Leone under the Lomé Agreement, which does not come from any vote or past evidence of democratic governance, but from participation in a conflict designed to bring down a freely elected government.

A legal approach, in the sense suggested in Chapter 3, would also help stop democracy being seen as just about elections. While acknowledging that there is debate about the utility of elections in post-conflict situations,⁹⁹ if democracy is the basis for the return of the government and this is what is needed to address concern for the value of self-determination, simply requiring elections seems insufficient. When a government is in power through external military presence, democratic governance, not just elections, is what accommodates the value of self-determination. Yet the SC debates tend to have scattered amongst the vague mention of democracy (which could be just elections or also conduct) comments that suggest elections are the end of the matter: '[o]nly recently, thanks to the sustained and collective efforts of the member States of ECOWAS, life has begun to return to normalcy in that country as we implement the final phase of the peace process —

⁹⁹ See G. H. Fox, 'War Time Entitlement to Democracy' (2003) 9 *Global Governance* 2179.

namely, the conduct of elections.’¹⁰⁰ Further, ‘[a]t this very moment, there is jubilation in Sierra Leone for the smooth conduct of presidential and parliamentary elections, signalling a full transition from conflict to peace and democracy.’¹⁰¹

With such an approach, what is to stop the elected government from governing without care for the emerging consensus on democracy as a human right? This would put the international actors that provide the effectiveness in a difficult position, not wanting to withdraw support prematurely and cause a relapse into anarchy, but at the same time, hopefully, feeling uneasy about supporting such a government. In such a situation, calling on compliance with human rights is not sufficient. There is a need for an ability to challenge the status of the government if there is persistent neglect. In Sierra Leone, as was noted, the conduct of governance was largely in line with the emerging consensus on democracy as a legal concept, there were, though, instances of inconsistency, such as certain impingements on the freedom of speech, or the persistent delay in local elections, and the delay of national elections. In respect of these instances, an international legal basis for a reminder of the importance of striving for consistency could have helped dampen fears that such instances indicated a slide back to one party rule.¹⁰² That it would be appropriate to spell out these obligations even once there had been fresh elections, is indicated by the fact that, following elections, the emphasis from the Security Council for wider support to continue was related to a call for ‘all political parties [in Sierra Leone] and their supporters to work together to strengthen democracy and thereby assure continuing peace’¹⁰³ – reiterating that support is based on the fact of democratic governance. A reasonable expectation, in this respect, is that there is at least strive towards the realisation of the emerging consensus on democracy as a human right. But as human rights there is the stigma of not questioning the authority of an incumbent government, especially not one that you are supporting, for risk of undermining one’s own position.

¹⁰⁰ Comment from Nigeria, SC Debates, 3797th Meeting Friday, 11 July 1997, 11.30 a.m. New York, S/PV.3797, Agenda: Situation in Sierra Leone.

¹⁰¹ Comment from Gambia, 4538th meeting Wednesday, 22 May 2002, 4 p.m. New York, S/PV.4538 (Resumption 1), Agenda: The Situation in Africa, Ad hoc Working Group on Conflict Prevention and Resolution in Africa.

¹⁰² See fears expressed by ICG, *op. cit.*, fn. 77.

¹⁰³ SC Debates, 4539th meeting Wednesday, 22 May 2002, 9.30 p.m. New York, S/PV.4539.

Indeed, at the Human Rights Commission, Mr Rowe speaking for Sierra Leone, in 2003, diplomatically discourages indication or assessment of human rights in Sierra Leone:

His Government did not need to be reminded of its human rights obligations. What it needed was the capacity to promote those rights. That required increased international cooperation, technical assistance and support, including for the National Recovery Strategy, the importance of which had been recognized by the Security Council in its resolution 1470 (2003).¹⁰⁴

While this comment was made in the context of Sierra Leone being removed from Agenda Item 9, which focuses on the human rights situation as one of concern, it signifies the sensitive nature of human rights even in a situation where a government is dependent on international actors for effective control. The legal concept of democracy linked to the right to self-determination, when there is no independently effective domestic government, would provide a basis for observance, criticism, and if necessary in light of persistent neglect, challenge to authority.

