

U.N. POSTCONFLICT RECONSTRUCTION

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I. INTRODUCTION

In the past decade, U.N. peacekeeping work has undergone a richly documented transformation. After more than forty years of stalemate, the end of the Cold War led, not only to a break in the Security Council deadlock, but also to a re-thinking of the limits of sovereignty, and saw the United Nations assuming new responsibilities and goals in the interests of the Charter's mantra of "international peace and security."¹

This Note examines an emerging tension in the theory and practice of U.N. postconflict reconstruction, visible in the relationships that must be negotiated between the United Nations and local political actors in each new mission.² It seeks to make sense of this recent transformation in the United Nations' reach by positing two basic models for the relationship between the United Nations and local actors in reconstruction

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1. U.N. CHARTER pmbl.

2. Every individual crisis differs, and the laudable efforts of commentators to find threads that weave these disparate endeavors together sometimes seem misleading or unproductive. And yet, the men and women who tackle new crises inevitably seek to apply general theories of peacekeeping and reconstruction as they ask which methods and approaches are most appropriate to achieve the best results (which themselves are often open to dispute). The influence of these decisions on the futures of entire regions can be profound. The theories are sometimes flawed and always provisional, but they nevertheless make up one part of the political, philosophical, and theoretical matrix that leads to the development of new mandates and new missions. Professor Benedict Kingsbury suggested this perspective on the inevitability of peacekeeping theory to me. Interview with Benedict Kingsbury, Professor of Law, New York University School of Law, in New York, N.Y. (Oct. 17, 2001).

efforts and examining the tension between these models. In one model, which can be called “consent-based,” the United Nations’ authority is limited and, to the extent that it exists, is only one element in a mix of control that includes local actors. This view casts the United Nations in a partnership role, seeking to help establish self-perpetuating institutions and values that will endure even as the international presence is reduced. In the second model, which can be termed “neocolonialist,” all authority in the region rests in the hands of the Secretary-General and is employed by his Special Representative. This approach rests on the belief that the quickest and most efficient way to rebuild societies is to reduce the disruptions that can be caused by local actors wielding authority against a region’s best interests.

In Part II, I illustrate the consent-based model by examining the relatively successful missions of the early 1990s in Namibia, El Salvador, and Cambodia. I focus on the U.N. efforts to create mechanisms—of varying degrees of formality—that could simultaneously enable political reconciliation in the countries (often by bringing rebel factions into the legitimate political discourse) and allow for meaningful cooperation between the United Nations and local political actors.

In Part III, I turn to the neocolonialist model, which developed in the mid-1990s. I first examine missions in Somalia and Bosnia, where the United Nations sought to import its successful consent-based model to circumstances where a multinational military force was the only guarantor of security in the country. I argue that the failure of the consent-based model in these conditions was due less to deficiencies with that approach than to politically compromised and at times misguided implementation efforts. I then examine the protectorates of Kosovo and East Timor, where the neocolonialist model has been realized fully: Absolute authority of the occupying multinational force is matched by an equally all-powerful civilian administration. I explore the serious criticisms of this model from both international and local actors exposed to it.

In Part IV, I explore a direct challenge to the neocolonialist model evident in the actions of Lakhdar Brahimi, the Chair of 2001’s Panel on U.N. Peace Operations and the current Secretary-General’s Special Representative for Afghanistan. In that country a new mission, under his stewardship, has aban-

done the neocolonialist approach in favor of the consent-based model examined in Part II.

Like any such grouping, this division will be subject to many valid criticisms. It is overly simplistic; it is at times arbitrary; and it contains inevitable overlap. Even with strenuous efforts, it will be very difficult to pin down the crucial concepts—such as consent, or control itself—that must underlie the models. I argue that my binary conceptualization is nevertheless a useful way to view and analyze these missions. As the United Nations moves into the twenty-first century, two views of its proper role are in conflict. This conflict is playing itself out at the level of rhetoric and discourse and, more crucially, of actual missions and their mandates. Whether this tension is recognized and openly addressed in future mandate debates could prove crucial to the success of those missions and to the U.N.'s continuing capacity to act as a guarantor of international peace and security.

But why must these two models—consent-based and neocolonialist—conflict, just because they represent different operational approaches? As has been documented by Michael Doyle and others, the circumstances on the ground in a given region should dictate what method is to be used.³ Perhaps it will be enough simply to identify the two approaches and leave it to future peace builders to make informed judgments about the proper approach.

The experience of the past decade, unfortunately, suggests that such a view is naïve. Closer analysis of recent missions demonstrates that many factors, ranging from political expedience to institutional flaws, have led to an overreliance on the neocolonialist model at the expense of a consent-based approach. I argue that Brahimi's alternate vision of the United Nations' appropriate role should not be limited to the circumstances in Afghanistan, but instead, embraced as a better baseline from which to confront new challenges; I further call for a return to the formalized constitutional structures that helped facilitate the successes of the early 1990s. As with any such general approach, conditions will sometimes demand departures to account for the need for greater international

3. See, e.g., Michael Doyle, *War Making and Peace Making: The United Nations' Post-Cold War Record*, in *TURBULENT PEACE: THE CHALLENGES OF MANAGING INTERNATIONAL CONFLICT* 529 (Chester A. Crocker et al. eds., 2001).

control, but these steps may be more restrained if they are viewed as a last resort rather than a dominant—or even an equally legitimate—model.⁴

II. THE CONSENT-BASED MODEL

In the immediate aftermath of the Cold War, the United Nations engaged in a series of reconstruction missions—in Namibia, Cambodia, and El Salvador—whose perceived success generated a great deal of enthusiasm about the capacity of the United Nations to assist in postconflict reconstruction. The methods and approaches of these missions help illustrate the consent-based model of U.N. reconstruction that we are seeing again today in Afghanistan.

The central factor in all of these missions was the consent and cooperation of local actors. “Consent” is a slippery word, however, and its meaning in contexts like these often runs counter to any generally accepted colloquial sense of the word. We can define three different classes of consent to an international presence in a country:

(1) “*Genuine*” consent, usually when warring parties are so fatigued by conflict that they welcome and cooperate with international assistance.

(2) “*Coerced*” consent, such as when a multinational military force has occupied a country and is calling the shots. The nominal consent of political factions to be governed by such an international authority is surely no more authentic than the “consent” of a mugging victim.⁵

4. A caveat: When an earlier draft of this Note was workshopped at the Conference on International Organizations in Civil War at New York University School of Law in February 2002, participants identified many paths not followed. Even studies of single missions inevitably ignore countless crucial and perhaps dispositive issues, such as judicial reform and transitional justice, international tribunals, human rights accountability, and police and army reform. Each of these issues, and many others, would need to be addressed in order to reach a full understanding of the missions examined in this study. In choosing to focus on the dynamic between international and local political actors in eight missions, I must pass over many other topics for the sake of brevity and coherence.

5. See Ralph Wilde, *From Bosnia to Kosovo and East Timor: The Changing Role of the United Nations in the Administration of Territory*, 6 ILSA J. INT'L & COMP. L. 467, 470 (2000) (“[T]he weakness of [these entities] renders consent meaningful [only] in a narrow, formal sense. In a more general sense, international administration projects are imposed.”). See *infra* Part III.B.

(3) “*Limited*” consent, which falls somewhere between those two extremes. This applies to a situation where parties begrudgingly accept the terms of a peace treaty and the international presence that goes with it because of pressure from other states or political realities in the country.

The consent-based model can be divided by the presence of either the first or third form of consent (the second form never appears in this category, and instead describes the neocolonialist approach), in what could be called “ideal consent” and “problematic consent” scenarios.

A. *Ideal Consent Scenarios*

Two missions in the early 1990s demonstrate how the United Nations, in the right circumstances, can play the role of cooperative facilitator, with very positive results. Whereas the circumstances in Namibia and El Salvador were different in many ways, the following similarity linked them: The United Nations arrived at exactly the moment when those in the country whose cooperation would be crucial for the mission’s success were best equipped to offer that cooperation. The consent to the U.N.’s presence therefore can be termed genuine.⁶ But the specific mechanisms that were established to define the U.N. presence and relation to local actors differed significantly and, as such, allow insight into the range of structures that can work in the best scenarios. Such an understanding might prove useful even when applied to more challenging situations.

1. *Namibia: UNTAG and the Administrator General*

When the United Nations finally arrived in Namibia in 1989, thirteen-year-old Security Council Resolution 435 mandated that the United Nations would have the “supervision and control” of the process by which Namibia would elect its

6. There is room for debate as to whether even such an ideal scenario actually should be termed genuine consent. Is consent genuine if it would be withdrawn at the first sign of military superiority that could be used to wipe out the opposition and do away with the need for an international presence? Possibly not—but, for our purposes, this is the most genuine consent we are likely to find.

own assembly to assume control of the new country.⁷ But the United Nations did not assume administrative control of Namibia, or even of the election: Under the eventual deal worked out with South Africa, a South West African Administrator General exerted final administrative authority—including control of the police force—over the country during the transition.⁸ What leverage the United Nations—and its Special Representative—had lay in its power to judge and certify the fairness of every stage of the election campaign,⁹ and in South Africa's interest in getting as much credit as possible from its decision to abandon its colony.

The United Nations, which was well funded for the mission, was able to match every South African administrator person for person.¹⁰ Teams consisting of one United Nations and one South African official engaged in a public information effort aimed at counteracting the stifling effect of decades of colonial rule and misinformation, and managed to oversee the registration of 700,000 Namibians in ten weeks, a number greater than the estimated number of qualified citizens.¹¹ The election was held in November 1989 in relatively peaceful circumstances; 97% of registered voters turned out at the polls.¹² The Namibian Constituent Assembly, charged with the task of

7. S.C. Res. 435, U.N. SCOR, 33d Sess., 2087th mtg., U.N. Doc. S/RES/435 (1978).

8. See ROGER HEARN, UN PEACEKEEPING IN ACTION: THE NAMIBIAN EXPERIENCE 63-64 (1999).

9. See *id.* at 64; see also LAURENT C.W. KAELA, THE QUESTION OF NAMIBIA 124 (1996).

10. Interview with Paul Szasz, Professor, New York University School of Law, in New York, N.Y. (Feb. 23, 2002). A military force of 4,500 blue-helmets was also deployed, with three main responsibilities: (1) to monitor the cease-fire and withdrawal of foreign troops; (2) to assist the civilian side in election monitoring; and (3) a more general charge to help maintain an atmosphere that could sustain free elections. See HEARN, *supra* note 8, at 88; see also United Nations, *Namibia—UNTAG Background*, at http://www.un.org/Depts/dpko/dpko/co_mission/untag.htm.

11. See HEARN, *supra* note 8, at 183-86, 191-97. This was quite an accomplishment, given a dangerous climate that included violence and intimidation by the counterinsurgency group known as Koevoet. See DAVID LUSH, LAST STEPS TO UHURU: AN EYE-WITNESS ACCOUNT OF NAMIBIA'S TRANSITION TO INDEPENDENCE 215 (1993).

12. See United Nations, *Namibia—UNTAG Background*, *supra* note 10.

drafting a constitution, was convened on November 21, 1989, and Namibia declared independence on March 21, 1990.¹³

UNTAG never moved beyond an advisory role, leaving much of the actual administration to the South African authorities.¹⁴ Roger Hearn notes that “[t]here was a conscious policy on the part of UNTAG to use non-confrontational conflict management strategies to defuse the tension, manage the conflict . . . and promote national reconciliation.”¹⁵ Lionel Cliffe appears somewhat troubled by this approach when he concludes that “despite a significant UN role, the administering power was able to manipulate sufficiently the process at the margins”¹⁶ And David Lush, in an eyewitness account, bemoans UNTAG’s inability to “prevent the sporadic fighting which continued as the security forces tracked down and killed remaining insurgents.”¹⁷ Although deeming the mission a success, Hearn also is troubled both by “the weakness of the mandate in Namibia” and by the fact that “the full powers offered under the mandate were not utilised.”¹⁸

Paul Szasz, who was the chief U.N. negotiator with the South African authorities, has a different perspective on the mission. “The observers didn’t catch up to the reality on the ground,” he explains.¹⁹ “They still saw hostility, while in fact South Africa was determined for the transition to be as peaceful as possible.”²⁰ Szasz suggests that, while the Administrator General himself occasionally caused problems, those in Pretoria who wielded final authority were determined for the mission to succeed, and “all it would take was a call to Pretoria, and the Administrator General would get a call himself within hours.”²¹ Szasz concludes that “there was good will on all sides.”²²

13. *Id.*

14. See HEARN, *supra* note 8, at 181-82.

15. *Id.* at 144.

16. LIONEL CLIFFE, *THE TRANSITION TO INDEPENDENCE IN NAMIBIA* 144 (1994).

17. LUSH, *supra* note 11, at 156.

18. HEARN, *supra* note 8, at 226.

19. Interview with Paul Szasz, *supra* note 10.

20. *Id.*

21. *Id.*

22. *Id.*

Conditions were ripe for a relatively painless transition to self-governance, and the lessons of Namibia may not prove useful to circumstances where the departing colonial power is less invested in a peaceful transition. The cooperative model is still worth noting, however. The United Nations worked side by side with local administrators—even to the point of providing one UNTAG official to shadow every South African election worker throughout the country—with an informal mechanism in place to ensure that any counterproductive local activity would be reined in (by a call from the Secretary-General to Pretoria). This approach is noteworthy, not only because of the ultimate success of the mission, but also for the good will it apparently generated.

