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UNaccountable? The United Nations, Emergency Powers, and the Rule of Law in Asia

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UNaccountable? The United Nations, Emergency Powers, and the Rule of Law in Asia

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> Above all we must remember that the ways of Orientals are not our ways, nor their thoughts our thoughts. Often when we think them backward and stupid, they think us meddlesome and absurd. The loom of time moves slowly with them, and they care not for high pressure and the roaring of the wheels. Our system may be good for us; but it is neither equally, nor altogether good for them. Satan found it better to reign in hell than to serve in heaven; and the normal Asiatic would sooner be misgoverned by Asiatics than well governed by Europeans.
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> Lord Curzon, 1889[1]

In 1952 a committee of the American Society of International Law considered whether the laws of war should apply to United Nations enforcement actions. After struggling with the question, they noted that the UN held a 'a superior legal and moral position'[2] to the states parties to the relevant conventions and concluded that the Organization should 'select such of the laws of war as may seem to fit its purposes'.[3] This conferred extraordinary latitude upon the United Nations, which at the time consisted of only 60 countries. Since that time the membership of the UN has more than tripled and the Organization itself has affirmed — though only in 1999 — that international humanitarian law does indeed apply to peacekeeping and other operations.[4]

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* New York University School of Law and National University of Singapore. This paper draws upon a few passages first published in *You, The People: The United Nations, Transitional Administration, and State-Building* (Oxford: Oxford University Press, 2004). I am deeply indebted to Mark Fenwick, Victor Ramraj, and Barnett Rubin for comments on an earlier draft.

1 George N. Curzon, *Persia and the Persian question*, 2 vols. (London: Frank Cass, 1966), p. 630.

2 William J. Bivens et al., 'Report of committee on the study of the legal problems of the United Nations, should the laws of war apply to United Nations enforcement action?' *American Society of International Law Proceedings* 46 (1952), 217.

3 Ibid., 220.

4 Secretary-General's bulletin: Observance by United Nations forces of international humanitarian law, UN Doc ST/SGB/1999/13 (6 August 1999), available at http://www.un.org/Docs/journal/asp/ws.asp?m=ST/SGB/1999/13.

For a body ostensibly so committed to the rule of law in theory,[5] the question of whether the rule of law applies to the United Nations itself in practice remains oddly unclear. An historical reason for this was the uncertain legal personality of this club of states when it was created, which had to be inferred by the International Court of Justice four years later.[6] With respect to specific bodies of law, an ongoing problem is that the United Nations is not itself a party to, among other things, the human rights treaties negotiated under its auspices.

This chapter will not consider the *personal* responsibility of UN officials, who generally enjoy personal or functional immunity from legal process in the territories where they work.[7] Rather the focus is on the quasi-constitutional question of the liability of the Organization itself. As the United Nations has assumed more state-like functions — in particular through the coercive activities of its Security Council — the question of what limits there are on the powers thus exercised has become more pressing. Though there are significant problems in applying concepts such as the rule of law uncritically onto the international level,[8] here the focus will be the manner in which the UN Security Council has *used* the rule of law as a tool, particularly in situations of actual or potential conflict, and the extent to which the rule of law has *constrained* the exercise of power by the Council or its delegate.

The Council's powers thus invoked derive from Chapter VII of the UN Charter, which are the sole exception to the saving clause that renders the domestic jurisdiction of member states otherwise inviolable;[9] these powers may be invoked when the Council determines that there has been a 'threat to the peace, breach of the peace, or act of aggression'.[10] Such a framework clearly resonates with a doctrine of emergency powers.[11] What is interesting, for the purposes of this volume, is that whereas states of

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5 See, e.g., 2005 World Summit outcome document, UN Doc A/RES/60/1 (16 September 2005), available at http://www.un.org/summit2005, para. 134(a) (member states unanimously reaffirmed their commitment to 'an international order based on the rule of law and international law, which is essential for peaceful coexistence and cooperation among States').

6 *Reparation for injuries suffered in the service of the United Nations (Advisory Opinion)* (1949) ICJ Rep 174.

7 For discussion of this topic, see Convention on the privileges and immunities of the United Nations, 13 February 1946, 1 UNTS 15, available at http://www1.umn.edu/humanrts/instree/p&i-convention.htm; Frederick Rawski, 'To waive or not to waive: Immunity and accountability in UN peacekeeping operations', *Connecticut Journal of International Law* 18 (2002); A comprehensive strategy to eliminate future sexual exploitation and abuse in United Nations peacekeeping operations (report of Prince Zeid to the Secretary-General), UN Doc A/59/710 (24 March 2005), available at http://www.un.org/apps/docs/ws.asp?m=A/59/710.

8 See, e.g., Simon Chesterman, 'An international rule of law?' *American Journal of Comparative Law* 56 (2008).

9 UN Charter, art. 2(7): 'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.'

10 UN Charter, art. 39.

11 Jared Schott, 'Chapter VII as exception: Security Council action and the regulative ideal of emergency', *Northwestern University Journal of International Human Rights* 6 (2007).

emergency are traditionally invoked in order to justify a departure from or stretching of the rule of law,[12] here the existence of an emergency is a prerequisite to invoking the rule of law at all. At the same time, however, those promoting the rule of law themselves generally lie beyond the reach of the jurisdiction in question — both during times of emergency *and* in times of quiet.

This paper will examine these two questions — the use of the rule of law at the international level as a tool, and its application to those who wield it — with a particular emphasis on UN operations in Asia, notably Timor-Leste (East Timor) and Afghanistan. Section one will examine the ways in which the rule of law has been used to stabilize conflict zones, focusing on the activities of the UN Security Council from the mid-1990s onwards and in particular on Timor-Leste. Section two will consider the extent to which the rule of law has constrained the decisions and actions of the Council, focusing on accountability issues and the apparent compromise of these principles in Afghanistan. A concluding section will consider what light (if any) these operations shed on larger questions raised by the book, such as whether there are discernibly 'Western' or 'Asian' approaches to the role law plays in times of crisis.[13]

Of particular interest is the extent to which the United Nations can be said to reflect Western values, as is frequently alleged. A tentative conclusion is that there may be some rhetorical merit to this claim: Western states do largely set the agenda for the human rights framework that is commonly used to judge state actions. Nevertheless, the United Nations and the international system wield executive authority so infrequently and inconstantly that broad conclusions are not yet possible. More interesting, for the purposes of this book, is the manner in which internationally-administered 'emergency' powers demonstrate the willingness of even established democracies to invoke the rule of law instrumentally, as a tool to provide stability — and thus implicitly to compromise rule of law principles in the name of security.