In terms of providing a military presence that would support the government, ECOWAS acted before the UN. In the communiqué issued at the end of the meeting of the Foreign Ministers of ECOWAS on the situation in Sierra Leone, which was held at Conakry, Guinea, on 26 June 1997, three objectives in relation to the situation in Sierra Leone were identified: the early reinstatement of the legitimate Government of President Ahmad Tejan Kabbah, the return of peace and security to Sierra Leone, and the resolution of the issues of refugees and displaced persons.¹⁰⁵ The term legitimate must be read as a reference to Kabbah's embodiment of the will of the people and thus, in the absence of effective control, his democratic credentials. As with the debates at the UN, the return of the government is thus justified in the interests of the value of self-determination and international peace. There is no suggestion of any particular limits or obligations on the government, other than support for the Abidjan Peace Agreement, which sets out the terms of democratic rule.

¹⁰⁴ Commission on Human Rights, Fifty-Ninth Session, Summary Record of the 49th Meeting held at the Palais des Nations, Geneva, on Tuesday, 15 April 2003, at 3 p.m. E/CN.4/2003/SR.49, 25 April 2003, para. 49.

¹⁰⁵ Communiqué issued at the end of the meeting of the Foreign Ministers of the Economic Community of West African States (ECOWAS) on the situation in Sierra Leone, which was held at Conakry, Guinea, on 26 June 1997, S/1997/499.

Particularly telling in terms of the lack of authority to challenge the otherwise ineffective government of Kabbah, were it not to act in a manner consistent with the emerging consensus on democracy, is the approach of the Commonwealth Secretariat. The Commonwealth Harare declaration set out a set of key principles on democracy in line with the emerging consensus. Had these been seen as part of the right to self-determination then there would have been a power, indeed arguably an obligation if it was continuing to help keep the government in power through technical assistance, to monitor compliance. Yet the report of the ministerial action group on the Harare declaration indicates that:

The Group has continued to be seized of the situation in Sierra Leone, not because it believes the Government to be in serious or persistent violation of the Harare principles, but at the request of the Government of Sierra Leone as a means of keeping the country's urgent needs for humanitarian and other assistance before the international community.¹⁰⁶

The biggest bilateral donor to Sierra Leone has been the UK.¹⁰⁷ The UK has a memorandum of understanding with the Government of Sierra Leone agreed to in November 2002, titled a 'Poverty Reduction Framework Arrangement', which sets out the terms for 'a substantial direct development programme to Sierra Leone.'¹⁰⁸ The substance and terms are based on, at para. 2.1, '[t]he legacy of mismanagement by successive governments in Sierra Leone and civil war has undermined much of the country's social fabric, and prevented the development of its human resource base, institutional capacity and social and economic infrastructure.' Further, at para. 3.1:

It [UK gov.] believes that Sierra Leone should be treated as a special case for international assistance. It recognises that without substantial, continued and flexible support from the donor community it will not be possible for the Government of Sierra Leone to sustain the difficult transition from conflict to peace and stability, and to attain the long term growth needed to reduce the extreme poverty suffered by the people of Sierra Leone.

¹⁰⁶ Chairman of the Commonwealth Ministerial Action Group on the Harare Declaration (CMAG) to present the Group's 1999 Report, Sierra Leone, para. 16, (on file with author).

¹⁰⁷ See, DFID 'country profiles' available at

<<http://www.dfid.gov.uk/countries/africa/sierraleone.asp>>: The UK is Sierra Leone's largest bilateral development partner. DFID provided £104.5m in aid in the three years from 00/01 to 02/03 (£35m, £37.1m, £32.4m). DFID has undertaken to provide £120m in aid over three years (03/04 to 05/06), as well as a 'substantial direct development programme' over the next ten years. (from Sept 2005).

¹⁰⁸ Poverty Reduction Arrangement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Sierra Leone, 13 November 2002, it may be terminated by either government on giving six months notice, p. 7.