2. *El Salvador: ONUSAL and COPAZ*

The U.N. role in El Salvador's reconstruction involved a more complex mechanism to establish and maintain a workable dynamic between the two factions and the international presence. In 1990, after years of deadlock, the Salvadoran government and the rebel movement, the Frente Farabundo Martí para la Liberación Nacional (FMLN), signed the San Jose Agreement on Human Rights,²³ which gave the United Nations a substantial role in verifying the accord. In a mammoth negotiating session in Mexico City in the spring of 1991, the factions agreed on a package of reforms relating to the armed forces, public security, the judiciary, the electoral system, and a U.N.-implemented truth commission that would investigate the crimes against humanity committed in El Salvador in the past decade.²⁴ A month later, Security Council Res-

23. Agreement on Human Rights, *Annex to Note Verbale Dated 14 August 1990 from the Charge d'affaires a.i. of the Permanent Mission of El Salvador to the United Nations Addressed to the Secretary-General*, U.N. GAOR, 44th Sess., Annex, Agenda Item 34, U.N. Doc. A/44/971-S/21541 (1990).

24. Mexico Agreements, *Annex to Letter Dated 8 October 1991 from El Salvador Transmitting the Text of the Mexico Agreement and Annexes Signed on 27 April 1991 by the Government of El Salvador and the FMLN*, U.N. Doc. A/46/553-S/23130 (1991), reprinted in U.N. Blue Book Series, 4 THE UNITED NATIONS AND EL SALVADOR, 1990–1995, at 167 (1995); see Mark LeVine, *Peacemaking in El Salvador*, in KEEPING THE PEACE: MULTIDIMENSIONAL UN OPERATIONS IN CAMBODIA AND EL SALVADOR 227, 238 (Michael W. Doyle et al. eds., 1997).

olution 693 established ONUSAL (U.N. Observer Mission in El Salvador).²⁵

“This was the first case,” says Alvaro de Soto, at the time Chief Political Advisor to Secretary-General Boutros-Ghali, “when the UN consciously took on a role that was meant to build peace after a conflict.”²⁶ He explains that the United Nations was able to play this role because of the circumstances surrounding the El Salvador conflict: 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 United Nations.²⁷

Resolution 693’s authorization language was weak: It simply stated that ONUSAL would “monitor all agreements concluded between the two parties” and that its initial mandate would be “to verify the compliance by the parties” of the San Jose Agreement on Human Rights.²⁸ The mandate would soon be extended to include “the verification and monitoring” of the New York Agreement, signed four months later.²⁹ This agreement finally included a comprehensive cease-fire, as well as agreements on disarmament, incorporation of guerilla forces into society, a civilian police force, judicial reform, and a new national body that included representatives from all the major political parties in El Salvador.³⁰

The new body, the National Commission for the Consolidation of Peace (COPAZ), included members from the gov-

25. S.C. Res. 693, U.N. SCOR, 46th Sess., 2988th mtg., U.N. Doc. S/RES/693 (1991).

26. Interview with Alvaro de Soto, Under-Secretary-General, United Nations, in New York, N.Y. (Jan. 9, 2002).

27. *Id.*

28. S.C. Res. 693, *supra* note 25, ¶ 2.

29. S.C. Res. 729, U.N. SCOR, 47th Sess., 3030th mtg. ¶ 2, U.N. Doc. S/RES/729; New York Agreement, *Annex to Letter Dated 26 September 1991 from the Permanent Representative of El Salvador to the United Nations Addressed to the Secretary-General*, U.N. GAOR 46th Sess., Annex, Agenda Item 31, at 2 (1991). The mandate was enlarged again a year later after the government of El Salvador requested that ONUSAL form an electoral division to oversee elections planned for 1994. See S.C. Res. 832, U.N. SCOR, 48th Sess., 3223d mtg. ¶ 3, U.N. Doc. S/RES/832 (1993).

30. See generally New York Agreement, *supra* note 29; see also LeVine, *supra* note 24, at 241.

ernment, the rebel faction, and all political parties.³¹ As spelled out by the Agreement, COPAZ had the responsibility “for overseeing the implementation of all the political agreements reached by the Parties”³² and was “a mechanism for the monitoring of and the participation of civilian society in the process of the changes resulting from the negotiations, in relation both to the armed forces, in particular, and to the other items on the agenda.”³³ In other words, this transitional body gave voice to the various groups whose cooperation was so essential to the success of the U.N. efforts, including the FMLN, who now could be fully integrated into the political life of the country.³⁴

Both a church figure and an ONUSAL official were given access to COPAZ deliberations as observers.³⁵ COPAZ had no explicit executive powers, but the legislative assembly was “obliged to consult with COPAZ before adopting decisions or measures relating to relevant aspects of the peace agreement.”³⁶ The body was made a central part of the reconstruction process via other powers granted it, including the right to draft preliminary legislation relating to the peace agreements³⁷ and a general overseeing role that complemented the similar role of the United Nations.³⁸

Ian Johnstone documents the important role that COPAZ played by providing a “forum for dialogue and, on some important legislation, consensus-building.”³⁹ COPAZ drafted legislation on subjects such as “the electoral code, the National Council of the Judiciary, the Career Judicial Service, and on private weapons and security bodies;” all of this legislation was adopted by the National Assembly.⁴⁰ Johnstone documents several instances where COPAZ was able to lend credibility to

31. New York Agreement, *supra* note 29, para. I(2)(a); see LeVine, *supra* note 24, at 241.

32. New York Agreement, *supra* note 29, para. I(1).

33. *Id.*

34. See IAN JOHNSTONE, RIGHTS AND RECONCILIATION: UN STRATEGIES IN EL SALVADOR 55-56 (1995).

35. New York Agreement, *supra* note 29, para. I(2)(b).

36. *Id.* para. I(4)(b).

37. *Id.* para. I(4)(g), (i).

38. *Id.* para. I(4)(h).

39. JOHNSTONE, *supra* note 34, at 56.

40. *Id.*

decisions because it was seen to represent the views of all of Salvadoran society: “[COPAZ] provides an important lesson on how the UN can use *ad hoc* representative mechanisms to manage the implementation of peace accords, without automatically deferring in each case to the will of the parties narrowly defined.”⁴¹

ONUSAL terminated in 1995, its mandate largely accomplished.⁴² D.H. McCormick asserts that “the remarkable progress achieved [in El Salvador] would not have been possible without the comprehensive post-conflict efforts of the United Nations.”⁴³ Robert Orr highlights El Salvador as “a model of reconciliation,” and adds that, “in the broader international context of peace efforts, El Salvador stands out for its successes [It] has avoided a return to war, the human rights situation has dramatically improved, a variety of new institutions have been built, the economy has grown, and democracy is increasingly taking hold.”⁴⁴ Once again, there is evidence of an implementation approach that one U.N. official termed “non-confrontational.”⁴⁵ Others have criticized ONUSAL for failing to push for human rights with enough vigor and for its spotty record depoliticizing the judiciary,⁴⁶ but with the perceived neutrality of the mission a top priority, such difficulties may have been inevitable.

ONUSAL’s integration into Salvadoran political life was more complex and nuanced than the less formal relationship between the Administrator General and UNTAG officials: COPAZ represented an effort to create a formal structure that both would represent Salvadoran society as a whole and would

41. *Id.*

42. The United Nations kept an ever-diminishing presence, first in MINUSAL (1995–1996), then ONUV (1996), and, since 1997, a “tiny support unit for UN headquarters of four.” Robert C. Orr, *Building Peace in El Salvador: From Exception to Rule*, in *PEACEBUILDING AS POLITICS: CULTIVATING PEACE IN FRAGILE SOCIETIES* 153, 181 n.71 (Elizabeth M. Cousens et al. eds., 2001) [hereinafter *PEACEBUILDING AS POLITICS*].

43. D.H. McCormick, *From Peacekeeping to Peacebuilding: Restructuring Military and Police Institutions in El Salvador*, in *KEEPING THE PEACE: MULTIDIMENSIONAL UN OPERATIONS IN CAMBODIA AND EL SALVADOR* 282, 311 (Michael W. Doyle et al. eds., 1997) [hereinafter *KEEPING THE PEACE*].

44. Orr, *supra* note 42, at 154.

45. JOHNSTONE, *supra* note 34, at 28.

46. *See id.* at 28, 69.

allow for ONUSAL's integration within it. By all accounts, this effort was successful.

B. *Problematic Consent Scenarios*

We now turn to more difficult circumstances, where the sincerity of the consent to an international presence is questionable—the third consent scenario outlined above.⁴⁷ In the case of Cambodia, the refusal of different factions to abide by their commitments undermined the U.N. mission, and events since have led many to question whether it was as successful as was thought at the time. But the creative effort to form workable relationships between the international and local authority figures still adds to our understanding of the ever growing experience of the United Nations in its reconstruction endeavors.⁴⁸

1. *Cambodia: UNTAC and the Supreme National Council*

The Paris Peace Agreements of 1991, which ended the civil war in Cambodia, were the result of complex negotiations between all parties to the Cambodian conflict and many other powers who shared an interest in Cambodia's fate.⁴⁹ Talks between the five permanent members of the Security Council led to the adoption of a plan, originally suggested by Australia, to have the United Nations run many aspects of the civil administration of Cambodia—with the factions' consent—until a newly elected government was in place.⁵⁰

The Agreement called for a transitional U.N. authority, U.N. Transitional Administration in Cambodia (UNTAC), to help administer a “comprehensive political settlement to the Cambodia conflict [that] will be just and durable”⁵¹ The basic blueprint was to create a Supreme National Council (SNC), representing all the factions, to “be the unique legiti-

47. See *supra* Part II.

48. A discussion of the new mission in Afghanistan, U.N. Assistance Mission in Afghanistan (UNAMA), which also can fit into this problematic consent category, will be postponed until the conclusion of this study. See *infra* Part IV.

49. Agreement on a Comprehensive Political Settlement of the Cambodia Conflict (with annexes), Oct. 23, 1991, 1663 U.N.T.S. 56 [hereinafter Paris Agreement].

50. Interview with Alvaro de Soto, *supra* note 26.

51. Paris Agreement, *supra* note 49, pmb1.

mate body and source of authority [in Cambodia].”⁵² The SNC membership included Prince Sihanouk, six members from the State of Cambodia’s faction, and six representatives from other factions.⁵³ As Nishkala Suntharalingam explains, the SNC was a

mechanism [that] not only provided the framework by which the UN could conduct, with the consent of the Cambodian factions, a peace operation in that country, but also created, as a by-product, a forum in which the Cambodian factions could start the process of national reconciliation, during the transitional period.⁵⁴

UNTAC was to exist only until a new constituent assembly had been elected in an election “organized and certified by the United Nations.”⁵⁵ This assembly then would ratify a new Cambodian Constitution and transform itself into a legislative body. In Article 6 of the Agreement, the SNC “delegate[d] to the UN all powers necessary to ensure the implementation of this Agreement.”⁵⁶

With 22,000 total staff, UNTAC was, in the words of James Schear, “large, experimental, and highly invasive.”⁵⁷ Michael Doyle writes that “[n]ot since the colonial era . . . had a foreign presence held so much formal administrative jurisdiction over the civilian functions of an independent country.”⁵⁸ Steven Ratner suggests that “the SNC’s primary purpose . . . was to delegate the authority needed to implement the settlement to UNTAC.”⁵⁹

52. *Id.* art. 3, at 59.

53. Nishkala Suntharalingam, *The Cambodian Settlement Agreements, in KEEPING THE PEACE*, *supra* note 43, at 82, 87-88.

54. *Id.* at 86.

55. Paris Agreement, *supra* note 49, art. 1, at 58. Because of political dynamics between the several powerful states who were involved in the negotiations, there was little chance to go further than such an election and a peaceful transfer of power. Interview with Alvaro de Soto, *supra* note 26.

56. Paris Agreement, *supra* note 49, art. 6, at 59.

57. James Schear, *The Case of Cambodia, in BEYOND TRADITIONAL PEACEKEEPING* 248, 252 (Donald Daniel et al. eds., 1995).

58. MICHAEL W. DOYLE, UN PEACEKEEPING IN CAMBODIA: UNTAC’S CIVIL MANDATE 13 (1995).

59. Steven Ratner, *The Cambodia Settlement Agreements*, 87 AM. J. INT’L L. 1, 10 (1993).

The Agreement, however, also anointed the SNC as the sole “unique legitimate body and source of authority” in Cambodia,⁶⁰ creating a strange tension: Where did the ultimate authority in Cambodia really lie? During the period of UNTAC’s implementation, for example, the SNC signed two human rights treaties that would be binding on the future government—the sort of action that sovereign entities typically undertake.⁶¹ The dynamic established by the Agreement—beginning with the fact that UNTAC was only invited to assist Cambodia *by* the SNC—suggests a more complicated interplay of authority. UNTAC was required to “comply with the advice provided”⁶² by the SNC, with the caveat that such advice must be “consistent with the objectives of the present Agreement.”⁶³ If the SNC could speak with one voice, it would present its advice to UNTAC; if it was divided, the President of the SNC, Sihanouk, would offer the advice.⁶⁴

We see here a constitutional structure familiar to students of U.S. constitutional law. Just as the U.S. Constitution, as interpreted by the Supreme Court, can trump an action of any other branch, UNTAC was empowered to determine if any advice was “consistent” with the Agreements; short of that, it was required to respond to the wishes of the SNC, just as acts of Congress, properly implemented, become the law of the land. Even when the UNTAC Special Representative saw fit to override the demands of the SNC, he was still required to take “fully into account the views expressed in the SNC.”⁶⁵

Other aspects of the Agreements attempted to solidify the relationship between UNTAC and the SNC. The ultimate question of who wielded final authority was left murky, but this is, again, no different than many constitutional structures: John Marshall, after all, had to assert the Supreme Court’s ultimate role in interpreting the U.S. Constitution. Subsequent events would determine where the power really lay, but the carefully structured relationship between the international and local authority may have created the opportunity for the

60. Paris Agreement, *supra* note 49, art. 3, at 59.

61. See Suntharalingam, *supra* note 53, at 88-89.

62. Paris Agreement, *supra* note 49, Annex 1, § A(2)(b), at 69.

63. *Id.* Annex 1, § A(2)(b), at 69.