At the same time, it is hoped that this chapter also sheds some light on the underlying question of whether it even makes sense to speak of 'emergency' powers before the rule of law has been established in a meaningful sense. Other chapters in this volume point to two types of problems that have historically confronted Asian states: the routine invocation of extra-constitutional measures without reference to formal emergency powers provisions in a basic law (as discussed in Maitrii Aung-Thwin's chapter on Myanmar and Andrew Harding's chapter on Thailand) and the availability to some regimes of extraordinary executive powers that remove the need to assert emergency powers in the first place (as discussed in Kevin Y.L. Tan's chapter with respect to Singapore and Malaysia). Both types of problems have arisen in Security Council authorized administration of territory, leading to predictable problems when power is transferred from international to 'Asiatic' and other hands.

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[12] See the Introduction to this volume.

[13] On the transplanting of rule of law discourse from Western to non-Western states, see Albert H.Y. Chen's chapter in this volume.

I. Invoking the Rule of Law as a Response to Emergency

The rule of law has long been invoked in human rights treaties as the foundation of a legitimate state[14] and in development policies as the basis for a sustainable economy.[15] Frequently this invocation has been of greater rhetorical than political significance, in the same way that a great many states invoke the rule of law in theory with little effort to implement it in practice.[16] More recently, however, the rule of law has also been used at the international level by the UN Security Council as a means of conflict resolution. This section considers the manner in which Council has used the rule of law as a response to 'emergencies' before considering how this played out in Timor-Leste. Following Dyzenhaus,[17] an examination of the relationship between the rule of law and emergencies may be best pursued through consideration of practical examples. Two elements are of special interest: what the United Nations did while exercising a degree of control over the territory, but also what influence this had (if any) on subsequent governance practices.

A. The Security Council's Uses of the Rule of Law

Apart from a preambular reference in relation to the deterioration of law and order in the Congo in 1961,[18] the Council first used the words 'rule of law' in the operative paragraph of resolution 1040 (1996), where it expressed its support for the Secretary-General's efforts to promote 'national reconciliation, democracy, security and the rule of law in

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[14] The preamble to the 1948 Universal Declaration of Human Rights states that 'it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.' Universal declaration of human rights, GA Res 217A(III) (1948), UN Doc A/810 (1948), preamble. On the relationship between human rights and the rule of law, see Randall Peerenboom, 'Human rights and rule of law: What's the relationship?' *Georgetown International Law Review* 36 (2005).

[15] For an early link between the rule of law, the free market, and economic prosperity, see Adam Smith, *An inquiry into the nature and causes of the wealth of nations* (Chicago: University of Chicago Press, 1976). In the 1960s, the U.S. Agency for International Development, the Ford Foundation, and other private American donors began an ambitious program to reform the laws and judicial institutions of countries in Africa, Asia, and Latin America. The 'law and development' movement, steeped in dependency theory, generated hundred of reports and articles — yet a decade later leading academic participants and a former official at the Ford Foundation declared it a failure. David M. Trubek and Marc Galanter, 'Scholars in self-estrangement: Some reflections on the crisis in law and development', *Wisconsin Law Review* 4 (1974); John. H. Merryman, 'Comparative law and social change: On the origins, style, decline & revival of the law and development movement', *American Journal of Comparative Law* 25 (1977); James Gardner, *Legal imperialism: American lawyers and foreign aid in Latin America* (Madison: University of Wisconsin Press, 1980).

[16] See, e.g., the chapters by Jacques deLisle on China and Andrew Harding on Thailand in this volume.

[17] David Dyzenhaus, 'The state of emergency in legal theory', in Victor V. Ramraj, Michael Hor, and Kent Roach (eds.), *Global anti-terrorism law and policy* (Cambridge: Cambridge University Press, 2005).

[18] SC Res. 161B (Feb. 21, 1961), preamble ('*Noting with deep regret and concern* the systematic violations of human rights and fundamental freedoms and the general absence of the rule of law in the Congo'; the relevant French text was '*l'absence générale de légalité au Congo*').

Burundi.'[19] (It is noteworthy that the French text rendered rule of law as '*le rétablissement de l'ordre*.'[20]) Many peace operations have subsequently had important rule of law components, such as those in Guatemala (1997),[21] Liberia (2003—),[22] Côte d'Ivoire (2004—),[23] Haiti (2004—),[24] and the Democratic Republic of the Congo (2007—).[25] The mandates for such missions tend to be broad, calling for the 're-establishment' or 'restoration and maintenance' of the rule of law, without formally articulating what this might entail. In practice, the dominant activities have tended to be training of personnel, assisting institution-building, advising on law reform issues, and monitoring, with the emphasis on criminal law processes.[26] Less attention has been paid, for example, to land law.[27]

In addition to supporting domestic rule of law institutions, the Council has created international criminal tribunals to replace domestic processes for trials arising from the former Yugoslavia (1991—)[28] and Rwanda (1994).[29] These tribunals were explicitly created as part of an effort to bring peace to war-torn territories, though they have been

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19 SC Res. 1040 (Jan. 29, 1996), para. 2.

20 'The reestablishment of order.' SC Res. 1040 (Jan. 29, 1996), para. 2 (French text available at documents.un.org).

21 UN Verification Mission in Guatemala (MINUGUA).

22 UN Mission in Liberia (UNMIL).

23 SC Res. 1528 (Feb. 27, 2004), para. 6(q) (authorizing the UN Operation in Côte d'Ivoire (UNOCI) to 'assist the Government of National Reconciliation in conjunction with ECOWAS and other international organizations in re-establishing the authority of the judiciary and the rule of law throughout Côte d'Ivoire').

24 SC Res. 1542 (Apr. 30, 2004), para. 7(I)(d) (authorizing the UN Stabilization Mission in Haiti (MINUSTAH) 'to assist with the restoration and maintenance of the rule of law, public safety and public order in Haiti through the provision inter alia of operational support to the Haitian National Police and the Haitian Coast Guard, as well as with their institutional strengthening, including the re-establishment of the corrections system').

25 SC Res. 1756 (May 15, 2007), para. 3 ('decid[ing] that the UN Organization Mission in the Democratic Republic of the Congo (MONUC) 'will also have the mandate, in close cooperation with the Congolese authorities, the United Nations country team and donors, to support the strengthening of democratic institutions and the rule of law in the Democratic Republic of the Congo and, to that end, to: … (c) Assist in the promotion and protection of human rights, with particular attention to women, children and vulnerable persons, investigate human rights violations with a view to putting an end to impunity, assist in the development and implementation of a transitional justice strategy, and cooperate in national and international efforts to bring to justice perpetrators of grave violations of human rights and international humanitarian law; … (e) Assist in the establishment of a secure and peaceful environment for the holding of free and transparent elections; (f) Contribute to the promotion of good governance and respect for the principle of accountability'). The UN Observer Mission in El Salvador (ONUSAL, 1991-1995) had a rule of law component within its human rights division.