As well as massive amounts of funding, the UK commits to assist with the development of governmental capacity, with the training of the military, and with support for the cause of Sierra Leone in international fora such as the World Bank, and the EC. In return Sierra Leone must strive to meet a series of targets: I. Resolving Conflict; II. Improving Standards of Governance and Combating Corruption; III. Reforming the Security Sector; IV. Reducing Poverty (incorporates the Millennium Development Goals); V. Ensuring Macro-Economic Stability; VI. Developing Human Resources. The terms for 'Improving Standards of Governance and Combating Corruption' highlight that '[t]he Government of Sierra Leone will work towards making progress on broad-based inclusive political agenda, grass root democracy and popular participation in decision making.'¹⁰⁹ There is, though, no further definition of democracy or attempt to link it to the right to self-determination.

Similarly, the US, another major donor to Sierra Leone, in a press release announcing \$272 Million USD to Sierra Leone in 2003, poses the question of '[w]hat conditions are attached to this official and private assistance from the people of the United States to the people of Sierra Leone?', and answers 'Americans expect that their contributions will assist Sierra Leone to build a peaceful and prosperous democracy.'¹¹⁰ In both instances, UK and US, the funding is intended to see the democratic ideal realised, and this addresses the fact that the government struggles for control of the state and accommodates the value of self-determination by the pursuit of genuine rule by the people. However, with such an approach, flexibility is retained for all involved when it comes to identifying whether the democratic ideal is in fact being pursued.

A final point on international actors and democracy in Sierra Leone, relates to the internationally staffed Special Court for Sierra Leone. Established by agreement between President Kabbah and the UN Secretary General in 2000, to bring to justice those who bear the greatest responsibility for grave crimes committed since November 1996, the Court has at least one decision in which democracy has been accorded a significant role. In the cases of two pro-government Civil Defense Forces (CDF) leaders, Fofana and Kondewa, the Trial Chamber of the Court accepted the fact of a motive in support of democracy as reason for leniency in sentencing for war

¹⁰⁹ Poverty Reduction Arrangement, p. 4, *op. cit.*, fn. 108.

¹¹⁰ Embassy of the United States of America, Freetown, Sierra Leone, 15 July 2003, Press Release. 'The People of the United States of America Contribute Over \$272 Million USD to the People of Sierra Leone in 2003' (on file with author).

crimes.¹¹¹ The Appeals Chamber, on the basis that international humanitarian law excludes considerations of political motivations as relevant for breaches of the law, rightly overturned this approach.¹¹² But the fact that the Trial Chamber allowed itself to be persuaded by the pursuit of democracy, in a situation where it should have no relevance is further testament to the ability of a connection with the pursuit of democracy to help present even the most dubious of activity as worthwhile, regardless of treatment as a legal or political concept.

In sum, the international actors involved in the reconstruction of Sierra Leone clearly acknowledge how the pursuit of democracy is an essential element for justifying and engendering international acceptance of a process, which, because of the lack of an independently effective domestic government, does not sit well with the right to political independence. Nonetheless, democracy is treated as a loose political concept, easily satisfied. And, accordingly, the otherwise ineffective government is treated as if it were effective, in terms of being a complete embodiment of the will of the state and its people, and thus not subject to any more regulation and accountability of its conduct than any other established government. What this signifies for future efforts is turned to in the conclusion.

7. Conclusion

The context in which the assistance model arose in Sierra Leone gave one good reason to expect the potential for a legal approach to democracy linked to self-determination, as a basis for regulation and accountability, to have been adopted. This would have been in the interests of better accommodation of the value of self-determination, which democracy as a political concept does not guarantee. The government saw how vital democracy was for international acceptance of the process, it was well aware of a history in which democracy had been abused by those in authority as a façade for authoritarianism, still it did not seek to encourage legal regulation and accountability of the pursuit of democracy. Likewise, the international actors emphasised how it was the commitment of Kabbah to democracy that justified his being put in control of the state. But there was no effort to suggest that the fact

¹¹¹ *Prosecutor v Fofana and Kondewa, SCSL-04-14-T*, Trial Chamber. Judgment On The Sentencing Of Moinina Fofana And Allieu Kondewa, 9 October 2007, para. 91 and para. 94.

¹¹² *Prosecutor v Fofana and Kondewa, SCSL-04-14-A*, Appeal Judgement, 28 May 2008, paras. 530-535.

that his effectiveness was dependent on international actors required regulation and accountability of the pursuit of democracy.