64. See *id.* Annex 1, § A(2), at 69.

65. *Id.* Annex 1, § A(2)(c), at 69.

process to get started peacefully. Given Cambodia's recent past, this was no small accomplishment.

Faced with resistance from many Cambodians and deeply ingrained structures of authority and administration, neither UNTAC nor the SNC ultimately wielded the authority envisioned in the Agreements. Michael Doyle explains that "UNTAC failed to establish effective control over Cambodian civil administration," even after establishing offices in all of the country's twenty-one provinces,⁶⁶ due to strategies of resistance employed by the institutional actors who controlled existing administrative structures.⁶⁷

Despite repeated cease-fire violations and an eventual decision to abandon disarmament efforts and instead focus on the single goal of a free and fair election, the election did come off peacefully, and a new Cambodian assembly soon convened.⁶⁸ UNTAC's success was unquestioned at the time. Recent events have led some to rethink that view, as a coup in 1997 meant the end of effective democracy in Cambodia, at least for the time being. Doyle now argues that "a peacekeeping operation that went relatively well turned into a peacebuilding experience that wasted the political opening created by the former."⁶⁹ "The international community settled for what it could get," explains U.N. Under-Secretary-General Alvaro de Soto.⁷⁰ "It was politically impossible to achieve an agreement that would tamper with the Cambodian institutions with any depth."⁷¹ Nevertheless, the mission was successful on its own terms, which were still fairly ambitious given the state of the country in 1991. Despite recent setbacks, the influence of this democratic transition may be felt in years to come.

However history ultimately judges UNTAC, the SNC was a useful tool for facilitating what progress *was* made. Suntharalingam identifies it as a model example of "[a] symbolic inter-

66. DOYLE, *supra* note 58, at 35, 38.

67. *Id.* at 35.

68. See SORPONG PEOU, *CONFLICT NEUTRALIZATION IN THE CAMBODIAN WAR* 68 (1997); see also DAVID ROBERTS, *POLITICAL TRANSITION IN CAMBODIA 1991-1999* (2001); MACALISTER BROWN & JOSEPH J. ZASLOFF, *CAMBODIA CONFOUNDS THE PEACEMAKERS, 1978-1998*, at 130-61, 173-74 (1998).

69. Michael Doyle, *Peacebuilding in Cambodia: Legitimacy and Power*, in *PEACEBUILDING AS POLITICS*, *supra* note 42, at 89, 90.

70. Interview with Alvaro de Soto, *supra* note 26.

71. *Id.*

locutor, consisting of the main parties to the conflict, to provide a minimalist authority for the legitimization of actions.”⁷² While Doyle admits that “[t]he actual status of the SNC as the legitimate sovereign authority of Cambodia during the transition period was problematic” and that the SNC “lacked the resources and coherence it needed to have a decided effect,” still he concludes that it was a “part—indeed, the symbolically vital Cambodian part—of the circle of authority in Cambodia.”⁷³

III. THE NEOCOLONIALIST MODEL

Secretary-General Boutros Boutros-Ghali’s *An Agenda for Peace* was released at the beginning of his term in June 1992.⁷⁴ The manifesto of the reimagined, activist United Nations, it outlines a bold vision of the United Nations’ new, post-Cold War relevance to international peace and security. Released shortly after the happy conclusion of UNTAG and during the successful deployments of UNTAC and ONUSAL, the form (and success) of these missions influenced the report.

Clearly referring to the ongoing missions in El Salvador⁷⁵ and Cambodia, Boutros-Ghali defines a new category of U.N. activity: “postconflict peace-building.” This category includes

disarming the previously warring parties, the restoration of order, the custody and possible destruction of weapons, repatriating refugees, advisory and training support for security personnel, monitoring elections, advancing efforts to protect human rights, reforming or strengthening governmental institutions and promoting formal and informal processes of political participation.⁷⁶

Later in the report, Boutros-Ghali suggests that the Security Council “should keep open the option of considering in

72. Suntharalingam, *supra* note 53, at 104.

73. DOYLE, *supra* note 58, at 27.

74. Boutros Boutros-Ghali, *An Agenda for Peace—Preventive Diplomacy, Peacemaking and Peace-Keeping: Report of the Secretary-General*, U.N. GAOR, 47th Sess., Preliminary List Item 10, ¶ 32, U.N. Docs. A/47/277-S/24111 (1992) [hereinafter *An Agenda for Peace*].

75. De Soto recalls Boutros-Ghali coining the phrase “peace-building” while on a flight to Brazil, discussing the ONUSAL mission. Interview with Alvaro de Soto, *supra* note 26.

76. *An Agenda for Peace*, *supra* note 74, ¶ 55.

advance collective measures, possibly including those under Chapter VII when a threat to international peace and security is also involved, to come into effect should the purpose of the United Nations operation systematically be frustrated and hostilities occur.”⁷⁷ This final suggestion presaged a shift in U.N. peacekeeping theory from the consent-based experiments of the early 1990s to a new model, in which cooperation with local authorities would take a back seat to the imposition of political reconciliation by force.

A. *The Uneasy Transition Between Models*

1. *Somalia: UNOSOM II and the Stillborn District Councils*

In December 1992, the Security Council took the unprecedented step of declaring the crisis in Somalia—where years of war between combating factions had led to a deadly famine and the absence of any functional state—to be a “threat to international peace and security,” triggering action under Chapter VII of the U.N. Charter.⁷⁸ Resolution 794, in keeping with the mandate of *An Agenda for Peace*, identified the situation in Somalia as “complex and extraordinary”⁷⁹ and asserted that it required “an immediate and exceptional response.”⁸⁰ It expressed the U.N. determination to “restore peace and law” and invited all Member-Nations to contribute to a multinational force that would “use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia.”⁸¹ The United States led the force, called UNITAF (United Task Force), which helped overcome the resistance to aid and even took some reconstruction steps of its own with preliminary efforts to create an indigenous police force.⁸²

U.N. Operation in Somalia (UNOSOM), the relief mission that had been disrupted by the combating factions, was

77. *Id.* ¶ 68.

78. S.C. Res. 794, 47th Sess., U.N. SCOR, 3145th mtg., pmb., U.N. Doc. S/RES/794 (1992).

79. *Id.*

80. *Id.*

81. *Id.* ¶ 10.

82. Clement E. Adibe, *Learning from the Failure of Disarmament and Conflict Resolution in Somalia*, in *A FUTURE FOR PEACEKEEPING?* 118, 136 (Edward Moxon-Browne ed., 1998).

soon revived and given a new mandate, also under Chapter VII.⁸³ The mandating resolution's preamble identified several of Boutros-Ghali's "peace-building" objectives: "the restoration of law and order[, . . . reconciliation and political settlement[, and] . . . the rehabilitation of Somalia's political institutions and economy"⁸⁴ The preamble also introduced a phrase—"transitional government institutions"⁸⁵—that would soon become common in such resolutions.

The United Nations was now attempting its most ambitious project yet, aiming to accomplish more by way of reconstruction than in any past missions, in an environment far less conducive to success. But a conceptual tension soon would spill over into real life disasters: In contrast to the missions discussed in Part II, the ambitious reconciliation agenda was to be implemented by a force that was also exercising military control over the region. The Somali factions, in other words, were to be asked simultaneously to submit to the superior firepower of an invading force and to cooperate with a civilian element of that force in forging new and durable political institutions. Gary Anderson reveals how this tension undermined the reconstruction goals almost immediately, when UNOSOM officials determined that the warlord General Aidid was a "war criminal and . . . the primary obstacle to a meaningful peace process."⁸⁶ In attempting to isolate and eliminate Aidid as part of the process of reconciliation, the United Nations branded itself as another party to the conflict.⁸⁷

A peace conference, in Addis Ababa in March 1993, helped create the blueprint for new government structures.⁸⁸ The Addis Ababa Agreement clearly stated that "the Somali people believe that . . . they must express their political views

83. S.C. Res. 814, U.N. SCOR, 48th Sess., 3188th mtg., U.N. Doc. S/RES/814 (1993). Post-Resolution 814 UNOSOM is known as UNOSOM II.

84. *Id.* at pmbl.; see also Sean D. Murphy, *Nation-Building: A Look at Somalia*, 3 TUL. J. INT'L & COMP. L. 19 (1995).

85. S.C. Res. 814, *supra* note 83, at pmbl.

86. Gary Anderson, *UNOSOM II: Not Failure, Not Success*, in BEYOND TRADITIONAL PEACEKEEPING 267, 269-70 (Donald Daniel et al. eds., 1995).

87. See *id.* at 270.

88. See Ameen Jan, *Somalia: Building Sovereignty or Restoring Peace?*, in PEACEBUILDING AS POLITICS, *supra* note 42, at 53, 62.

and make the decisions that affect them,”⁸⁹ and the language of the Agreement focused on the importance of Somali participation in the reconciliation process. Following the Cambodia model, a Transitional National Council was to be the “repository of Somali sovereignty.”⁹⁰ It was to be divided into a mix of representatives from different factions, and a series of Regional and District Councils were to be formed to create a federal governance structure.⁹¹ As a clear sign of the intention of the Agreement’s drafters not to impose any external vision of how the new Somali political system must function, the Councils’ members were to be chosen either by election or “through consensus-based selection in accordance with Somali tradition.”⁹²

UNOSOM II’s reconstruction experience on the ground marks a key departure from the creative, and by now familiar, approach laid out in the Addis Ababa Agreement.

With hindsight, this divergence can be viewed as the point at which the new U.N. “peace-building” agenda ran off course. In practice it was never clear whether the visiting foreigners were simply assisting political development or imposing a blueprint of the sort of political system they believed necessary for the Somalis.⁹³ Ameen Jan, in a study of UNOSOM II, charges that U.N. agents doomed their efforts by ultimately choosing *not* to incorporate into those efforts “local Somali political dynamics and capacities.”⁹⁴ Jan concludes that “the district and regional councils that worked effectively would very likely have done so even without UN support,” and that the United Nations actually “disrupt[ed] . . . local reconciliation processes.”⁹⁵ William Durch observes that “UNOSOM [II] had neither the attention span nor the staff to focus on its political

89. Addis Ababa Agreement of the First Session of the Conference on National Reconciliation in Somalia, Mar. 27, 1993, § IV, *reprinted in* THE PREFERRED FUTURE DEVELOPMENT IN SOMALIA, ch. 2 (Mohammed Farah Aidid & Satya Pal Ruhela eds., 1993), *available at* http://www.civicwebs.com/cwvlib/af-rica/somalia/1993/preferred_future_development/chapter_2.htm.

90. *Id.* § IV(1)(a).

91. *Id.* § IV(3)-(4).

92. *Id.* § IV(4).

93. William J. Durch, *Introduction to Anarchy: Humanitarian Intervention and “State-Building” in Somalia*, in UN PEACEKEEPING, AMERICAN POLITICS, AND THE UNCIVIL WARS OF THE 1990s, at 311, 341 (William J. Durch ed., 1996).

94. Jan, *supra* note 88, at 65.

95. *Id.* at 67.

reconciliation tasks.”⁹⁶ These failures became all the more pressing as chaos erupted in Mogadishu, eventually leading to the now infamous botched attack on Aidid’s compound that resulted in the death of eighteen U.S. Rangers and, eventually, the collapse of the U.N. reconstruction efforts.⁹⁷

We might conclude that Somalia’s lesson was that the cooperative perspective of the Addis Ababa Agreement had been ignored on the ground. Ensuing missions suggest, however, that the lesson gleaned from this disastrous experience was not that too much force had been used, but too little.

2. *Bosnia: Dayton’s “Creeping Protectorate”*

The complex political relationship between international and local actors created by the Dayton Peace Accords in post-war Bosnia sees the United Nations in only a small and supporting role, so the attempt at political reconciliation since 1995 cannot fairly be termed “U.N. reconstruction.” It is, however, important to focus our attention on this experiment, because it was a crucial step in the evolution of the neocolonialist model that would find expression in later U.N. missions.

On November 20, 1995, the Croat, Serbian, and Bosnian presidents signed the Dayton Agreement. This peace plan came about primarily because of the force exerted by the NATO Rapid Reaction Force, which intervened to stop the fighting. NATO had an obvious influence on the plan’s form. NATO’s main agenda was to end the devastating violence that had plagued the region for half a decade, and a great many compromises were made toward that goal. Unfortunately, the model for the reconstruction of Bosnia that came out of Dayton was difficult, if not unworkable. Oleksandr Matsouka, a Political Affairs Officer at the United Nations, stresses that Dayton was “a perfect cease-fire agreement, but a mediocre, or even lousy, model for reconstruction.”⁹⁸

96. Durch, *supra* note 93, at 344.

97. *See id.* at 346-48; UNITED NATIONS, THE UNITED NATIONS AND SOMALIA, 1992-1996, at 54, U.N. Blue Book Series Vol. VIII, U.N. Sales No. E.96.I.8 (1996). The U.N. withdrawal did not lead to a return to total chaos as many feared; in fact, in the years since, some progress has been made toward reconstruction and the development of new Somali political institutions based on the traditional clan structure. *See Jan, supra* note 88, at 53.