26 Vivienne O'Connor, 'Rule of law and human rights protections through criminal law reform: Model codes for post-conflict criminal justice', *International Peacekeeping* 13(4) (2006).

27 Daniel Fitzpatrick, Land policy in post-conflict circumstances: Some lessons from East Timor (Evaluation and Policy Analysis Unit, United Nations High Commissioner for Refugees, Working Paper No. 58, Geneva, February 2002), available at http://www.unhcr.ch/cgi-bin/texis/vtx/research/opendoc.pdf?tbl=RESEARCH&id=3c8399e14.

28 SC Res. 827 (1993).

29 SC Res. 955 (1994).

criticized for spending significant resources in order to prosecute few individuals with little lasting impact on the judicial institutions of the territory concerned. Hybrid tribunals, such as the Special Court for Sierra Leone[30] and the Extraordinary Chambers in the Courts of Cambodia,[31] were intended to blend international supervision with development of national capacity but have had limited success.

In two situations, Kosovo (1999-2008)[32] and Timor-Leste (1999-2002),[33] the United Nations assumed direct responsibility for the administration of justice, including control of police and prison services. (Similar powers were exercised in Bosnia and Herzegovina through the Office of the High Representative from 1996.) Resolution 1272 (1999), for example, determined that the situation in Timor-Leste constituted a threat to peace and security and invoked the Security Council's Chapter VII powers.[34] It established the UN Transitional Administration in East Timor (UNTAET) and endowed it with 'overall responsibility for the administration of East Timor', granting the new body power 'to exercise all legislative and executive authority, including the administration of justice'.[35] UNTAET was further authorized 'to take all necessary measures to fulfil its mandate'.[36] These potentially dictatorial powers were tempered by the political understanding that the Timorese people had voted overwhelmingly for independence and that this transition should be overseen by the United Nations.[37] Timor-Leste duly became independent two-and-a-half years later.

The frequency with which the rule of law is now invoked through the United Nations as a means of preventing or responding to crisis has led to a proliferation of institutions, notably including a new Rule of Law Coordination and Resource Group and a Rule of Law Unit.[38] The roles attributed to the rule of law as a response to crisis has also been reflected in the burgeoning literature on the subject.[39]

That literature rarely considers the irony that lawless means are being used to

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30 Agreement between the United Nations and the government of Sierra Leone on the establishment of a special court for Sierra Leone, done at Freetown, 16 January 2002.

31 Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea, done at Phnom Penh, 6 June 2003, available at http://www.eccc.gov.kh.

32 UN Interim Administration Mission in Kosovo (UNMIK).

33 UN Transitional Administration in East Timor (UNTAET).

34 SC Res. 1272 (1999), preamble.

35 SC Res. 1272 (1999), para. 1.

36 SC Res. 1272 (1999), para. 4.

37 SC Res. 12727 (1999), preamble.

38 UN Doc. A/61/636-S/2006/980 (2006).

39 See generally Thomas Carothers, 'The rule of law revival', *Foreign Affairs* 77 (1998); Richard Caplan, *International governance of war-torn territories: Rule and reconstruction* (Oxford: Oxford University Press, 2005); Jane Stromseth, David Wippman, and Rosa Brooks, *Can might make rights? Building the rule of law after military interventions* (Cambridge: Cambridge University Press, 2006); Dominik Zaum, *The sovereignty paradox: The norms and politics of international statebuilding* (Oxford: Oxford University Press, 2007).

promote law (though that irony tends not to be lost on the locals[40]). Analogies are sometimes made to the laws of military occupation and colonialism, in particular the civilizing mission incorporated more openly in texts such as the League of Nations Covenant, which explicitly provided that 'the tutelage of [peoples not yet able to stand by themselves] should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it'.[41] This language of a 'sacred trust' survived into the present UN Charter.[42]

A more interesting analogy for present purposes is that which one might draw between the UN Security Council and the Roman law concept of *iustitium*. As Agamben has argued, this state of exception represents not the fullness of powers, but 'an emptiness and standstill of the law.'[43] In times of crisis, the Security Council does not invoke emergency powers in the sense of enhanced centralized authority — rather, the crisis (a threat to international peace and security) justifies a temporary suspension of the law (the non-intervention principle enshrined in Article 2(7) of the UN Charter) for a specific purpose (restoration of peace and security).[44]

Formally, states have agreed to this arrangement through their membership of the United Nations, even though such powers go somewhat beyond what was originally contemplated when the Charter was drafted. Through the 1990s that expansion could be tracked by the language used to justify each step as 'unique' (Somalia in 1992),[45] 'unique and exceptional' (Haiti in 1993),[46] and again 'unique' (Rwanda in 1994).[47] Predictably, these powers have become most controversial when they slipped from the exceptional into the normal, as the Council's powers arguably have in the over-use of targeted financial sanctions and legislative resolutions. In the former case, sanctions in principle operate, inter alia, to prevent the financing of terrorist acts: as asset freezes stretch into more than a decade these preventive acts based on secret intelligence look more like a

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40 See, e.g., Jose 'Kay Rala Xanana' Gusmão, 'New year's message: The right to live in peace and harmony' (Dili, East Timor, 31 December 2000), available at http://www.cpa.org.au/garchve3/1031xan.html: 'We are witnessing another phenomenon in East Timor; that of an obsessive acculturation to standards that hundreds of international experts try to convey to the East Timorese, who are hungry for values: democracy (many of those who teach us never practised it in their own countries because they became UN staff members); human rights (many of those who remind us of them forget the situation in their own countries); gender (many of the women who attend the workshops know that in their countries this issue is no example for others)'.

41 Covenant of the League of Nations, art. 22.

42 See, e.g., UN Charter, art. 73.

43 Giorgio Agamben, *State of exception* (Chicago: University of Chicago Press, 2005), p. 48; Stephen Humphreys, 'Legalizing lawlessness: On Giorgio Agamben's *State of exception*', *European Journal of International Law* 17 (2006), 681-2.