In such a context, regulation of democracy should not be seen as an insult to the government, rather it is about setting an example/precedent for future efforts where the government that is supported on the basis of a promise of democracy might not be so committed to the democratic ideal. Where there is a conflict between the democratic ideal and peacemaking objectives, these can be accommodated on the basis of reasonable exceptions. Moreover, the point is not to seek to remove governments from office, although this would be an ultimate possibility if there were persistent neglect while the government remained dependent on international actors for effectiveness. Rather, the point is to provide a basis for ensuring that there is a commitment to the democratic ideal, which, as has been stressed throughout this study, is what excuses the neglect of political independence by addressing the value of self-determination. The importance of this point is illustrated by the fact that the International Crisis Group (ICG) felt it necessary to urge the international actors in Liberia to do more to reconstruct the state before an elected government was in place. The implication being that, on the basis of the consent of the warring factions, the international actors had free reign until an elected government, regardless of its effectiveness, would have the discretion to reconstruct as it pleased and might not be so compliant with the wishes of ICG; including wishes such as the importance of the strive for the democratic ideal.¹¹³

Moreover, in relation to Haiti from 1994, the international actors that kept Aristide in power had no basis to challenge his authority, regardless of their providing effective control. If it had been clearer from the start that Aristide's authority, as a matter of international law, was dependent on striving for basic standards of democratic governance, this could have been relevant in 2004 when international involvement again appeared to be necessary. This is because it would have provided some grounds for explanation as to why a government, deserving of support in 1994, was required to step down in 2004. Of course, the lack of an international military presence keeping Aristide in power in 2004 would not have permitted a direct challenge to his authority on the basis of the proposal of this study. Instead, such a challenge could have been based on the inability to exert effective control of the

¹¹³ International Crisis Group (ICG), 'Liberia and Sierra Leone: Rebuilding Failed States'. (8 December 2004) *Crisis Group Africa Report No. 87* p. i, available at <<http://www.crisisgroup.org>>.

territory, coupled with a history of lack of commitment to the democratic ideal. The international actors in question, however, without the proposed law, could not rely upon this explanation without appearing inconsistent. This is because they had made the same ineffective government effective in 1994, without indicating any legal criteria for democratic governance. Some evidence of democratic credentials, in the form of an electoral mandate, had appeared sufficient, but Aristide also had this in 2004.

By not grasping the opportunity in relation to Sierra Leone, a chance was missed to set in process legal development that would have served to better ensure the value of self-determination in subsequent examples of state reconstruction without an independently effective domestic government. Thus, in relation to the Somalia circumstances, noted in Chapter 6, it seems unlikely that, if the transitional government were to be put in authority by a large-scale international military presence, the authority of the government could be legally challenged if it failed to pursue its promise of democracy in any meaningful sense; despite that this would be the central excuse for international involvement in neglect of the right to political independence.

Thinking more generally, there is clearly reason to suspect that the positing of democracy, if not supported by a real commitment to realisation of genuine democracy, may not be able to galvanise international acceptance of processes which neglect political independence in the way that the assistance model and the other examples of state reconstruction have been argued, by this study, to do. Legal regulation and accountability of the democratic excuse is one means by which the commitment of all involved can be demonstrated.

Conclusions

Conclusions

In the light of the significance of the preservation of the right to political independence for the UN system, and that traditional international legal doctrine requires an independent effective domestic government for embodiment of the rights and obligations of the state and its people in international law, this study asked: how does the practice in each of the three paradigms relate to the right to political independence of the target state and its people? To the extent that the legal justifications do not sufficiently address the right to political independence, what explains international acceptance of the approach? And, does this involve international legal development?