98. Interview with Oleksandr Matsouka, Political Affairs Advisor, United Nations, in New York, N.Y. (Jan. 15, 2002).

The Dayton Agreement reflected the divisions of the battlefield by recognizing two separate, autonomous entities, the Republica Srpska and the Federation of Bosnia and Herzegovina, as part of a sovereign Federation of Bosnia-Herzegovina.⁹⁹ The United Nations was only one of many international actors that pledged to help implement the complex web of agreements and obligations that were designed, first, to prevent fighting from resuming and, second, to rebuild Bosnia.¹⁰⁰

The ambitions of the Dayton Accords resembled those in the Somali solution at Addis Ababa: International military control was combined with a more cooperation-based civilian wing. Dayton created an Office of the High Representative (HR) to wield final authority to interpret Dayton's provisions,¹⁰¹ but initially, at least, this power was used with great restraint on the civilian side. Political forces that had little to do with the needs of the Bosnians (such as a looming U.S. presidential election) led to a rushed attempt to hold elections within nine months.¹⁰² This chaotic effort contributed to the democratically legitimated consolidation of power within three nationalist parties representing the three warring factions.¹⁰³ The draft Bosnian Constitution had been altered at Dayton to remove a proposed international panel to resolve deadlocks between the parties; without this mechanism, deadlock became the norm.¹⁰⁴

A Peace Implementation Conference in Bonn, Germany, in late 1997 led to a new assertion of international authority, which called upon the High Representative

to facilitate the resolution of difficulties by making binding decisions [and] . . . to take interim measures when parties are unable to reach agreement, [includ-

99. ELIZABETH M. COUSENS & CHARLES K. CATER, TOWARD PEACE IN BOSNIA: IMPLEMENTING THE DAYTON ACCORDS 25, 34 (2001).

100. *Id.* at 33, 38 (listing international actors involved). The United Nations suffered a serious blow to its credibility after Somalia, and some Dayton participants reported that a catchphrase at the conference was "anybody but the U.N." Anonymous Interview, Secretariat Official, United Nations, in New York, N.Y. (Nov. 2001).

101. This authority was spelled out in S.C. Res. 1035, U.N. SCOR, 50th Sess., 3613th mtg. ¶ 3, U.N. Doc. S/RES/1035 (1995).

102. COUSENS & CATER, *supra* note 99, at 112-14.

103. *Id.* at 115.

104. Interview with Paul Szasz, *supra* note 10.

ing] . . . actions against persons holding public office or officials who are . . . found by the High Representative to be in violation of legal commitments made under the Peace Agreement or the terms for its implementation.¹⁰⁵

Under this new approach, in which democratically elected nationalist officials can be removed at the HR's whim, a deep tension has emerged between international authority and local political reconciliation. Instead of power and decision-making authority flowing from international actors to local ones (the theoretical goal of Dayton's power arrangements), the opposite has proven true, as international authorities have exerted more and more control over the Bosnian state in an effort to keep Dayton on track.

David Chandler views the post-Bonn Dayton implementation as "a major international experiment in political engineering," one in which "there is little role for the Bosnian people, or their elected representatives, in policy development and implementation."¹⁰⁶ He goes on to argue that this dynamic has created "unintended results, undermining Bosnian institutions and creating relations of dependency rather than a basis for stable democratic self-government."¹⁰⁷ He highlights how "a clear pattern has emerged of majorities being given little control over policy-making," not in order to give "minority groups a stake in government" but, instead, simply to "transf[er power] to the international institutions"¹⁰⁸

Cousens and Cater echo these concerns, arguing that "the most salient feature of peace implementation in Bosnia has been the emergence of what has been variously called a 'trusteeship in all but name' and a 'creeping protectorate'"¹⁰⁹ These assertions of authority under the so-called "Bonn Powers," Cousens and Cater argue, now threaten to undermine the reconstruction effort: "The exercise of international authority to unify Bosnia thus remains both contradictory and

105. Peace Implementation Conference, Dec. 10, 1997, Bonn; § XI, ¶ 2, 2(b)-(c), *quoted in* COUSENS & CATER, *supra* note 99, at 131.

106. DAVID CHANDLER, BOSNIA: FAKING DEMOCRACY AFTER DAYTON 2 (2d ed. 2000).

107. *Id.* at 3.

108. *Id.* at 89.

109. COUSENS & CATER, *supra* note 99, at 107.

self-perpetuating: the more it is used to combat perceived obstructionism, the more enmeshed international actors become in Bosnia's domestic political life."¹¹⁰

Some—from the HR down—support this increased assertion of international authority, citing the fact that nobody else can be trusted to wield it. “In spite of extensive efforts by the international community to construct the formal institutions of democratic governance,” argues a commentator from the U.S. Army Peacekeeping Institute, “the reality is that these efforts are co-opted and perverted by Bosnia's criminalized power structures.”¹¹¹ Former HR Carlos Westendorp declared, in a New Year's message to the Bosnian people in 1998, “As High Representative, I have to take decisions now and in the future with your best interests in mind, should your leaders fail to take them.”¹¹²

Chandler argues that this approach is ultimately counterproductive, because it “tend[s] to restrict democratic accountability rather than develop mechanisms which could allow a transition away from international administration toward self-government.”¹¹³ He even takes the cynical position that this extension of international authority has nothing to do with the needs of Bosnians at all, but is instead the result of “institutions of the international community looking to project themselves on the world stage.”¹¹⁴ Nonetheless, those who have “seen action” in post-Dayton Bosnia remain firmly committed to the necessity of extending and expanding Dayton's mandate for the international community.¹¹⁵ “In a civil, inter-ethnic or other conflict, the need to negotiate decisions with local

110. *Id.* at 147-48.

111. Mac Warner, *SFOR: Lessons Learned in Creating a Secure Environment with Respect for the Rule of Law: Based on a Study of Bosnia May 2000*, 4 J. NAT'L SEC. L. 107, 112 (2000).

112. CHANDLER, *supra* note 106, at 157 (quoting U.N. High Representative Carlos Westendorp).

113. *Id.* at 155.

114. *Id.* at 180. He finds a larger geopolitical explanation for Bosnia's treatment, arguing that “in a period of international transition after the Cold War it became a focus for international institutions that could enable them to redefine their political and strategic objectives and transform themselves.” *Id.* at 186. That is, of course, a dramatic claim, and one that likely underestimates the commitment and sacrifices made by these institutions—and their staff—on the ground in Bosnia.

115. Interview with Oleksandr Matsouka, *supra* note 98.

authorities can lead to dangerous compromises,” argues Matsouka,¹¹⁶ and Carl Bildt congratulates Washington for “its shift from efforts to restrict the mandate of the HR to efforts to strengthen it.”¹¹⁷

It may be impossible to make a reasonable judgment about Dayton until history has shown whether the efforts of the international community have any long-term positive impact,¹¹⁸ but recent developments are not promising. In October 2002, much of the electorate stayed home in elections that helped the nationalist parties that began the war consolidate their power even further.¹¹⁹ “[S]even years later . . . the people of Bosnia have grown weary of voting,” explains Paddy Ashdown, the most recent HR.¹²⁰ Viewed in light of the U.N. experiences in Namibia, El Salvador, Cambodia, and Somalia, one conclusion seems inescapable: In both Somalia and Bosnia, the creative, cooperative approach, developed with mechanisms like COPAZ and the SNC, was clumsily imported to a scenario in which an international military force was either wielding total control (Bosnia) or at least trying to wield total control (Somalia). The transfer did not work: In Somalia, the mission was abandoned, and in Bosnia, it was replaced with a protectorate model at Bonn in 1997. It was this new model that would be transferred next to troubled regions.

B. *The Neocolonialist Model, Fully Realized*

1. *Kosovo: UNMIK, “With All Necessary Means”*

When NATO forces bombed Kosovo in 1999, pushing back the Serbian army, the international community was forced to confront a power vacuum. The vast majority of the administrators, judges, civil servants, police, and other essen-

116. *Id.*

117. CARL BILD, *PEACE JOURNEY: THE STRUGGLE FOR PEACE IN BOSNIA* 386 (1998).

118. The UNMIBH mission was scheduled to complete its mandate on December 31, 2002. This date simply marked a transfer of authority from one group of international actors to another, however. *Report of the Secretary-General on the United Nations Mission in Bosnia and Herzegovina*, U.N. S.C., 57th Sess., ¶ 27, U.N. Doc. S/2002/618 (2002).

119. Daniel Simpson, *Nationalist Parties Set to Regain Power in Bosnia*, N.Y. TIMES, Oct. 8, 2002, at A8.

120. Paddy Ashdown, *What I Learned In Bosnia*, N.Y. TIMES, Oct. 28, 2002, at A25.

tial public servants who had helped run Kosovo had fled with the retreating Serbian army, and those who remained were subject to reprisals at the hands of the ethnic Albanian majority. Despite the widely perceived view that the United Nations was discredited as a peace-builder,¹²¹ it would soon fall to it to devise a means of reconstructing Kosovo.

On May 3, 1999, Secretary-General Kofi Annan addressed the Security Council in a private meeting. Talking points from that address reveal that this was where he first proposed the rough outline of the structure for the U.N. mission in Kosovo. Annan speaks of the “general agreement” for the proposition that an “international presence will be needed to . . . fill the vacuum of authority that would exist, at least for a period of time.”¹²² He confirms the consensus that an international military presence would be needed to guarantee the peace and adds, “As to the parallel civilian presence, I would hope that the Council, based on recent experience, including in the region, can make provision for an integrated operation under the Council’s authority.”¹²³ He stresses, “In sketching these ideas, I am not indulging in what is commonly known as empire-building.”¹²⁴

Despite that protestation, the model of international presence that Annan outlined, which was formalized a month later, would strike some as eerily reminiscent of colonial protectorates. After the failed experiment with combining a military protectorate with a less intrusive civilian presence in neighboring Bosnia, negotiations with local actors were deemed unnecessary.¹²⁵

On June 10, 1999, U.N. Security Council Resolution 1244, enacted under Chapter VII of the U.N. Charter, authorized

121. U.N. officials were surprised to discover at the last minute that they were not even invited to Dayton. Interview with Paul Szasz, *supra* note 10.

122. Kofi Annan, Secretary-General’s Talking Points for Security Council Luncheon (May 3, 1999) (on file with author).

123. *Id.*

124. *Id.*

125. It is beyond the scope of this article to examine the basis—either legal or ethical—of “humanitarian interventions.” For two perspectives on that issue, see Eleanor Lumsden, *An Uneasy Peace: Civil Wars and Military Intervention*, 35 N.Y.U. J. INT’L L. & POL. 795 (2003); Christopher Le Mon, *Unilateral Intervention by Invitation in Civil Wars*, 35 N.Y.U. J. INT’L L. & POL. 741 (2003).

the Secretary-General to “establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo.”¹²⁶ An immediate problem with the mission, as the resolution reflected, was the lack of clarity on Kosovo’s ultimate fate. Many countries, including more than one on the Security Council, feared that granting it full independence could create a dangerous precedent that violent insurgent movements could win independence even when they could not win a war of independence on their own. The solution arrived at in Resolution 1244 deferred this issue of Kosovo’s status with vague language, suggesting that the Kosovars can “enjoy substantial autonomy within the Federal Republic of Yugoslavia,”¹²⁷ a phrase whose exact meaning has proven only more elusive as time has passed.¹²⁸ William O’Neill argues that the resolution’s “ambiguity on Kosovo’s future has . . . reinforced extremist views in both Albanian and Serb camps, undermining security and respect for human rights” by giving both groups an incentive to continue their violence: Albanians, to ensure that there are no Serbs left to challenge independence; and the Serbs, to ensure that Kosovo “stays” in Serbian hands, as the resolution seemed to suggest it has thus far.¹²⁹ “[The] uncertainty over Kosovo’s future stymied efforts to start dialogue and interaction between the two communities,” concludes O’Neill.¹³⁰ This solution may have been the best out of a number of bad ones, however.

The United Nations lacked both the interest and the capacity to run a significant military operation, and NATO was happy to provide the force.¹³¹ But the civilian authority handed to the United Nations was significant. In all of the

126. S.C. Res. 1244, U.N. SCOR, 54th Sess., 4011th mtg. ¶ 10, U.N. Doc. S/RES/1244 (1999). Matsouka recalls that only two days before the Resolution was passed, there was still no consensus on whether the United Nations or some other organization should take the lead in running Kosovo’s civil administration. Interview with Oleksandr Matsouka, *supra* note 98.

127. S.C. Res. 1244, *supra* note 126, ¶ 10.

128. Bernard Kouchner, head of United Nations Mission in Kosovo from July 1999 until January 2001, is famously rumored to have remarked that he read Resolution 1244 twice before breakfast every day, and still had no idea what “substantial autonomy” meant. See SIMON CHESTERMAN, *KOSOVO IN LIMBO: STATE-BUILDING AND “SUBSTANTIAL AUTONOMY”* 4 (2001).