44 Cf Nehal Bhuta, 'The antinomies of transformative occupation', *European Journal of International Law* 16 (2005).

45 SC Res. 794 (1992).

46 SC Res. 841 (1993).

47 SC Res. 929 (1994).

form of punitive confiscation based on no evidence.[48] In the latter case, the ability of the Council to respond swiftly and robustly to international threats has crept towards using those powers to issue norms of general application without operating through the normal — and cumbersome — processes of international law.[49]

Though the United Nations is highly unusual in the coercive powers granted to its security organ, regional organizations of more recent vintage have been granted explicit powers to be critical of, among other thing, non-constitutional changes of government. The OSCE, in its previous incarnation as the CSCE, adopted the Copenhagen Document in 1990, in which member states recognized their responsibility to defend and protect 'the democratic order freely established through the will of the people against the activities of persons, groups or organizations that engage in or refuse to renounce terrorism or violence aimed at the overthrow of that order or of that of another participating state'.[50] The European Union has even more intrusive powers with respect to its members. In 1992 the Organization of American States amended its Charter to permit suspension of a member whose democratic government has been overthrown by force.[51] Going one step further, the African Union in 2000 adopted a constitutive act that recognized 'the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity'.[52] Most recently, the United Nations at the 2005 World Summit endorsed the 'responsibility to protect', and member states declared their preparedness 'to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.'[53]

These developments may be contrasted with the more traditional conception of sovereignty that tends to be embraced in Asian institutions, such as they are. Asia lacks comparable bodies to the EU/OSCE, the OAS, or the AU. Those bodies that do exist either have no provision at all for scrutiny of members, such as the Shanghai Cooperation

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48 See below nn. 91-96 and accompanying text.

49 Stefan A. Talmon, 'The Security Council as world legislature', *American Journal of International Law* 99 (2005). See now The UN Security Council and the rule of law, UN Doc A/63/69-S/2008/270 (2008), available at http://documents.un.org.

50 Conference on Security and Co-operation in Europe, Document of the Copenhagen meeting of the conference on the human dimension (Copenhagen document) (29 June 1990). See also Malvina Halberstam, 'The Copenhagen document: Intervention in support of democracy', *Harvard International Law Journal* 34 (1993).

51 OAS Charter (1948), art. 9, as amended by the Protocol of Washington, adopted on 14 December 1992 by the Sixteenth Special Session of the General Assembly of the OAS, amendment entered into force 1997. Suspension is not automatic, however, and must be approved by a two-thirds majority of the OAS member states.

52 Constitutive act of the African union, done at Lomé, Togo, 11 July 2000, in force 26 May 2001, available at http://www.africa-union.org, art. 4(h).

53 World summit outcome document, para. 139.

Organization, or extremely weak mechanisms such as the embryonic human rights body within ASEAN.[54] This is not to say that such questions of institutional design are explicable by Asian cultural or political differences, but it does suggest that — at least in this respect — Asia provides a useful counterpoint to the general trend towards greater delegation of powers to international organizations.

B. Applying the Rule of Law in Timor-Leste

Leaving aside the question of what international organizations have been empowered to do in theory, what happens in practice when forces are deployed on the ground? This paper will not rehearse the pre-1999 history of Timor-Leste.[55] When the Australia-led INTERFET force landed — formally authorized by both a Security Council resolution[56] and Indonesian consent[57] — they swiftly drew up a Detainee Ordinance that provided for temporary detention of persons suspected of or on trial for committing a serious offence, voluntary detainees, and persons detained as 'a security risk'. 'Serious offence' was defined by reference to certain chapters of the Indonesian Penal Code.[58] Plans had been made to transfer persons so detained to Indonesian civilian authorities, but the collapse of those structures soon led to the creation of a Detainee Management Unit (DMU) to review detention cases, comparable to a bail hearing except on the basis of written submissions. Between 21 October 1999 and 12 January 2000 the DMU reviewed 60 cases, after which all detainees were handed over to civilian authorities under the auspices of UNTAET.[59]

Following the transfer of power to the civilian UNTAET operation, an early order of business was to determine what law applied. In Kosovo, the controversial mission authorized just months earlier, choice of law had been politically fraught. At Russian insistence, and consistent with the terms of resolution 1244 (1999), the first UNMIK regulation established that the law in force prior to 24 March 1999 (the day on which NATO's air campaign commenced) would apply, provided that this law was consistent

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54 Charter of the Association of Southeast Asian Nations (ASEAN charter), done at Singapore, 20 November 2007, not yet in force, available at http://www.aseansec.org/AC.htm, art. 14.

55 See generally José Ramos-Horta, *Funu: The unfinished saga of East Timor* (Lawrenceville, NJ: Red Sea Press, 1987); Damien Kingsbury (ed.), *Guns and ballot boxes: East Timor's vote for independence* (Clayton, Australia: Monash Asia Institute, 2000); Ian Martin, *Self-determination in East Timor: The United Nations, the ballot, and international intervention, International Peace Academy occasional paper series* (Boulder, CO: Lynne Rienner, 2001).

56 SC Res. 1264 (1999).

57 Statement of the President of Indonesia, 12 September 1999, cited in SC Res. 1264 (1999), preamble. From a legal perspective this consent would appear to be redundant.

58 INTERFET Detainee Ordinance, 21 October 1999. See Bruce M. Oswald, 'Model codes for criminal justice and peace operations: Some legal issues', *Journal of Conflict and Security Law* 9 (2004), 269.

59 Michael J. Kelly et al., 'Legal aspects of Australia's involvement in the international force for East Timor', *International Review of the Red Cross* 841 (2001).

with internationally recognized human rights standards and Security Council resolution 1244.[60] The largely Albanian judiciary that was put in place by UNMIK rejected this, however, with some judges reportedly stating that they would not apply 'Serbian' law in Kosovo. Though they accepted some federal laws, such as the federal code of criminal procedure, the judges insisted on applying the Kosovo Criminal Code and other provincial laws that had been in effect in March 1989, asserting that these had been illegally revoked by Belgrade. The judges nevertheless 'borrowed' from the 1999 law to deal with cases involving crimes not covered in the 1989 Code, such as drug-trafficking and war crimes. In addition to lowering hopes that Serb judges would return to office, this dispute further undermined local respect for UNMIK — especially when it finally reversed its earlier decision in December 1999 and passed a regulation declaring that the laws in effect on 22 March 1989 would be the applicable law in Kosovo.[61]

In Timor-Leste, by contrast, choice of law was uncontroversial. UNTAET Regulation 1999/1 defined the applicable law as 'the laws applied in East Timor prior to 25 October 1999'.[62] This language (referring to 'the laws applied', rather than 'the applicable laws') was chosen in order to avoid the retroactive legitimation of the Indonesian occupation.[63] These laws were not translated from Indonesian to English, however, greatly complicating the efforts of international judges to inform themselves of the laws governing the territory. Institutions were sometimes developed idiosyncratically: Timor-Leste found itself, for example, with German-style investigative judges — an outcome not unconnected with the fact that UNTAET's legal adviser at the time happened to be German.[64]