Answers to these questions have been gleaned through analysis of prominent examples of the three paradigms for large-scale international involvement in state reconstruction: occupation, international territorial administration, and the assistance model. Despite the range of contexts and approaches, analysis of practice under the three paradigms in one study was based on the common theme of significant changes in the state and civil infrastructure, such as the redesign of the economic system, being made possible by international involvement, without anything approaching an independently effective domestic government to make the choices. This basic commonality is central to a number of strands of argument that run throughout the study and provide the foundation for the main thesis: when there is no independently effective domestic government, there is a need for greater international legal regulation and accountability of those that exercise the right to decide for the purpose of state reconstruction, to compensate for the lack of assurance that the process reflects the wishes of the state and its people, an aspect that threatens the core UN system values of self-determination and international peace. The strands of argument reflect key findings in response to the primary research questions, and can be identified by the headings of legality, projection, reality, and potential. These pages of conclusions will set out these findings and consider some of the implications.

1. Findings

A. Legality

In terms of legality, valid state consent is possible because of the power of international recognition as evidence of the status of a government in an international legal sense to override the requirement of traditional international legal doctrine that legal status is dependent on a display of independent effective control. International recognition, however, is subjective and thus offers no guarantees about the attachment of the government to the will of the state or its people, thus significantly reducing the extent to which state consent reconciles practice with political independence. A chapter VII resolution provides legality because member states of the UN have waived the right to complain about an infringement of their rights in international law in respect to activity within the powers of the Security Council under this heading. It does not, then, reconcile the practice with the right to political independence. While legality is an essential part of wider international acceptance, it does not appear, on its own, sufficiently considerate of the right to political independence to explain international acceptance. In this respect, the extent to which other facts reconcile the international involvement with the right to political independence is of vital importance.

B. Projection

The consensual basis and domestic elements in the government, in most of the examples, help provide some consistency with the right to political independence, but are far from convincing. Thus how the attendant values of self-determination of peoples and international peace have been addressed is of central importance for international acceptance. Endorsement of the practice in a chapter VII resolution helps engender the view that the practice is necessary for international peace, but it says nothing of the value of self-determination. The value of self-determination is important in its own right but if neglected also risks sparking international conflict.

With legality in place, it is argued that it is the pursuit of democracy that is the central element which engenders international acceptance of practice in neglect of the right of political independence. This is because the pursuit of democracy portrays the governance, when not by an independently effective domestic government, as intended to realise genuine rule by the people. The pursuit of democracy thus takes

the focus in relation to self-determination away from 'keep out', as counselled by the right to political independence, to the means of exercising self-determination. Moreover, the pursuit of democracy is also important for discrete aspects of the process related to international peace, such as the peacemaking process.

C. Reality

Democracy, in practice, is pursued as a loose political concept; this retains flexibility for all involved in governance. What it lacks is a basis for regulation and accountability of those that are entrusted with the right to decide on change and development of state and civil infrastructure on the basis of their commitment to democracy. This is argued to be an insufficient substitute for the right to political independence when core UN system values of self-determination of peoples and international peace are at stake, on the basis that there is little to prevent democracy being treated as a mere platitude by those who legitimate their authority through it. If we are to accept this approach as sufficient excuse for the neglect of political independence, as actually providing something like genuine rule by the people, then, as well as free and fair elections, there are basic standards of governmental conduct, as indicated in the emerging consensus on democracy as a human right, that must be realised.

D. Potential

It is argued, in the interests of the values at stake, that the practice could be improved if democracy was treated as a legal concept as part of the legal right to self-determination. This might utilise the emerging consensus on democracy as human right. As part of the right to self-determination, democratic reconstruction would be seen as a required element for the exercise of the right to political independence in circumstances of a lack of independent effective governance. It would also introduce a set of rights and obligations with much more purchase than democracy as human right is able to provide. This is because it would be the basis of the government's authority, whether already elected or pursuing elections, as such it would provide the basis for challenge to that authority if the required elements were not adhered to. This is unlike the situation with democracy treated as a stand alone human right,

which imposes obligations but comes with little impetus for enforcement in light of the nature of international human rights law. With reasonable exceptions in the interests of international peace and a high standard of persistent neglect for the authority to be challenged, this proposal would provide a legally bounded flexibility in contrast to the complete flexibility which exists when democracy is treated only as a political concept. It would, perhaps most importantly, encourage the questioning of the conduct of governments that cannot be described as independently effective domestic governments, because it would make explicit that the authority is because of the pursuit democracy, understood as more than just a promise of elections.