129. WILLIAM O’NEILL, *KOSOVO: AN UNFINISHED PEACE* 30 (2001).

130. *Id.*

131. Interview with Alvaro de Soto, *supra* note 26.

operations discussed above, U.N. authority was never absolute. Resolution 1244, by contrast, unilaterally imposes a U.N. protectorate.¹³² The resolution dictates that the mission's "main responsibilities will include . . . promoting the establishment . . . of substantial autonomy and self-government in Kosovo, . . . performing basic civilian administrative functions where and as long as required, . . . organizing . . . elections, . . . [and] maintaining law and order," along with other functions that, taken as a whole, give the United Nations authority to run the territory "with all necessary means."¹³³ The resolution provides that, once these institutions are established (with no deadline), they are to be transferred to the Kosovars, "pending a final settlement" of the central issue of what exactly Kosovo's status will be.¹³⁴ That an international military force would control Kosovo for at least the near future was already a done deal: Resolution 1244 extended that control to all functions carried out by a state.

Two days after the enactment of Resolution 1244, Secretary-General Annan submitted a report presenting "a preliminary operational concept for the overall organization" of the mission, now named UNMIK (U.N. Mission in Kosovo).¹³⁵ "Learning from the lessons of Bosnia, we wanted to create and design the architecture of an international presence that would avoid the mess on the ground in Dayton," explains de Soto, who was Under-Secretary-General for Political Affairs at that time.¹³⁶ Annan stresses in his report that "all activities of the international community . . . [must be] carried out in an integrated manner with a clear chain of command."¹³⁷ Annan goes on to specify the Special Representative's "overall author-

132. While both parties to the conflict agreed to this U.N. presence, see *Rambouillet Accords: Interim Agreement for Peace and Self-Government in Kosovo*, U.N. S.C., 53d Sess., Annex, U.N. Doc. S/1999/648 (1999), this consent seems to fit into the second category outlined above of "coerced consent." See *supra* Part II; Wilde, *supra* note 5, at 469-70.

133. S.C. Res. 1244, *supra* note 126, ¶ 7.

134. *Id.* ¶ 11.

135. *Report of the Secretary-General Pursuant to Paragraph 10 of the Security Council Resolution 1244*, U.N. S.C., 53d Sess., ¶ 1, U.N. Doc. S/1999/672 (1999) [hereinafter *SG Report of June 12, 1999*]. The United Nations would realize, too late, that the acronym they chose sounded exactly like the local word for "enemy." See CHESTERMAN, *supra* note 128, at 4.

136. Interview with Alvaro de Soto, *supra* note 26.

137. *SG Report of June 12, 1999*, *supra* note 135, ¶ 2.

ity to manage the Mission and coordinate the activities of all UN agencies and other international organizations operating as part of UNMIK.”¹³⁸

The centralized power structure of UNMIK reflects valuable lessons learned in the preceding missions, but the lesson of the utility of institutions like COPAZ and the SNC seems to have been lost on UNMIK’s planners. For all the determination to ensure that the operation was streamlined and ultimately run by a single figure, less concern appears to have been dedicated to the crucial dynamic between this international authority and the local figures who would have to interact with it.

In three years, UNMIK has made progress in its political reconstruction project, but it also has struggled to govern. In a recent report, Annan describes, among other things, an “increase in tensions in” some regions; “a disturbing increase in violence against the international community”; “continued destabilizing effect[s]” of violence across Kosovo’s borders; the “major concern” of the plight of non-Albanian communities in Kosovo; the “lack of freedom of movement in many localities and threats and intimidation in the workplace”; and the complaint of the majority Albanian party President that UNMIK’s legislative framework “will hold hostage the aim of the people of Kosovo.”¹³⁹ William O’Neill’s study of post-1999 Kosovo suggests that violence against Serbs and other minorities has been stunning and that KFOR has done little to halt it.¹⁴⁰

Many of these concerns are inevitable given the deeply destabilized environment where UNMIK operates. It would be foolish to blame the mission for the very ills that it has been created to counteract. Nonetheless, some observers have suggested that the absolute authority granted to UNMIK and the ways it has chosen to exercise it may be leading it into the trap Elizabeth Cousens and Charles Cater outlined in Bosnia, in

138. *Id.* ¶ 3. So while the United Nations would run only the interim civil administration portion of the mission, leaving other aspects of institution and capacity building to the Organization for Security and Cooperation in Europe, the European Union, and NATO, all of these “pillars” would report to the sole commander of UNMIK.

139. *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, U.N. S.C., 55th Sess., ¶¶ 6, 7, 9, 16, 25, 36 U.N. Doc. S/2001/565 (2001) [hereinafter *SG Report of June 7, 2001*].

140. See O’NEILL, *supra* note 129, at 47.

which the “exercise of international authority [becomes] both contradictory and self-perpetuating.”¹⁴¹

In May 2001, the U.N. Secretary-General’s Special Representative, Hans Haekkerup, promulgated the Constitutional Framework for Provisional Self-Government (Constitutional Framework), which set up the move toward “provisional self-government” in Kosovo, starting with the election of a constituent assembly in November 2001. The election produced no single majority party and, in its first two months, was unable to settle on a President.¹⁴² Another set of elections were held in October 2002; 57% of the eligible Albanian population voted, but a much more discouraging 20% of the eligible Serbs voted.¹⁴³

The Kosovo constituent assembly has nominal authority over a wide range of domestic affairs. The Independent International Commission on Kosovo, run by Justice Richard Goldstone and Carl Tham, points out, however, that “this authority is circumscribed by the SRSG’s wide range of reserved powers.”¹⁴⁴ These reserved powers, the Commission argues, “mean that instead of the substantial self-government promised the Kosovars under Resolution 1244, they will instead get very limited autonomy. They will have the illusion of self-rule rather than the reality.”¹⁴⁵ The Secretary-General’s discussion of the Special Representative’s reserved powers seems to bear this out, as he lists dozens of areas still under international control, including some very broad ones: “general powers, such as international relations, in a number of areas; and the judiciary and the police”¹⁴⁶ Under UNMIK’s constitu-

141. COUSENS & CATER, *supra* note 99, at 147.

142. *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, U.N. S.C., 56th Sess., U.N. Doc. S/2002/62 (2002) [hereinafter *SG Report of Jan. 15, 2002*].

143. See *Kosovo Voting: Inching Forward*, *ECONOMIST*, Nov. 2, 2002, at 53, 54.

144. INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, *THE FOLLOW-UP OF THE KOSOVO REPORT: WHY CONDITIONAL INDEPENDENCE?* 20 (2001) [hereinafter *KOSOVO FOLLOW-UP REPORT*].

145. *Id.*

146. A partial list of the reserved powers follows:

The administration and financing of civil security and emergency preparedness; mine clearance; the administration of public, state and socially owned property; the regulation of public and socially owned enterprises; the administration of railways, allocation of radio frequencies, and civil aviation; the civil registry database; the

tional provisions, continues the *Kosovo Follow-Up Report*, “the UN administration retains . . . [what amounts to] vice regal powers, appropriate to a colonial dependency, rather than to a self-governing people.”¹⁴⁷

The report describes how “[t]he Commission was struck, on its many visits to Kosovo, by lingering attitudes of imperial condescension, on the part of at least some elements of the international administration, toward the Kosovars’ capacity for self-rule.”¹⁴⁸ It goes on to announce that “[a] pervasive distrust of the administrative and political capacity of the population appears to underlie the constitutional provisions” promulgated in May 2001.¹⁴⁹ Goldstone and Tham fear that soon “the stage will be set for a growing conflict over the SRSG’s reserved powers,” which may “thwart Kosovo’s long-term economic and social development.”¹⁵⁰

The Secretary-General does not appear to share those concerns. Discussing the Constitutional Framework, he describes elements “which will enable strict monitoring of the process by my Special Representative” and “full control and authority by my Special Representative[, including] . . . broad authority for my Special Representative to intervene and correct any actions of the provisional institutions of self-government that are inconsistent with Security Council Resolution 1244 (1999), including the power to veto Assembly legislation, where necessary.”¹⁵¹ There is no discussion of the implications of this wide authority, or a defense of it.

In another recent report, the Secretary-General explains that, “[a]lthough the constitutional framework provides a clear distinction between transferred responsibilities and those reserved for my Special Representative, the exact delineation

registration of habitual residents; the Housing and Property Directorate, including the Housing Claims Commission; control over cross-border/boundary transit of goods; general powers, such as international relations, in a number of areas; and the judiciary and the police . . . and several economic areas.

SG Report of Jan. 15, 2002, supra note 142, ¶ 15.

147. *KOSOVO FOLLOW-UP REPORT, supra note 144, at 25.*

148. *Id.* at 20.

149. *Id.* at 20-21.

150. *Id.* at 21.

151. *SG Report of Jan. 15, 2002, supra note 142, ¶ 23.*

of those responsibilities was an issue of discussion.”¹⁵² The report goes on to specify a number of areas where the Special Representative saw fit to declare acts of the legislature null and void, and characterizes these turf wars as “inevitable jostling for more responsibilities.”¹⁵³ The view that both sides “inevitably” will fight for more responsibility is an odd one, given the ultimate goal of the mission. To the extent that this “jostling” comes about because international actors act in good faith for the best interests of the region where they wield control, it is understandable, but it appears that it may stretch beyond those limits.

Given the vagueness of Resolution 1244, the powers asserted by the Secretary-General for his Special Representative amount to total authority over most local governing institutions in Kosovo even after the shift to “provisional self-rule.”¹⁵⁴ In another recent report, the Secretary-General expresses concern that “the ability of the elected representatives and members of the municipal boards to now engage in substantive policy issues continues to be a major challenge.”¹⁵⁵ Again and again he speaks of the dire need to “engage” the community in the political processes that UNMIK has established.¹⁵⁶ It is unclear how the population can become engaged without being able to join institutions that at least share in the process of governing the territory; as the *Kosovo Follow-Up Report* argues, “people will not behave responsibly unless they are given responsibility.”¹⁵⁷

A closer look at one aspect of Kosovo’s reconstruction, however, demonstrates exactly why international authorities are so reticent to give up power to local actors. William

152. *Report of the Secretary-General on the United Nations Interim Mission in Kosovo*, U.N. S.C., 56th Sess., ¶ 8, U.N. Doc. S/2002/779 (2002) [hereinafter *SG Report of July 17, 2002*].

153. *Id.* ¶¶ 8-9.

154. This veto authority is exactly what the High Commissioner has begun asserting in Bosnia, much later in a process that does not appear to be moving forward with much speed.

155. *SG Report of June 7, 2001*, *supra* note 139, at ¶ 36.

156. He cites the “challenges” for UNMIK in engaging the Kosovo Serb community not once, but twice. *Id.* ¶¶ 5, 17. In his concluding observations, he repeats that “[i]t is critical to seek the active engagement of all communities in the process of building the institutions of provisional self-government.” *Id.* ¶ 60.

157. KOSOVO FOLLOW-UP REPORT, *supra* note 144, at 21.

O'Neill describes UNMIK's difficulty reforming Kosovo's judiciary, which was totally decimated after the withdrawal of Serbian forces (and the accompanying flight of the almost entirely Serbian judiciary). It swiftly became clear that "it [was] very difficult for a Serb to get a fair trial in Kosovo without the participation of international jurists."¹⁵⁸ O'Neill documents open admissions by Albanian judges that they apply different standards—if not entirely different laws—against Serbian defendants,¹⁵⁹ and he identifies "the undue depth of deference accorded by some UNMIK officials to the local power structure dominated by Albanian hard-liners and a lack of understanding about how ethnic bias affected the judiciary."¹⁶⁰ The result has been a series of regulations allowing an increase in the appointments of international judges to every judicial district in Kosovo—which could well seem like exactly the sort of "mandate creep" that has been criticized in Bosnia.¹⁶¹ O'Neill goes on to cite critics who point to "UNMIK's . . . soft approach in the early days" of the mission as one factor that allowed extremists "to take control of numerous sectors of the economy and to intimidate moderates."¹⁶²

Sometimes, the deep distrust of local actors is well founded. If those actors genuinely cannot be trusted, what alternative is there to international control? But when might that control end? Simon Chesterman returned from two weeks of interviews with key players in the mission in mid-2001 with the conviction that "the international community will remain in Kosovo and Bosnia for the foreseeable future, certainly with a strong military presence and at least a supervisory civilian authority."¹⁶³

Even O'Neill, who defends extensive international authority as necessary in some contexts, gives us cause to question the motives of at least some of those actors. He speaks of the "frenzied discussion . . . over who would get what piece of the Kosovo pie" in the initial development of the mission; the magnet-like effect of the region, which brought many aid

158. O'NEILL, *supra* note 129, at 84.

159. *Id.*

160. *Id.* at 89.

161. *Id.* at 90.

162. *Id.* at 49 n.9.

163. CHESTERMAN, *supra* note 128, at 13.

workers “drawn by the lure of media exposure”;¹⁶⁴ and the fact that “careers and reputations could be made working there.”¹⁶⁵ An international mandate with such plenary authority creates the possibility of abuse by those with poor skills or bad intentions.

Annan’s reports continue to strike a positive tone, focusing on the mission’s successes. Nonetheless, the consistent problems that stem, in part, from the uncertain final status of the province still permeate even these official narratives. “The continued existence of parallel administrative structures challenged the day-to-day operations for” many of the new Kosovo institutions, Annan explains in his most recent report.¹⁶⁶ He also suggests that “the Assembly missed an important opportunity when it rejected proposals of the minority representatives.”¹⁶⁷ Such problems are probably inevitable products of an effort to create democratic institutions from scratch, but it is worth asking whether those institutions stand less of a chance of surviving when most meaningful authority continues to reside in an international occupying force.