Though Timor-Leste had fewer security and political problems than Kosovo, lack of local capacity presented immense challenges. Under Indonesian rule, no Timorese lawyers had been appointed as a judge or prosecutor. A Transitional Judicial Service Commission was established, comprising three Timorese and two international experts,[65] but the absence of a communications network meant that the search for qualified lawyers had to be conducted through leaflet drops by INTERFET planes. Within two months, sixty qualified Timorese with law degrees had applied for positions and the first eight judges and two prosecutors were sworn in on 7 January 2000.[66]

The decision to rely on inexperienced local jurists came from a mix of politics and

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60 UNMIK Regulation 1999/1 (25 July 1999), §§2, 3.

61 UNMIK Regulation 1999/24 (12 December 1999), §1.1.

62 UNTAET Regulation 1999/1 (27 November 1999), §3.1

63 Hansjoerg Strohmeyer, 'Building a new judiciary for East Timor: Challenges of a fledgling nation', *Criminal Law Forum* 11 (2000), 267 n18.

64 Hansjoerg Strohmeyer, 'Collapse and reconstruction of a judicial system: The United Nations missions in Kosovo and East Timor', *American Journal of International Law* 95 (2001); Zaum, *Sovereignty paradox*, p. 232.

65 UNTAET Regulation 1999/3 (3 December 1999), §2.

66 Strohmeyer, 'Collapse and reconstruction', 53-4.

pragmatism. Politically, the appointment of the first Timorese legal officers was of enormous symbolic importance. At the same time, the emergency detentions during the Australian-led INTERFET operation required the early appointment of judges who understood the local civil law system and who would not require the same amount of translation services demanded by international judges. In addition, appointment of international judges would necessarily be an unsustainable temporary measure that would cause further dislocation when funds began to diminish.

In the end, UNTAET was more aggressive in Timorizing the management of judicial systems than the institutions working in political and civil affairs.[67] The trade-off, of course, was in formal qualifications and practical experience. Some of the appointees had worked in law firms and legal aid organizations in Indonesia; others as paralegals with Timorese human rights organizations and resistance groups.[68] None had ever served as a judge or prosecutor. Timorization thus referred more to the identity of a particular official, rather than the establishment of support structures to ensure that individuals could fulfil their responsibilities. UNTAET developed a three-tier training approach, comprising a one week 'quick impact' course prior to appointment, ongoing training, and a mentoring scheme. However, limited resources and difficulties in recruiting experienced mentors with a background in civil law posed serious obstacles to the training program, which UNTAET officials later acknowledged was grossly insufficient.

Quite apart from the limited legal training that was possible during the period of UNTAET administration (which was shorter than even a three-year law degree), a greater source of potential instability was the political situation upon independence. It is arguable that continuing the international administration or a large foreign military presence would ultimately have encouraged free-riding on the part of the government, and that limited peacekeeping resources needed to be deployed elsewhere. Nevertheless, the international presence can certainly take some responsibility for laying the foundations for disorder by leaving in place a government where the first President (Xanana Gusmão) enjoyed massive popular support (including that of the military) without meaningful constitutional power, while the Prime Minister (Mari Alkatiri) had constitutional authority but little personal public support.[69] This contributed to outbursts of violence in December 2002, June 2006, and February 2008.

Given the subsequent instability in Timor-Leste, what lessons if any were drawn from the period of international administration? Timor-Leste's emergency powers in the constitution adopted upon independence in May 2002 are, unusually, gathered under an Agambenesque subheading:

Section 25 (State of exception)

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67 See, e.g., Joel C. Beauvais, 'Benevolent despotism: A critique of UN state-building in East Timor', *New York University Journal of International Law and Politics* 33 (2001), 1149.

68 Strohmeyer, 'Collapse and reconstruction', 54.

69 See further Simon Chesterman, *You, the people: The United Nations, transitional administration, and state-building* (Oxford: Oxford University Press, 2004), p. 233.

> 1. Suspension of the exercise of fundamental rights, freedoms and guarantees shall only take place if a state of siege or a state of emergency has been declared as provided for by the Constitution.
>
> 2. A state of siege or a state of emergency shall only be declared in case of effective or impending aggression by a foreign force, of serious disturbance or threat of serious disturbance to the democratic constitutional order, or of public disaster.
>
> 3. A declaration of a state of siege or a state of emergency shall be substantiated, specifying rights, freedoms and guarantees the exercise of which is to be suspended.
>
> 4. A suspension shall not last for more than thirty days, without prejudice of possible justified renewal, when strictly necessary, for equal periods of time.
>
> 5. In no case shall a declaration of a state of siege affect the right to life, physical integrity, citizenship, non-retroactivity of the criminal law, defence in a criminal case and freedom of conscience and religion, the right not to be subjected to torture, slavery or servitude, the right not to be subjected to cruel, inhuman or degrading treatment or punishment, and the guarantee of non-discrimination.
>
> 6. Authorities shall restore constitutional normality as soon as possible.[70]

Subsequent provisions set out the means by which such a declaration is to be made. The power to do so is granted exclusively to the President, but this is to follow 'authorisation of the National Parliament, after consultation with the Council of State, the Government and the Supreme Council of Defence and Security.'[71] When parliament is not in session, the power of authorisation falls to the Standing Committee.[72] The Government, for its part, has the power to propose such a declaration to the president.[73]

The Timorese constitution draws in part on the Constitution of Portugal.[74] In particular the threshold for declaration of a state of emergency is very similar, with the Portuguese constitution (under the more prosaic heading 'Suspension of the Exercise of Rights') allowing for such a declaration in cases of 'actual or imminent aggression by foreign forces, a serious threat to or disturbance of constitutional democratic order, or public disaster.'[75] This is a significantly broader set of circumstances than that recognized in the International Covenant on Civil and Political Rights, to which Timor-Leste acceded, which limits derogations to 'a public emergency which threatens the life of the

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70 Constitution of the Democratic Republic of East Timor (Timor-Leste) (2002), available at http://www.unmit.org/legal/RDTL-Law/RDTL-Constitution.pdf, § 25.