2. Implications

This study has indicated the failings of the current approach to state reconstruction without an independently effective domestic government in relation to the right to political independence. It has also suggested how it could be improved in relation to the attendant values of self-determination and international peace through the development of new law. Such findings should make international actors realise that the framework for new law is available, and that it is needed, especially if the projection that the practice remains consistent with the legal structures and political values which underpin the inter-sovereign relations paradigm of the international system is to continue to engender international acceptance. Furthermore, particular elements of the findings also have wider implications for international law.

A. The Persistent Possibility of State Consent

If international actors want to find a way into a state without an independently effective domestic government, in a manner which will not be deemed wrongful under international law and at least maintain a degree of consistency with the right to political independence, the examples investigated indicate that state consent is the answer. Where there is no effective government, international recognition will readily evidence that a government has the international legal status and consequently the competence to consent to large-scale international involvement in the process of state reconstruction. Accordingly, state reconstruction has only taken place with some form of consensual basis, however inadequate this may be as a

representation of the will of the state and its people in relation to the right to political independence. The present situation in Somalia, where an un-elected government awaits a massive international military presence to put it in a position to reconstruct the state along democratic lines, is perhaps the most striking instance of how international recognition can essentially accord status to a government with little tangible basis for its claim to represent the state or its people.

As was noted in Chapter 1, the doctrine of *jus cogens* means that, at least, 'a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.'¹ This is to protect the values and interests that are fundamentally important to all of international society, or in the words of the Vienna Convention 'the international community of states as a whole',² and it does so by preventing a state from entering into a contract to achieve what it could not do unilaterally. The legal principle of a right of all peoples to self-determination has been identified by an increasing number of scholars as a norm of *jus cogens*.³ Once one starts thinking of the right to self-determination as applicable beyond the colonial context, however, such an idea becomes much more unlikely in light of the potential significance of the status of *jus cogens* and the uncertainty which surrounds the substance of the right of self-determination. Still there are those that strongly state that the right to self-determination has a status of *jus cogens* beyond the colonial context and that it includes a right to democracy.⁴ While one might worry that this appears to be the type of inflationary argumentation of which Weil has warned,⁵ the practice that has been addressed in this survey strongly supports a view that the principle of a right to self-determination does not have peremptory status beyond the colonial context. This is on the basis that it is not a matter of fundamental importance for 'the international community of states as a whole', because, if it were, surely there would be greater interest in who can exercise the rights to decide found in the legal doctrine of self-determination. It is simply not consistent for a legal norm to be signaled out as one for which there can be no derogation, because of its vital importance for 'the

¹ VCLT, Article 53.

² VCLT, Article 53, see also *Prosecutor v. Anto Furundzija*, No. IT-95-17/1-T10, Trial Chamber. Judgment, 10 December 1998, paras. 155-157; J. Frowein, 'Jus Cogens', (1984) 7 *EPIL* 329.

³ See, e.g., M. Shaw, *Title to Territory in Africa* (1986) 91; A. Cassese, *Self-Determination of Peoples. A Legal Reappraisal* (1995) 171-172.

⁴ See, e.g., A. Orakhelashvili, 'The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions', (2005) 16 *EJIL* 59 at 81.

⁵ P. Weil, 'Towards Relative Normativity in International Law', (1983) 77 *AJIL* 413.

international community of states as a whole', and then for it to be overcome through some international recognition, and then consent, of a government that lacks any meaningful attachment to the will of the state and its people.

The ease with which state consent can be obtained is also troublesome for those who advocate a *jus post bellum* to regulate, in particular, the reconstruction of a state after conflict.⁶ This is because state consent serves to bring international involvement within the internal affairs of the target state. Thus international involvement is shielded from the eyes of international law, so to speak, by the same sovereignty, the same right to political independence, the preservation of which has been a key concern of this study. One need only contrast the attention given to the reconstruction of Iraq when still formally occupied with the complete lack of comment on how the reconstruction proceeded under a selected Iraqi government, which consented to the large-scale international involvement, to understand the power of consent in this respect. By identifying the inadequacy of the consensual basis in relation to the right to political independence, this study provides a basis for piercing the veil of sovereignty that the consensual basis sustains, and for arguing for regulation and accountability of all involved.