Goldstone and Tham’s Commission on Kosovo has proposed what it calls “conditional independence,” which is “quite distinct from limited self-rule under UNMIK.”¹⁶⁸ It proposes to allow Kosovo to control “the whole range of powers reserved to the SRSG,” but under conditions that would ensure stability in the region: “explicit renunciation of any changes of borders, . . . a constitutional guarantee of human rights for all citizens,” including Serbs, “the renunciation of violence in settling internal or external disputes,” and “a commitment to regional cooperation.”¹⁶⁹ An international presence would remain to ensure that these conditions were met—and to continue to protect minorities in Kosovo.¹⁷⁰ This proposed solution, in the tradition of what Michael Doyle has

164. O’NEILL, *supra* note 129, at 38.

165. *Id.* at 32.

166. *Report of the Secretary-General on the United Nations Interim Mission in Kosovo*, U.N. S.C., 57th Sess., ¶ 7, U.N. Doc. S/2002/1126 (2002).

167. *Id.* ¶ 49.

168. KOSOVO FOLLOW-UP REPORT, *supra* note 144, at 28.

169. *Id.* at 25-27.

170. *See id.* at 27.

termed the “cascading structures” of COPAZ and the SNC,¹⁷¹ demonstrates a creative effort to find a middle ground between absolute international control and chaos. It suggests that there are potential alternatives to the hard-line approach that has been adopted by the Security Council.

2. *East Timor: International Overreaching?*

The U.N. Transitional Administration in East Timor (UNTAET) followed the Kosovo model of vesting all authority in a region in the United Nations. Despite a simpler political context, including the all-important bottom line of a clear goal toward which to work, many of the same problems that arose in Kosovo plagued UNTAET, with likely costs for its efforts to establish self-governing political structures in the region. Problems in the U.N. transitional administration, which in Kosovo could be attributed to a genuine need to keep power away from nationalist local actors, find far less justification in East Timor. This discrepancy between what was needed and what was done raises the question of whether the neocolonialist approach has been too-quickly embraced because of its short-term operational efficiencies, despite lingering questions of its long-term efficacy.

In 1999, East Timor voted overwhelmingly to become independent from Indonesia.¹⁷² After terrible post-independence-referendum violence in East Timor in 1999¹⁷³ and the restoration of order by a multinational force,¹⁷⁴ the United Nations was faced with a soon-to-be-independent state with no remaining infrastructure. U.N. Security Council Resolution 1272 mandated a new mission, UNTAET, that was closely modeled on UNMIK in Kosovo.¹⁷⁵ Resolution 1272 endowed UNTAET with overall responsibility for the administration of

171. Interview with Michael Doyle, Assistant Secretary-General, United Nations, in New York, N.Y. (Apr. 2, 2002).

172. See Seth Mydans, *In East Timor, Decisive Vote for a Break from Indonesia*, N.Y. TIMES, Sept. 4, 1999, at A1.

173. See Seth Mydans, *East Timor Falls into Gangs' Hands; Killings Reported*, N.Y. TIMES, Sept. 6, 1999, at A1.

174. S.C. Res. 1264, U.N. SCOR, 54th Sess., 4045th mtg., U.N. Doc. S/RES/1264 (1999); see IAN MARTIN, SELF-DETERMINATION IN EAST TIMOR: THE UNITED NATIONS, THE BALLOT, AND INTERNATIONAL INTERVENTION 14 (2001).

175. S.C. Res. 1272, U.N. SCOR, 54th Sess., 4057th mtg., U.N. Doc. S/RES/1272 (1999).

East Timor and empowered it to exercise all legislative and executive authority, including the administration of justice.¹⁷⁶ The resolution called for “capacity building for self-government,”¹⁷⁷ and endowed UNTAET with the power “to take all necessary measures to fulfill its mandate.”¹⁷⁸

As Jarat Chopra, who resigned as head of UNTAET’s Office of District Administration in March 2000, explains, “[B]y the time UNTAET began to deploy . . . there were conditions for success that are rarely available to peace missions. The belligerent power had completely withdrawn, and an effective multinational force could credibly guarantee internal and external security.”¹⁷⁹ UNTAET nevertheless struggled to govern East Timor. Most damaging to the mission was its loss of credibility with the East Timorese, who swiftly came to view UNTAET’s presence as “replicating the Indonesian system of administration” they had fought for years to be rid of.¹⁸⁰ Analysis of the mission on the ground suggests that many of these problems or missteps can be traced, again, to the absolute grant of authority and the robust interpretation of it by the United Nations. It is unclear if the circumstances in East Timor warranted such a mandate to the same extent as in Kosovo and Bosnia.

In many respects, UNTAET was a success. By January 2002, nearly 10,000 East Timorese civil servants had been recruited to help run new administrative structures, infrastructure was being rebuilt, an East Timorese police force was making progress toward independent operation, the militia presence (at least partly responsible for the post-referendum violence) was markedly reduced, and nearly 200,000 refugees had returned.¹⁸¹ Local governance structures were set up, culminating in the election of a Constituent Assembly in August

176. *Id.* ¶ 1. Matsouka explained that the “very same people” who formulated the Kosovo administration traveled to East Timor to replicate it there. Interview with Oleksandr Matsouka, *supra* note 98.

177. S.C. Res. 1272, *supra* note 175, ¶ 2.

178. *Id.* ¶ 4.

179. Jarat Chopra, *The UN’s Kingdom in East Timor*, SURVIVAL, Autumn 2000, at 27, 28.

180. *Id.* at 31.

181. *Report of the Secretary-General on the U.N. Transitional Administration in East Timor: For the Period from 25 July to 15 October 2001*, U.N. S.C., 56th Sess., ¶ 5, U.N. Doc. S/2001/983 (2001).

2001¹⁸² and the election of Xanana Gusmao as the first President of East Timor in April 2002.¹⁸³ In March 2002, a new East Timor Constitution was ratified by the Assembly, and it came into force on May 20, East Timor's Independence Day.¹⁸⁴ UNTAET itself ceased to exist on that day, leading the way for a new assistance mission, U.N. Missions in Support of East Timor (UNMISSET), that does not have the sort of plenary authority exercised by UNTAET.¹⁸⁵

Hidden within this optimistic picture are problems that stem from what Simon Chesterman has called "a central contradiction" of Resolution 1272: It existed solely to help transfer authority to the East Timorese but jealously guarded all of that authority in the meantime.¹⁸⁶ The fact that East Timor was able to achieve independence may have less to do with UNTAET's plenary authority and more to do with the positive circumstances in the region at the inception of UNTAET identified by Chopra—exactly the circumstances that should have militated *against* such an invasive international authority.

Chesterman traveled to East Timor in 2001 and interviewed several dozen figures involved in UNTAET's transitional administration from all sides. The picture his observations paint is in sharp contrast to that of the U.N. official reports. There is wide dissatisfaction amongst the East Timorese about the U.N. administration, perhaps best summed up by an East Timorese National Council member: "We are used as a justification for the delays and the confusion in a process which is outside our control."¹⁸⁷ The Council member went on to assert that "The East Timorese Cabinet members are caricatures of ministers in a government of a banana republic. They have no power, no duties, no resources to function ade-

182. *Id.* ¶¶ 10, 24, 27, 36, 49.

183. Barbara Crossette, *Annan Wants Longer U.N. Role In East Timor*, N.Y. TIMES, Apr. 22, 2002, at A4.

184. *Report of the Secretary-General on the U.N. Transitional Administration in East Timor*, U.N. S.C., 56th Sess., ¶ 4, U.N. Doc. S/2002/432 (2002).

185. *Id.* ¶ 64.

186. See SIMON CHESTERMAN, EAST TIMOR IN TRANSITION: FROM CONFLICT-PREVENTING TO STATE-BUILDING (Int'l Peace Acad. Reports, 2001), at <http://www.ipacademy.org/Publications/Publications.htm> [hereinafter CHESTERMAN, EAST TIMOR IN TRANSITION]; see also Joel Beauvais, *Benevolent Despotism: A Critique of U.N. State-Building in East Timor*, 33 N.Y.U. J. INT'L L. & POL. 1101, 1107-08 (2001).

187. CHESTERMAN, EAST TIMOR IN TRANSITION, *supra* note 186.

quately.”¹⁸⁸ Chopra analogizes UNTAET’s power to “that of a pre-constitutional monarch in a sovereign kingdom.”¹⁸⁹

These words are more than simple criticisms of the manner in which UNTAET went about its business: They raise the issue of whether the progress toward self-governance is undermined when all the governance that there is has been imposed from the outside. Gusmao’s criticisms of UNTAET show how the United Nations’ benevolent activities can appear to those subjected to them: “We absorb standards just to pretend we look like a democratic society and please our masters of independence.”¹⁹⁰

Perhaps most alarming, Chopra’s account of working for UNTAET suggests that some of the mission’s problems can be traced to bad-faith governance by U.N. officials. He describes UNTAET’s resistance to a World Bank-sponsored Community Empowerment and Local Governance Project (CEP) because “the logic of the project dictated that they would [lose] control” over the territory.¹⁹¹ He outlines other ways in which “UNTAET resisted Timorese participation in order to safeguard the UN’s influence.”¹⁹² Chopra identifies the root of this problem at the planning stage of UNTAET, which “involved no genuine contact with, or participation by, East Timorese representatives.”¹⁹³ One also might conclude that this is an example of what Elizabeth Cousens and Charles Carter refer to as the battle over “implementation ‘market share,’” in which “rivalry over roles and turf [characterizes] how organizations and governments approach their involvement in peace-building.”¹⁹⁴ Instead of competing with other international actors, as happened in Bosnia, here UNTAET appears to have competed directly with the East Timorese. These observations recall Secretary-General Annan’s remark about the “inevitable jostling” between local actors and international authority in Kosovo.¹⁹⁵ Why must we view it as “inevitable” that

188. *Id.*

189. Chopra, *supra* note 179, at 29.

190. CHESTERMAN, EAST TIMOR IN TRANSITION, *supra* note 186.

191. Chopra, *supra* note 179, at 29.

192. *Id.* at 31.

193. *Id.* at 32.

194. COUSENS & CATER, *supra* note 99, at 45.

195. *SG Report of July 17, 2002*, *supra* note 152, ¶ 8.

international actors in these circumstances will fight for control with locals?¹⁹⁶

Even Sergio Vieira de Mello, an experienced “peace-builder” who briefly ran UNMIK before taking the helm of UNTAET, and who wielded extensive influence on the structure of both missions,¹⁹⁷ openly admits that the United Nations, under his leadership, “acted with mandates and powers comparable to colonial regimes.”¹⁹⁸ But his own observations on the lessons from these two recent missions suggest a different perspective than that of Chopra, the East Timorese, the Kosovars, or this Note. “Develop a model for good governance through benevolent despotism,” he instructs, but he fails to suggest where such a model might come from, finally observing that the “question remains open how the UN can exercise fair governance with absolute powers”¹⁹⁹

Chesterman now argues that, after a bad start, UNTAET “showed itself able to experiment with new ideas”²⁰⁰ and did a much better job of following the mandate’s command “to consult and cooperate closely with the East Timorese people.”²⁰¹ The nonelected advisory council that UNTAET initially set up, the National Consultative Council (NCC), was eventually replaced with a National Council (NC) that worked in concert with UNTAET to govern East Timor.²⁰² Chesterman explains that, “unlike the NCC, which was generally presented with draft regulations for approval, the National Council ha[s] power to initiate, modify and recommend draft regulations; to amend regulations; and to call Cabinet members before it to answer questions regarding their respective functions.”²⁰³ Nevertheless, Gusmao and many others are still highly critical

196. In some circumstances, it may be in the best interests of a region for the “jostling” for authority by local nationalist politicians to be held at bay by international actors, but this need not be viewed as a universal condition of the local/international power dynamic.

197. Interview with Oleksandr Matsouka, *supra* note 98.

198. Sergio Vieira de Mello, *How Not to Run a Country: Lessons for the UN from Kosovo and East Timor* (2000) (unpublished manuscript, on file with author).

199. *Id.*

200. Simon Chesterman, *East Timor in Transition: Self-Determination, State-Building and the United Nations*, 9 INT’L PEACEKEEPING (forthcoming 2002).

201. S.C. Res. 1272, *supra* note 175, ¶ 8.

202. *See* Chesterman, *supra* note 200.

203. *Id.*

of UNTAET. Even after the creation of the NC, Gusmao insisted that the East Timorese wanted more than a “role [of giving] our consent as observers”:²⁰⁴ They wanted to be active players.

The two jarringly separate visions of UNTAET’s administration, in the end, may prove compatible: Without any serious foes to independence remaining in the territory, such criticisms and discontentments may be simply a necessary process in the lead-up to a democratic society. Clearly UNTAET did not appear legitimate to many East Timorese, but now that it has done its work and handed over authority, those left with the reins will be forced to win the trust of the people they govern. That the conditions in East Timor were so ideal that the United Nations, despite its missteps, has managed to do its job in the end, hardly supports the argument that the decision to retain so much authority in international hands was wise. Annan’s recent expressions of dismay at the slow pace of East Timor’s reconstruction may have to do with UNTAET’s wrong turns.²⁰⁵ If the UNTAET administration actually has stood in the way of the development of self-governing democratic institutions, and if the United Nations intends to use the Kosovo/East Timor governance model in the future, this problem of international overreaching needs to be addressed.