71 Ibid., § 85(g). The National Parliament's power to 'authorize and confirm the declaration' is provided in § 95(3)(j).

72 Ibid., § 102(3)(g).

73 Ibid., § 115(2)(c).

74 For a critique of the failure to engage with legal pluralism in Timor-Leste, see Laura Grenfell, 'Legal pluralism and the rule of law in Timor Leste', *Leiden Journal of International Law* 19 (2006).

75 Constitution of the Portuguese republic (seventh revision) (2005), available at http://www.parlamento.pt/ingles/cons_leg, art. 19.

nation'.[76] Indeed, Timor-Leste goes beyond the Portuguese baseline of either '*serious threat to* or disturbance of constitutional democratic order' by allowing for a state of emergency to be declared if there is a 'serious disturbance or *threat of serious disturbance to* the democratic constitutional order'.[77]

Nevertheless there would appear to be little question that the higher threshold had been reached on the two occasions when a state of emergency was declared. The first followed a dispute between the military and the Fretilin-dominated leadership, with 600 soldiers deserting and an escalation of violence through March and April 2006 that saw about forty deaths, including nine unarmed police killed by soldiers. President Gusmão declared a state of emergency on 31 May 2006 — in part to reassert control over the armed forces, but also in order to force the resignation of Prime Minister Alkatiri. Alkatiri ultimately resigned on 26 June 2006.[78]

A state of emergency was declared for a second time following assassination attempts on the President and Prime Minister on 11 February 2008, apparently led by Alfredo Reinado — a rebel soldier who had deserted in the May 2006 unrest. Reinado had been detained by Portuguese and Australian troops but escaped a month later. As President Jose Ramos-Horta had been shot, the Speaker of the National Parliament took on the function of acting President.[79] On behalf of the Government Xanana Gusmão, now Prime Minister, requested an initial state of emergency of 48 hours in order to suspend the right to free movement, impose a dusk to dawn curfew, and prohibit any assembly or demonstration.[80] This was subsequently extended by ten days in order to cover Reinado's funeral,[81] and then by a further thirty days.[82]

It is far too early to draw any meaningful conclusions about how emergency powers will be invoked in Timor-Leste in the future. It is not clear that it is possible to distinguish an 'Asian' or non-Western position, however. Relations with Indonesia remain somewhat tense and the constitution and the ruling elite look more to Portugal for guidance.[83] ASEAN has been reluctant to consider Timor-Leste as a potential member.

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76 International covenant on civil and political rights, 16 December 1966, 999 UNTS 171, in force 23 March 1976, available at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm, art. 4. Cf Freedom of expression and the media in Timor-Leste (Article 19 and Internews, London and Dili, 2005), available at http://www.Article19.org, 40.

77 Constitution of Timor-Leste, § 25(2).

78 Tom Hyland, 'Charges over Timor violence', *Sunday Age* (Melbourne), 8 October 2006; Graham Lloyd, 'Trio holds key to resolving conflict', *Courier Mail* (Australia), 3 June 2006.

79 Constitution of Timor-Leste, § 84.

80 Jose 'Kay Rala Xanana' Gusmão, Message to the nation by the prime minister (Dili, East Timor, 11 February 2008), available at http://mnec.gov.tl/index2.php?option=com_content&do_pdf=1&id=118.

81 ABC (Australia) News Radio, State of emergency extended in East Timor (14 February 2008), available at http://mnec.gov.tl/index.php?option=com_content&task=view&id=122&Itemid=2.

82 'President improves', *The Australian*, 22 February 2008. The state of emergency was ultimately lifted in all but one district on 22 April 2008. Mark Metherell, 'E. Timor told to follow the rules', *Sydney Morning Herald*, 23 April 2008.

83 Cf. Nadirsyah Hosen's chapter on Indonesia in this volume.

Australia's ongoing military support will be essential for stability; the United Nations presence, recently extended until February 2009, will provide additional oversight. Timor-Leste thus has little Asian identification and enjoys far closer formal and substantive relations with Western states and the United Nations, even if those relations resemble the colonial ties of earlier times. It demonstrates, if anything, the extent to which even this newest of states found itself swiftly drawn to a familiar discourse on and practice of the rule of law.

II. Compromising the Rule of Law Because of Emergency

Where the previous section looked at efforts by the United Nations to promote the rule of law, invoking exceptional powers to do so, this section will consider the application of rule of law principles to the United Nations itself, before examining the manner in which it was prepared to compromise them in the hope of achieving a more modest form of organized political life in Afghanistan.

A. Does the Rule of Law Apply to the United Nations?

The United Nations is not a party to the human rights treaties negotiated under its auspices or monitored through its agencies. In part this reflects the traditional view that only states properly enter into such treaties, a view also supported by the understanding that it is primarily states that violate or protect human rights. As the United Nations has assumed state-like functions, however — including administrations that ran entire territories — the question of whether the United Nations is required to abide by basic human rights standards has become more pressing. Arguments that the United Nations should be bound sometimes proceed on the basis that such a conclusion is self-evident from the purposes and principles of the UN Charter. A second approach asserts that the United Nations has sufficient legal personality to be bound by customary international law. A third approach focuses on the activities of the United Nations and the state-like functions that it is now exercising. In a series of cases arising from the use of targeted financial sanctions, the European Court of First Instance has held that Security Council decisions, by virtue of the UN Charter's primacy clause in Article 103, are constrained only by norms of *jus cogens*.[84] This is one of only a few cases in which a tribunal has reviewed, even indirectly, the validity of Council action.[85]

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[84] See below n. 93.

[85] See also *Legal consequences for states of the continued presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council resolution 276 (1970) (Advisory Opinion)* (1971) ICJ Rep 16, para. 118 (referring to 'a situation which the Court has found to have been *validly* declared illegal' by the Security Council (emphasis added)); *Prosecutor v. Tadic (Appeal on Jurisdiction)* (ICTY Appeals Chamber, 2 October 1995) Case No. IT-94-1-AR72, available at http://www.un.org/icty, paras 28-30 ('neither the text nor

Apart from the general 'state of exception' that might be used to characterize the Security Council's use of Chapter VII powers[86] — most obviously to authorize the use of military force to restore peace and security — two sets of activities undertaken with the authority of the Council warrant closer analysis for their proximity to national debates about states of emergency and thus the subject of this book: detention without trial in a period of relative calm, and confiscation of assets without judicial review.

1. Kosovo - Executive Detentions

Kosovo, like Timor-Leste, was an unusual situation in which the United Nations exercised de facto day-to-day governance over a territory and population — at the time technically part of what remained of the Federal Republic of Yugoslavia (later renamed Serbia and Montenegro, and after further secession simply 'Serbia'), but always destined for a political future separate from that of Belgrade. As indicated earlier, however, UNMIK's faith in the judiciary and its own credibility as a lawmaker were shaky. One consequence of this was recourse to executive detentions.