The responsibility to protect doctrine, as advocated by ICISS, envisages intervention and rebuilding without a consensual basis as a response to immense human suffering. It was recently observed by Wills that the nature of the responsibility after intervention, including the responsibility to rebuild, is not addressed adequately in the Report. Wills has therefore indicated the need for clarification of: 'what are the legal responsibilities of the forces that have been sent to provide protection and what are the legal responsibilities of the state or organisation that sent them?'⁷ In practice, on the basis of this study, one finds it hard to imagine that the interveners would not, as soon as thoughts turn to reconstruction, select a government to consent to the international involvement and administer the reconstruction process. Thus projecting the process as an internal matter, and, consequently, helping to avoid calls for the development of international law. One

⁶ See, e.g., C. Stahn, '*Jus ad bellum*', '*jus in bello*' . . . '*jus post bellum*'? -Rethinking the Conception of the Law of Armed Force', (2006) 17 *EJIL* 943; B. Orend, '*Jus Post Bellum*: The Perspective of a Just-War Theorist', (2007) 20 *LJIL* 571; K. Boon, 'Legislative Reform in Post-conflict Zones: *Jus Post Bellum* and the Contemporary Occupant's Law-Making Powers', (2005) 50 *McGill LJ* 285.

⁷ S. Wills, 'Military Interventions on Behalf of Vulnerable Populations: The Legal Responsibilities of States and International Organisations Engaged in Peace Support Operations', (2004) 9 *JCSL* 387 at 388.

also imagines, on the basis of this study, that such a government would decide to pursue democratic reconstruction, thus at least suggesting accommodation of the value of self-determination put at risk by a process inconsistent with the right to political independence.

B. The Pursuit of Democracy as a Freely Chosen Political Concept

The examples addressed by this study span some 20 years. So for 20 years, when an independently effective domestic government has been absent, democracy has been the substitute, the device for legitimising the entity that has made the choices about how the reconstruction should proceed. Over such a period of time, amidst the debate in international law about the emergence of a legal concept of democracy, it would be reasonable to expect that there would be some signs of adoption of a legal concept of democracy. Yet the developments that have been identified, by way of the emerging consensus on democracy as a human right linked to the right to self-determination,⁸ have been found by this study, which has searched for *opino juris*, not to have lead the international actors involved in state reconstruction to believe that they were legally bound. Instead, in all the examples, the democracy pursued has been chosen in act of self-determination and treated as a political concept. The potential for a legal concept of genuine democracy linked to the right to self-determination, to provide a basis for regulation and accountability of the democratic excuse for neglect of political independence has been shunned. This finding is not affected by the fact that some scholars, of the opinion that democracy has already crystallised as an international legal concept in the normal run of things, have suggested that a legal concept of democracy did apply in the examples addressed by this study.⁹

The complete lack of belief in legal obligation attaching to the use of the term democracy, on behalf of all those involved in state reconstruction, clearly does not support the development of a legal concept of democracy in the normal run of things. Not least because, in the normal run of things, there is the additional difficulty of the implications that a legal concept of democracy linked to the right to self-

⁸ See, e.g., T. Franck, 'The Emerging Right to Democratic Governance' (1992) 86 *AJIL* 46.

⁹ See, e.g., L. Carlowitz, 'UNMIK Lawmaking between Effective Peace Support and Internal Self-Determination', (2003) 41/3 *Archiv des Völkerrechts* 336 at 360-364; G. H. Fox, *Humanitarian Occupation* (2008) 155.

determination would carry for effective but undemocratic domestic governments. But, most significantly, this finding also reveals how what may amount to little more than rhetoric has been able to sustain international acceptance of a practice that challenges the cornerstone of the international system, political independence. for a considerable period of time. This relates to the fact that if international actors do not perceive a 'need' for new law then it will not be created.