IV. AFGHANISTAN AND BRAHIMI’S APPROACH: A “LIGHT FOOTPRINT”

At the outset of my research, in the summer of 2001, the development in U.N. peacebuilding theory and practice seemed to point in a clear direction, moving from the cooperative and consent-based mission of the early 1990s to the protectorates of the turn of the century. Events since the September 2001 attacks in New York City and Washington, D.C., have turned much of that analysis on its head. Under the leadership of the Secretary-General’s Special Representative to Afghanistan, Lakhdar Brahimi,²⁰⁶ a new vision of U.N. peacebuilding is being staked out, one that draws heavily on the consent-based models of the early 1990s and that openly

204. *Id.*

205. See Crossette, *supra* note 183, at A4.

206. See Serge Schmemann, *Architect to a Nation, Post-Taliban*, N.Y. TIMES, Oct. 12, 2001, at B3.

rejects the neocolonialist model. Furthermore, this new approach is being proposed, and implemented, in circumstances that closely resemble the posthumanitarian interventions of the late 1990s—in a region where security is guaranteed, if at all, by an invading multinational force. These recent developments demonstrate a vivid tension in current U.N. peacebuilding theory; it will be the aim of the remainder of this Note to describe this tension in greater detail and to propose how it might best be resolved.

A. *The Brahimi Report*

Well before the events of late 2001, Brahimi chaired a *Panel on Untied Nations Peace Operations*, which produced a report on that topic, filled with recommendations to address what the panel viewed as pressing problems and deficiencies in U.N. peacekeeping work.²⁰⁷ In a section entitled *The Challenge of Transitional Civil Administration*, Brahimi addresses some of the unique challenges that face such administrations:

These operations face challenges and responsibilities that are unique among United Nations field operations. No other operations must set and enforce the law, establish customs services and regulations, set and collect business and personal taxes, attract foreign investment, adjudicate property disputes and liabilities for war damage, reconstruct and operate all public utilities, create a banking system, run schools and pay teachers and collect the garbage—in a war-damaged society, using voluntary contributions In addition to such tasks, these missions must also try to rebuild civil society and promote respect for human rights, in places where grievance is widespread and grudges run deep.²⁰⁸

Brahimi's report appears to question the wisdom of the new model head-on when it adds, "Beyond such challenges lies the larger question of whether the United Nations should be

207. *Comprehensive Review of the Whole Question of Peacekeeping Operations in All Their Aspects*, U.N. GAOR, 55th Sess., Provisional Agenda Item 87, U.N. Doc. A/55/305-S/2000/809 (2000) [hereinafter *Brahimi Report*].

208. *Id.* ¶ 77.

in this business at all”²⁰⁹ Brahimi is not on the record explicitly rejecting the neocolonialist model as a general principle, but his actions speak for themselves. Credible (but anonymous) sources report that he was offered the position of Special Representative for UNTAET but refused it, arguing that the mission’s mandate was unjustified by the circumstances and that a cooperative, consent-based mission would make more sense.²¹⁰ In his new role as Special Representative for Afghanistan, his influence is clearly visible in the direction that mission is taking.

B. *Afghanistan: A Challenge to the Neocolonialist Model*

When he was first appointed to his second tour as Special Representative to Afghanistan, Brahimi immediately signaled his intention to minimize U.N. authority, insisting at his first news conference that the United Nations “definitely” had no intention of attempting to impose an international administration.²¹¹ He soon repeated his intention to ensure Afghan “ownership” of any interim government, insisting that, “[o]therwise, it has no future,” and adding, “All the resolutions of the United Nations say that the Afghans are independent, that the country must remain united, that there should be no interference in their affairs.”²¹²

As Brahimi engaged in diplomacy in an effort to ensure that political developments kept pace with the quicker-than-expected fall of the Taliban, he continued to reinforce his theme. “The bitter experience of the last 10 years shows that the solution must be carefully put together and be home-

209. *Id.* ¶ 78. This Note has not addressed the moral aspects of this question, but it is important to recognize that this larger debate alters the terms of any discussion of the particular choices that are made when such transitional administrations are contemplated and undertaken. If reasonable people could disagree as to whether it is a mistake—or simply wrong—to take over the governance of such regions at all, then it is all the more important to move carefully when such projects are undertaken. The decision to vest UNTAET with such vast authority, for example, is harder to view as a harmless error.

210. Anonymous Interview with Leading Scholar on Peacekeeping Issues, in New York, N.Y. (Feb. 2002).

211. Serge Schmemmann, *U.N. Envoy Says All Options Are Open on a Post-Taliban Afghanistan*, N.Y. TIMES, Oct. 18, 2001, at B4.

212. Serge Schmemmann, *U.N. Insisting Afghans Get a Government They Want*, N.Y. TIMES, Oct. 24, 2001, at B3.

grown, so that it enjoys the support of all the internal and external players,” he told the Security Council in mid-November 2001.²¹³ His approach was codified in the Bonn Agreement, which he shepherded, and which established the interim Afghan administration.²¹⁴ The agreement’s preamble speaks extensively of the “national sovereignty and territorial integrity of Afghanistan,” explicitly “acknowledg[es] the right of the people of Afghanistan to freely determine their own political future,” and, while asserting that the “UN, as the internationally recognized impartial institution, has a particularly important role to play,” makes a point of adding the limiting phrase “in the period prior to the establishment of permanent institutions in Afghanistan.”²¹⁵

Such language is hardly unusual, but the substance of the Bonn Agreement lays out a dynamic in which genuine authority rests, from the start, with the Afghan Interim Administration itself. The “Functions” section specifies that “[t]he Interim Administration shall be entrusted with the day-to-day conduct of the affairs of state, and shall have the right to issue decrees for the peace, order and good government of Afghanistan.”²¹⁶ That section contains the phrase, “with the assistance of the United Nations,” four separate times²¹⁷ but grants no actual authority to the organization. The Annex to the Bonn Agreement, which explicitly lays out the United Nations’ role, reveals a closer resemblance to the “observer” role of ONUSAL in El Salvador and the other consent-based missions examined in Part II than to any of the more recent missions. “The United Nations shall advise the Interim Authority in es-

213. Serge Schmemmann, *U.N. Seeks Meeting of Afghans to Fill Vacuum in Kabul*, N.Y. TIMES, Nov. 14, 2001, at B4 (“Outlining his plan to the Security Council, Mr. Brahimi repeatedly stressed that any plan must be broad-based and developed from within the country to stand a chance of acceptance. Above all, diplomats said, it could not appear to be imposed by victorious powers.”).

214. See Steven Erlanger, *Talks in Bonn End with Deal on Leadership for Afghans*, N.Y. TIMES, Dec. 5, 2001, at B1.

215. *Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions*, Dec. 5, 2001, pmbl., reprinted in U.N. SCOR, 56th Sess., U.N. Doc. S/2001/1154 (2001) [hereinafter Bonn Agreement].

216. *Id.* III(C)(1)

217. *Id.* III(C)(4)-(6), (9).

establishing a politically neutral environment,” it promises,²¹⁸ mirroring language from the mandates of the early 1990s. There are no reserved powers, either: Even “[i]f for whatever reason the Interim Administration . . . [is] actively prevented from meeting or unable to reach a decision,” the U.N. capacity to correct such a problem is limited to the “good offices” of the Secretary-General²¹⁹—a capacity that hardly needs codification. Finally, the last paragraph of the Annex grants the United Nations the “right to investigate human rights violations and, where necessary, recommend corrective actions.”²²⁰ But a right to “investigate” and “recommend” is a mere shadow of the plenary authority exercised in recent missions.

Four months later, Security Council Resolution 1401 officially mandated the new U.N. mission, U.N. Assistance Missions in Afghanistan (UNAMA).²²¹ The presence of the word “Assistance” in the mission’s title immediately establishes its operating principle. The resolution refers to a recent *Report of the Secretary-General* for the mandate and structure; this report in turn refers to the Annex of the Bonn Agreements examined above.²²² In addition to these responsibilities, the report adds two new functions for the mission: “Promoting national reconciliation . . . through the good offices role of my Special Representative,” and “[m]anaging all UN humanitarian relief, recovery and reconstruction activities.”²²³ Lest there be any doubt about the open-ended language in the final provision, the report goes on to be as explicit as possible about the perceived role of UNAMA. “The overall objective of UNAMA should be to provide support for the implementation of the Bonn Agreement processes . . . while recognizing that *the responsibility for the Agreement’s implementation ultimately rests with the Afghans themselves.*”²²⁴ It also adds that “UNAMA should aim to bolster Afghan capacity (both official and non-govern-

218. *Id.* Annex II, ¶ 3.

219. *Id.* Annex II, ¶ 5.

220. *Id.* Annex II, ¶ 6.

221. S.C. Res. 1401, U.N. SCOR, 57th Sess., 4501st mtg., U.N. Doc. S/RES/1401 (2002).

222. *The Situation in Afghanistan and Its Implications for International Peace and Security: Report of the Secretary-General*, U.N. GAOR, 56th Sess., Agenda Item 43, ¶ 97, U.N. Doc. A/56/875-S/2002/278 (2002).

223. *Id.*

224. *Id.* ¶ 98 (emphasis added).

mental), relying on *as limited an international presence and on as many Afghan staff as possible . . . [,] thereby leaving a light expatriate 'footprint.'*"²²⁵

This vision of the United Nations' civilian role in what will surely be a lengthy and challenging reconstruction process is utterly different from the approach taken in Somalia, Bosnia, Kosovo, and East Timor.²²⁶ It is no exaggeration to say that U.N. peacebuilding policy in Afghanistan has veered sharply back toward the consent-based model of the early 1990s. On the military side, however, the situation in Afghanistan more closely resembles the recent missions: The Bonn Agreements invite the protection of a multinational security force, authorized by the Security Council,²²⁷ and the allied operation against the Taliban and Al Qaeda, spearheaded by the United States, still exercises control in many parts of the country.²²⁸

This combination—an (or in this case, two separate) occupying international force(s) guaranteeing the peace and a limited, consent-based civilian mandate—is exactly what was envisioned, and later abandoned, in Somalia and Bosnia. Only time will tell how the experiment works this time, and

225. *Id.* (emphasis added).

226. The reconstruction process in Afghanistan has run into many difficulties so far, but those difficulties appear to be attributable, not to the vesting of civilian authority with Afghans themselves, but to two other problems: the lack of a sufficient amount of foreign aid and the political obstacles to extending the international security presence beyond Kabul. See *The Situation in Afghanistan and Its Implications for International Peace and Security: Report of the Secretary-General*, U.N. GAOR, 56th sess., Agenda Item 43, ¶¶ 20, 67, U.N. Doc. A/56/1000-S/2002/737 (2002). But the new Interim Afghan Administration, which was established at an Emergency Loya Jirga held in June 2002, see *id.* ¶¶ 28-42, nevertheless has taken many positive steps—steps that would have been impossible had the international community assumed plenary civilian authority. For example, the most recent UNAMA report announces that

the Transitional Administration has taken a number of measures to demonstrate its policy of responsible international citizenship. These include the signing of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their Destruction, concerted efforts against terrorism and, as mentioned above, a serious anti-narcotics campaign.

The Situation in Afghanistan and Its Implications for International Peace and Security: Report of the Secretary-General, U.N. GAOR, 57th sess., Agenda Item 37, ¶ 18, U.N. Doc. A/57/487-S/2002/1173 (2002) (citation omitted).

227. See Bonn Agreement, *supra* note 215, Annex 1, ¶ 3.

228. *Unfinished War in Afghanistan*, N.Y. TIMES, Mar. 5, 2002, at A22.

the unwillingness of the United States and other countries to expand the International Protection Force beyond Kabul (despite the call of the departing second-in-command U.N. official in Afghanistan, Francesc Vendrell, for at least 35,000 foreign peacekeepers to help maintain security there²²⁹) certainly raises concerns about the viability of the present arrangement.²³⁰ Nevertheless, the language of both the Bonn Agreement and the Secretary-General's initial report illustrates a serious challenge to the neocolonialist theory of U.N. peacebuilding—a theory that seemed ascendant until very recently.

This claim—that the mission Brahimi has crafted in Afghanistan reveals normative judgments about what is the appropriate U.N. peacebuilding role—must overcome a basic argument that has been present throughout all of the previous analyses. Many would argue sensibly that the individual differing circumstances of each new region's crisis wholly determine the range of potential actions by the international community, and that in cases such as Afghanistan, that range is so narrow as to dictate the only possible role. As soon as the first U.S. bombs began to fall, or at least as soon as people began seriously to discuss the fall of the Taliban regime, the country's historical rejection of all forms of colonial occupation was nervously cited as diplomats raced to devise an effective means of filling the sudden power vacuum.²³¹ Doubtless, such concerns about past resistance have played a large role in determining the direction that the United Nations under Brahimi's guidance has taken in Afghanistan.

Close study of U.N. reconstruction efforts demonstrates, however, that any overly simplified, blanket explanation of a mission's causes, on the front end, and success or failure, at

229. John F. Burns, *U.N. Aide Asks More Security Troops for Afghanistan*, N.Y. TIMES, Jan. 25, 2002, at A10.

230. See *A Peace To Keep?*, ECONOMIST, Dec. 15, 2001, at 13 (reporting that Bonn participants insisted that the peacekeeping force must remain within Kabul); see also *Guns Before Butter*, ECONOMIST, Apr. 6, 2002, at 13 (arguing that U.S. reservations have prevented the peacekeeping force from expanding beyond Kabul). But see James Dao, *Bush Sets Role for U.S. in Afghan Rebuilding*, N.Y. TIMES, Apr. 18, 2002, at A1 (discussing President Bush's speech that "called for a plan he compared to" the Marshall Plan after World War II).