On 28 May 2000, Afram Zeqiri, a Kosovar Albanian and former Kosovo Liberation Army (KLA) fighter, was arrested on suspicion of murdering three Serbs, including the shooting of a four year old boy. An Albanian prosecutor ordered him released for lack of evidence, raising suspicions of judicial bias. The decision was upheld by an international judge, but Special Representative of the Secretary-General Bernard Kouchner (now Foreign Minister of France) nevertheless ordered that Zeqiri continue to be detained under an 'executive hold', claiming that the authority to issue such orders derived from 'security reasons' and Security Council resolution 1244 (1999). Similar orders were made by Kouchner's successor, Hans Haekkerup. In February 2001, a bus carrying Serbs from Nis into Kosovo was bombed, killing 11. British KFOR troops arrested four ethnic Albanians in mid-March on suspicion of being involved, but on 27 March a panel of international judges ordered that three of them be released (the fourth escaped). The following day, Haekkerup issued an executive order extending their detention for 30 days, later extended by six more such orders.[87]

Following criticism by the OSCE Ombudsperson,[88] as well as international human rights organizations such as Human Rights Watch and Amnesty International, a Detention Review Commission of international experts was established by UNMIK in August 2001 to make final decisions on the legality of administrative detentions. The Commission approved extension of the detentions of the alleged Nis bombers until 19

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the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law)').

86 See above n. 11.

87 Chesterman, *You, the people*, pp. 167-8.

88 Ombudsperson Institution in Kosovo, Special report no 3: On the conformity of deprivations of liberty under "Executive Orders" with recognized international standards (29 June 2001), available at http://www.ombudspersonkosovo.org.

December 2001 — a few weeks after Kosovo's first provincial elections — ruling that 'there are reasonable grounds to suspect that each of the detained persons has committed a criminal act'. At the end of that period, the three month mandate of the Commission had not been renewed; in its absence, the Kosovo Supreme Court ordered the release of the three detainees. The last person held under an Executive Order, Afrim Zeqiri, was released by a judge on bail in early February 2002 after approximately 20 months in detention.

Two years into the mission, UNMIK officials argued that Kosovo still ranked as an 'internationally-recognized emergency'. And, in such circumstances, 'international human rights standards accept the need for special measures that, in the wider interests of security, and under prescribed legal conditions, allow authorities to respond to the findings of intelligence that are not able to be presented to the court system.'[89] Human rights law does indeed provide for derogation from particular norms including the right to a fair trial, although this is generally limited to a time of 'war or other public emergency threatening the life of the nation' and there must be some form of official notification of this situation.[90] No such notification was offered in Kosovo — due largely to political reservations against admitting that Kosovo even two years after UNMIK arrived remained a 'public emergency'. Rather, the view was taken that a Chapter VII resolution adopted by the Security Council somehow absolved a UN operation from certain human rights obligations — an odd conclusion to a war that was justified precisely on the grounds of its support for human rights.

2. *Targeted Financial Sanctions*

A second instance of quasi-emergency powers being invoked through the United Nations is the use of targeted financial sanctions. Security Council resolution 1267 (1999) established a committee (the '1267 Committee') to oversee implementation of a sanctions regime that initially targeted Afghanistan's Taliban government but was later expanded to apply to Osama bin Laden and 'individuals and entities associated with him as designated by the Committee, including those in the Al-Qaida organization'.[91] In January 2002, following the September 11, 2001, attacks on the United States and the successful military operation in Afghanistan, the regime was further expanded with the removal of a geographic connection to Afghanistan and any time-limit on its application.[92]

The targeted sanctions in question entailed the worldwide freezing of an individual's assets. The process for identifying those individuals whose assets should be

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89 'UNMIK refutes allegations of judicial bias and lack of strategy', *UNMIK News* (Pristina), 25 June 2001.

90 See European Convention for the protection of human rights and fundamental freedoms, done at Rome, 4 November 1950, 213 UNTS 222, in force 3 September 1953, art. 15; ICCPR, art. 4.

91 SC Res. 1333 (2000), para. 8(c).

92 SC Res. 1390 (2002), para. 3.

frozen, however, was somewhat opaque. Only in January 2004, with the passage of resolution 1526, were member states proposing individuals to be listed called upon to provide information demonstrating an association with al Qaida. The same resolution '*encourage[d]*' member states to inform such individuals that their assets were being frozen. In July 2005 — almost six years after the listing regime was first established — resolution 1617 required that when states proposed additional names for the consolidated list they should henceforth provide to the Committee a 'statement of case describing the basis of the proposal.' This did not affect the more than four hundred individuals and entities that had been listed without such a formal statement of case. The resolution also '*request[ed]* relevant States to inform, to the extent possible, and in writing where possible, individuals and entities included in the Consolidated List of the measures imposed on them, the Committee's guidelines, and, in particular, the listing and delisting procedures.' Meanwhile, the sanctions regime had been challenged in European courts on the basis that assets were being frozen without adequate legal protections.

The European Court of First Instance held that the ability to review decisions ultimately made by the Security Council was severely limited. Nevertheless,

> the Court is empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to *jus cogens*, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible.[93]

The Court found that this very high threshold had not been reached in the cases before it, but those decisions might well be overturned on appeal. In January 2008 the Advocate General of the European Court of Justice argued that measures adopted by the Council applied within the European Community only to the extent that this was compatible with Community law: 'There is no reason, therefore, for the Court to depart, in the present case, from its usual interpretation of the fundamental rights that have been invoked by the appellant.'[94] As for what this might mean for states bound by Article 103 of the UN Charter,[95] the Advocate General merely noted its understanding that such a ruling might 'inconvenience the Community and its Member States in their dealings on the

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93 *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities (Case T-306/01)* (Court of First Instance of the European Communities, 21 September 2005), available at http://curia.eu.int, para. 277. See also *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities (Case T-315/01)* (Court of First Instance of the European Communities, 21 September 2005), available at http://curia.eu.int; *Faraj Hassan v. Council of the European Union and Commission of the European Communities (Case T 49/04)* (Court of First Instance of the European Communities, 12 July 2006), available at http://curia.eu.int; *Chafiq ayadi v. Council of the European Union (Case T-253/02)* (Court of First Instance of the European Communities, 12 July 2006), available at http://curia.eu.int.

94 *Opinion of advocate general Poiares Maduro regarding the case of Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities (Case C-402/05 P)* (European Court of Justice, 16 January 2008), available at http://curia.eu.int, para. 46.