If, however, in the future, in the absence of an effective government, the pursuit of democracy is not treated as a legal concept linked to the right to self-determination, there is the risk that the hortatory utility of democracy to suggest genuine rule of the people, and thereby convince that the international involvement is in the interests of the value of self-determination, will be lost. At the moment, when democracy is posited, there is still a reasonable expectation that it is something like the democratic ideal, with respect to both procedure for government identification and substantive standards of conduct, which the international actors are committed to helping realise. However, should the view start to form that democracy is simply a palliative for the neglect of political independence – through a pattern of lack of commitment to the democratic ideal – such power will naturally diminish. The adoption of the legal proposal of this study will not only help confirm the commitment but it will also provide a basis for challenging the authority of governments that the international actors keep in power in order to reconstruct the state. The idea is not to seek to remove the government, but to encourage the continued pursuit of the democratic ideal by having removal from authority as an option should there be persistent neglect of the legal standards.

This call for a legal approach to democracy linked to the right to self-determination is not meant as challenge to the argument that peace-making must be treated as a political process. This is the idea that 'international peacebuilding efforts should focus on those factors that allow stable political processes to emerge and flourish.'¹⁰ 'Hence, international peacebuilders should not focus primarily on prescribing or operating specific political structures but on facilitating or enforcing the conditions that constitute an appropriate context for these structures to emerge.'¹¹ But the call of this study does require, in the interests of the value of self-

¹⁰ E. M. Cousens, C. Kumar, and K. Wermester, *Peacebuilding as Politics: Cultivating Peace in Fragile Societies* (2001) 183.

¹¹ *Ibid.*, p. 184.

determination, that, while there is no independently effective domestic government and effectiveness is dependent on large-scale international involvement, the government which is supported, with reasonable exceptions to accommodate concessions in the peacemaking process, strives to realise the emerging consensus on democracy as a legal concept.

C. The Disappearance of the Right to Political Independence in State Reconstruction

Is large-scale international involvement in state reconstruction evidence that state sovereignty is losing meaning as an ordering principle of international society? The fact that, across all the examples, there is a consensual aspect indicates that formally, at least, state sovereignty is still seen as something that must be respected. Still, when one looks more closely, it is evident that, because of the lack of independent effective domestic government, there is little actual meaning left in the right to political independence in these examples. Why, then, retain the pretence?

Chandler sees the desire of international actors 'to preserve the formal trappings of sovereignty' as a consequence of the contradictory desire to intervene but to avoid political responsibility.¹² Undoubtedly, international actors might prefer not to incur responsibility for their actions. However, one can also see it as an inevitable result of how international law develops in an *ad hoc* fashion pursuant to the 'needs' of states rather than in pursuit of some blueprint for international order. As a decentralised international legal system there is a need for states, as the basic unit, to have effective governments if international law is to retain its efficacy. Without effective governments there is no chance of a state fulfilling its international obligations. Logically, then, international law should defer to effectiveness. Indeed, once upon a time it largely did. A turn to ethics has, however, taken international law ever further away from effective realities. The right of peoples to self-determination is a central feature of this turn, so much so that it is the explanation for why ineffective states remain sovereign states.

¹² D. Chandler, *Empire in Denial: The Politics of State-building* (2006) 40; see, similarly, O. Schachter, 'The Decline of the Nation State and its Implications for International Law', (1997) 36 *Columbia Journal of Transnational Law* 7 at 19.

The importance placed in the right to self-determination by international society and the need for states to be effective for the efficacy of international law collide in the context of state reconstruction. Its importance in its own right and as an ordering principle signifies that international actors are not able to simply abandon the right to self-determination and assume responsibility for the target territory and its people. Rather they must try and present the reconstruction process as consistent with the right to self-determination. The ease with which state consent can be obtained is one element which allows this; the other core element is the pursuit of democracy. So while the right to political independence is in fact hardly satisfied, there is the projection that both it and the attendant values are satisfied. If this compromise is going to continue to engender international acceptance, given the importance of the right to political independence for international order, then states, and scholars who advocate greater levels of international involvement in ineffective states,¹³ would be well advised to consider the suggestions of this study in relation to regulation and accountability of the democratic excuse. If not, then, those international actors involved will likely find that their conjuring trick of balancing state reconstruction with the target state and its people's right to political independence will one day fail to convince both the domestic and the wider international audience.

¹³ See, e.g., S. D. Krasner and C. Pascual, 'Addressing State Failure'. (July/August 2005) 84 *Foreign Affairs* 153.

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