231. See *Who Should Lead?*, ECONOMIST, Nov. 10, 2001, at 17.

the back end, is bound to be wrong. A complex array of forces and judgments act to shape every mission's mandate and results; once a certain path has been taken, it becomes with passing time to view that choice as predetermined and inevitable. When Brahimi assumed the role of Special Representative to Afghanistan in late 2001, he immediately began to push his vision for the appropriate U.N. role in the region; before long that vision had become a reality, through negotiations in Bonn and elsewhere.²³² This result was not inevitable.

An anonymous U.N. official, high ranking in the Secretariat, expressed confidence in early 2002 that another path would be followed. "It seems pretty obvious to me," he said, "given that a force has been authorized by the Council under outside command, and plans are proceeding full steam ahead for a civilian mission to prop up the interim administration . . . [,] that you will have a structure based on the Kosovo/East Timor model."²³³ This has not come to pass.

No matter how much weight one gives to external forces as the major determinants of the U.N. approach in Afghanistan, the words of the Secretary-General's report—the insistence that "the responsibility for the Agreement's implementation ultimately rests with the Afghans themselves," and the call for "as limited an international presence and . . . as many Afghan staff as possible . . . [,] thereby leaving a light expatriate 'footprint'"—should put to rest any doubt that a larger policy argument is being played out in UNAMA's mandate.²³⁴ David Malone, the President of the International Peace Academy and former Canadian Ambassador to the United Nations, agrees, arguing that "Brahimi's approach is designed in reaction to many things he did not like in East Timor and Kosovo, mainly the idea of the UN governing, rather than assisting local leaderships in governing."²³⁵ Michael Doyle also agrees that the approach in Afghanistan, "which resonates with the

232. See *supra* notes 207-209 and accompanying text.

233. Anonymous Interview, Secretariat Official, United Nations, in New York, N.Y. (Jan. 2002).

234. In his report, Brahimi explicitly stated that his recommendations, which included the question of whether the "[United Nations] should be in this business at all," were influenced by recent experiences with transitional administrations. See *Brahimi Report*, *supra* note 207, ¶¶ 76-83.

235. Interview with David Malone, President, International Peace Academy, in New York, N.Y. (Apr. 7, 2002).

methodologies and rhetoric” of the early 1990s missions, reflects “a strong desire for the light footprint as a matter of principle, independent of the situation on the ground.”²³⁶

Brahimi recently accepted a “Great Negotiator” Award from Harvard Law School’s Program on Negotiation.²³⁷ His remarks at the award presentation offer further evidence that his approach to Afghanistan reflects a broader view of the proper role of U.N. reconstruction efforts.

It would be astounding to see a U.N. official such as Brahimi explicitly criticize recent U.N. missions, and Brahimi does no such thing: In the early part of his speech, he mentions the Kosovo and East Timor missions and then urges, “The situation in Afghanistan, however, was completely different.”²³⁸ As he then describes his approach to Afghanistan in more detail, however, he belies any sense that he speaks only of that country. Afghans, he explained, “would unanimously demand to pick up the pieces of their country on their own,” and, while he explains that “we have tried to be consistent with this philosophy” in UNAMA, he adds that he is “sometimes told that this runs counter to the culture of the United Nations, and to that of most other international organizations.”²³⁹

Brahimi appears here to be challenging the prevailing orthodoxy of the United Nations and most other international organizations. He is quite explicit about what he means: “The essence of our approach is to ensure, first and foremost, that the activities of the UN strengthen national capacities—not our own institutional capacities; and, second, that we are responsive to the priorities articulated by the Afghans themselves—and not to our own agendas or priorities.”²⁴⁰

Lest these words be viewed as applying only to the very “different situation” of Afghanistan, Brahimi adds that “[e]xperience has shown that the number of UN agencies flying their flags in a country is not proportionate to the overall

236. Interview with Michael Doyle, *supra* note 171.

237. See Harvard Law School News and Events, *Lakhdar Brahimi Receives Great Negotiator Award*, (Oct. 1, 2002), at http://www.law.harvard.edu/news/2002/10/02_brahimi.html.

238. Lakhdar Brahimi, “Great Negotiator” Award Acceptance Speech (Oct. 2, 2002) (transcript on file with author).

239. *Id.*

240. *Id.*

success achieved.”²⁴¹ Finally, he adds that “providing effective assistance requires not only an understanding of the local needs and context, but also a recognition of one’s own limitations.”²⁴²

Clearly this commentary, along with all of Brahimi’s words and actions since undertaking his second tour of duty as the Secretary-General’s Special Representative to Afghanistan, applies to U.N. peacekeeping theory as a whole.²⁴³ This new direction in—or challenge to—U.N. peacebuilding theory, even as U.N. experiments in neocolonialism linger on, raises questions about the coherence of the United Nations’ or the international community’s vision for its most appropriate role in crises to come.

V. CONCLUSION

In his book *The Warrior’s Honor*, Michael Ignatieff voices some of the criticisms of the neocolonialist model:

The United Nations once oversaw discrete development projects. Now it takes over the political and administrative infrastructure of entire nations and rebuilds them from scratch These lords of poverty talk the jargon of development; building “local capacity,” strengthening “indigenous initiative.” But there is an imperial premise at work here: Wealthy strangers are taking upon themselves the right to rule over those too poor, too conflict-ridden, to rule themselves. If it is an imperialism, is it benign? Only if it succeeds: if [the occupied region] learns to rule itself, then these well-paid agents of the international conscience do themselves out of a job. But no one knows if it will succeed. And the omens are not auspicious.²⁴⁴

241. *Id.*

242. *Id.*

243. Final proof is perhaps evident in the fact that UNAMA is listed as a “political,” and not “peacekeeping,” mission on the U.N. website’s page on peacekeeping operations, even as other similarly “assistance”-oriented missions like UNMISSET are listed as peacekeeping missions. See <http://www.un.org/Depts/dpko/dpko/home.shtml> (last visited Mar. 13, 2003).

244. MICHAEL IGNATIEFF, *THE WARRIOR’S HONOR* 79-80 (1997).

To be sure, this model has its advantages: Rid of the necessity of negotiating with obstructionist local actors, the United Nations can pursue its reconstruction work with a new-found focus and efficiency. But troubling questions have been raised, not only by locals who are subjected to it, but also by those who take part in its implementation. There is some evidence that it may be impossible to make progress toward developing local democratic structures when the means employed toward that end actually resemble an authoritarian colonial administration. Even if that claim goes too far, progress toward democratic self-governance at least may be undermined by the United Nations' plenary power, and practical necessities—from the inevitable political considerations that influence the choice of Special Representatives, possibly barring those best-suited for the difficult job, to the impossibility of recruiting the right sorts of specialists who also can demonstrate sufficient sensitivity toward the local population—also have undermined these missions' effectiveness.

If one examines these missions with more than a superficial gaze, it becomes clear that any simple judgment, in the abstract, either for or against international administration, is problematic. We are then left with the pressing question of which model, if not perfect, is the best one to start with when preparing for a new reconstruction mission. Lest we choose instead to wait for new problems to arise before we take a position, we should heed the lessons of the recent past: The possibly unnecessary use of the neocolonialist model in East Timor, followed by Brahimi's forceful restoration in Afghanistan of the consent-based approach when some sort of transitional international administrative presence was an option on the table, demonstrates how theory and a normative baseline can play a crucial role in such determinations.

Some take the view that the Kosovo/East Timor model is fine and only needs exceedingly skilled implementers to dodge the problems that may arise. "You have to strike a balance. A good Special Representative will be able to exercise enough power that everything doesn't fall apart while at the same time engaging the locals in a way that ensures continued support and ownership," proposes Alvaro de Soto, who was Under-Secretary-General for Political Affairs at the time the

Kosovo model was invented.²⁴⁵ “You need good people at the top who are prepared to be imaginative and inventive,” offers Justice Richard Goldstone.²⁴⁶ And William O’Neill, whose study of UNMIK poignantly demonstrates the need for international authority, similarly argues that “the UN should avoid acting like the ‘ugly imperialist’ but also should not be reluctant to be assertive, even overriding local decisions.”²⁴⁷

On the other hand, the legacy of colonialism suggests that total coercive control over distant regions, wielded by unaccountable individuals, is a poor recipe for “building” sustainable, independent political structures—or peace. The potential for missteps, and for making a bad situation worse, is glaringly present in the history books, including the history we have examined here. These experiences might suggest a moral duty not to meddle in the processes of development more than is necessary to assist those processes—and the practical experiences of such interventions points toward the same conclusion.

Too much international authority is “a mistake of the colonial mentality,” offers Justice Goldstone.²⁴⁸ He continues, “[A]dequate consultation and transparency is most crucial, because if you consult people, they’re normally with you.”²⁴⁹ This view appears to be championed by Brahimi and his supporters. Indeed, in accepting his “Great Negotiator” Award, Brahimi offered these words: “If there is one lesson that years of experience in peacekeeping and peacebuilding has [sic] taught us, it is that a peace and reconstruction process stands a far better chance of success when it is nationally owned, rather than led by external actors.”²⁵⁰

While it will be impossible to make a truly informed judgment about this ongoing theoretical and operational tension until the missions in Kosovo, East Timor, and Afghanistan have played themselves out—if then—Brahimi should be lauded for steering the United Nations toward the consent-based approach that was ignored after the initial disastrous at-

245. Interview with Alvaro de Soto, *supra* note 26.

246. Interview with Justice Richard Goldstone, Constitutional Court of South Africa, in New York, N.Y. (Oct. 8, 2002).

247. O’NEILL, *supra* note 129, at 139.

248. Interview with Justice Richard Goldstone, *supra* note 246.

249. *Id.*

250. Brahimi, *supra* note 238.

tempts to integrate it with military control of war-torn regions in the mid-1990s. A further step should be to revive the experiments with bodies that both can help the United Nations integrate with the local community and can allow silenced factions to ease themselves into the political life of a country. These valuable experiments were too quickly ignored after 1993 in favor of the expedience of absolute force. Perhaps the interim arrangements in Afghanistan will herald a rebirth of this approach, even in highly unstable situations. But, particularly if “humanitarian intervention” gains further acceptance,²⁵¹ there may be more crises in the coming years in which a consent-based approach is simply not feasible. It is likely that we have not seen the last of the neocolonialist model.²⁵²

In a discussion of this theoretical tension, Michael Doyle argues that “constitutional structures are needed to tie international authority to the long-term interests of the population.”²⁵³ He highlights the SNC and COPAZ as good examples of such experiments, arguing that “temporary sovereignty arrangements, in which decision-making processes have a degree of separation of powers,” need to be considered more in the future. There is no reason that these experiments need to be limited to missions that apply the consent-based approach. Many of the criticisms and problems of the neocolonialist missions might be alleviated if they incorporated similar “cascading” (to use Doyle’s word) power structures. Such structures allow the local actors—both political figures and the general public—to see that the international authority to which they submit involves them in meaningful decisions and is guided by similar restraints and principles as the democratic structures it is seeking to foster in the region.

In an interview at U.N. headquarters in New York City, Hans Corell, the U.N. Under-Secretary-General for Legal Affairs, argued eloquently that the relationship between head-

251. See Lumsden, *supra* note 125; Le Mon, *supra* note 125.

252. An Israeli politician has gone even so far as to propose an international administration for the West Bank, an idea for which *The Economist* has indicated some support. See *Sharon’s War*, *ECONOMIST*, Apr. 6, 2002, at 11, 12 (“Yossi Sarid, Israel’s opposition leader, has proposed a previously unthinkable idea: the creation, in the Balkan manner, of some sort of international protectorate for the occupied territories, to restore calm while their ultimate status is resolved.”).

253. Interview with Michael Doyle, *supra* note 171.

quarters and the Special Representatives in Kosovo and East Timor provides the necessary checks on unwarranted use of power and similar problems with U.N. transitional administrations.²⁵⁴ But it is not enough that the Security Council and headquarters act as a constitutional check on the overreaching of a particular Special Representative—this oversight is invisible to the local population and too often restrained by political dynamics. We need not look further than the missions examined in Part II for guidance on what more visible structures might look like. Goldstone's *Kosovo Follow-Up Report* suggests how such a mechanism might be imported to that region. Such ideas are worth exploring further. The risks inherent in any such experimentation are no worse than those already present in any current approach.

Even after vigorously defending the necessity of the neocolonialist approach, arguing that "if you have to govern, you must govern with a robust government," Corell slipped toward Brahimi's camp when he conceded that "the UN should think twice" before creating a neocolonialist mission.²⁵⁵ After a thoughtful pause to contemplate the criticisms of the neocolonialist missions, he seemed to embrace the consent structures championed here when he added that "a solution may be to encourage a national government and send in mentors, people who can follow the work and give guidance on how to solve problems."²⁵⁶ Perhaps, after a period on the wane, the consent-based model will be ascendant once again. It is time for the United Nations to embrace this approach as the normative baseline from which all postconflict reconstruction mandate discussions must start. The long-term interests of a region can be best served with that model underpinning international involvement, even if dire circumstances occasionally will demand a temporary departure from the spirit of that theory.

254. Interview with Hans Corell, Under-Secretary-General for Legal Affairs, United Nations, in New York, N.Y. (Mar. 27, 2002).

255. *Id.*

256. *Id.*