95 UN Charter, art. 103: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.'

international stage'.[96] A decision from the European Court of Justice is pending.

B. Compromising the Rule of Law in Afghanistan

The rule of law was compromised in a quite different manner in Afghanistan, which faced challenges distinct from Timor-Leste and represented an entirely different context. A 'light footprint' approach was advocated by the United Nations as a means of promoting local ownership — though it was also only practical given the size and population of the country, and only politically viable given the undisputed sovereignty of the Afghan government under Hamid Karzai. This substantially limited the role that the international presence played, though key areas were still potentially 'externalized'.

Justice in Afghanistan under the Taliban had been notoriously capricious and brutal; their overthrow was brutal in its own way. In addition to allegations that anti-Taliban forces summarily executed prisoners of war during the fighting, there were several reports that Rashid Dostum's troops killed hundreds of Taliban detainees while transporting them in sealed freight containers. There was little willingness to investigate these and other allegations against members of Hamid Karzai's new government.[97]

The Bonn Agreement provided that the Interim and later Transitional Authority should, 'with the assistance of the United Nations, establish an independent Human Rights Commission, whose responsibilities will include human rights monitoring, investigation of violations of human rights, and development of domestic human rights institutions.' At the same time, the United Nations was separately granted 'the right to investigate human rights violations and, where necessary, recommend corrective action', as well as developing and implementing a human rights education programme.[98] In keeping with the 'light footprint' philosophy, senior UN staff were circumspect about taking the lead in human rights.

Also under the Bonn Agreement, the Interim Authority was to establish, 'with the assistance of the United Nations, a Judicial Commission to rebuild the domestic justice system in accordance with Islamic principles, international standards, the rule of law and Afghan legal traditions.'[99] A document from the Office of the Special Representative emphasized the need for a careful, strategic approach:

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96 *Maduro opinion January 2008*, para. 39.

97 Human Rights Watch, *World report 2003* (New York: Human Rights Watch, 2003), p. 198. The detention of Taliban and alleged al Qaeda forces on US military bases raised serious questions of international humanitarian law.

98 Agreement on provisional arrangements in Afghanistan pending the re-establishment of permanent government institutions (Bonn agreement), done at Bonn, 5 December 2001, UN Doc S/2001/1154, art. III.C(6), Annex II, para. 6.

99 Ibid., art. II(2).

> all agree that global experience in justice reform and development has shown that non-strategic, piecemeal and 'interventionist' approaches can have dire consequences for the effective development of [the justice] sector. A strategic, comprehensive, Afghan led, integrated programme of justice sector reform and development can only begin with a comprehensive sectoral review and assessment of domestic needs, priorities, initiatives and capacities for reconstruction and development of this crucial sector. To date, none has been undertaken.[100]

Given the experiences of Kosovo and Timor-Leste, these assumptions are highly debatable. UNMIK in particular found that failure to engage *immediately* with rule of law questions can lead to missing the opportunity for the maximum impact of international engagement. It is true that a strategic, comprehensive approach is desirable — but not if it means indefinite delays until the security environment allows for a thorough review. If necessary, skeletal legal reforms might be made on an emergency basis until a more strategic approach can be formulated.[101]

In Afghanistan, UNAMA's mandate was interpreted as requiring the United Nations to facilitate rather than lead. In areas such as the choice of laws, the structure of the legal system, and appointment of judges, this was entirely appropriate. Such arguments were less persuasive in relation to basic questions of rebuilding courthouses, procuring legal texts and office equipment, and training of judges. Instead, it appeared that rule of law was simply not a priority. In the 48-page National Development Framework drafted by the Afghan Assistance Coordination Authority (AACA) in April 2002, the justice system warranted only a single substantive sentence.[102] Italy agreed to serve as 'lead donor' on the justice sector at the Tokyo pledging conference in January 2002 — essentially because the other 'lead donor' portfolios had already been taken — and there was little evidence of activity in this area. The Afghan Interim Authority did appoint some new judges, including a number of women, but those courts that functioned at all continued to do so erratically. This was not helped by Karzai's appointment of a septuagenarian Chief Justice who had never studied secular law.[103]

Of still greater concern than the relative inattention to establishing the rule of law — admittedly difficult in a country that had known little peace in a generation — was the preparedness of both international and national actors to look the other way as war criminals moved into political office and narco-trafficking was used to supplement ministerial appropriations.[104]

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100 Office of the SRSG for Afghanistan, Proposal for a multi-agency review of justice sector development in Afghanistan (UNAMA-OSRSG, Kabul, May 2002), 2.

101 See, e.g., A review of peace operations: A case for change (King's College London, London, March 2003), available at http://ipi.sspp.kcl.ac.uk, 263.

102 National development framework (draft for consultation) (Afghan Assistance Coordination Authority, Kabul, April 2002), 47: 'The judicial system will be revived through a sub-program that provides training, makes laws and precedents available, and rehabilitates the physical infrastructure of the judicial sector.'

103 Hafizullah Gardish, 'Chief justice under scrutiny', *IWPR Afghan Recovery Report No 54*, 1 April 2003.

104 Cf Faiz Ahmed, 'Afghanistan's reconstruction five years later: Narratives of progress, marginalized realities, and the politics of law in a transitional Islamic republic', *Gonzaga Journal of International Law* 10 (2007).

The formal laws on declarations of a state of emergency in the Constitution ultimately adopted in 2004 are not especially controversial; if anything the relevant chapter is restrictive, setting up a potentially tense relationship between the President and the National Assembly which must 'consent' to a state of emergency longer than two months, but the 'endorsement' of which is also required for a shorter period.

Chapter Nine: State of Emergency

Article 143. If because of war, threat of war, serious rebellion, natural disasters or similar conditions, protection of independence and national life become impossible through the channels specified in this Constitution, the state of emergency shall be proclaimed by the President, throughout the country or part thereof, with endorsement of the National Assembly.[105] If the state of emergency continues for more than two months, the consent of the National Assembly shall be required for its extension.

Article 144. During the state of emergency, the President can, in consultation with the presidents of the National Assembly as well as the Chief Justice of the Supreme Court, transfer some powers of the National Assembly to the government.

Article 145. During the state of emergency, the President can, after approval by the presidents of the National Assembly as well as the Chief Justice of the Supreme Court, suspend the enforcement of the following provisions or place restrictions on them:

1. Clause Two of Article Twenty-Seven; [no detention without due process]

2. Article Thirty-Six; [right to free assembly]

3. Clause Two of Article Thirty-Seven; [privacy of personal correspondence]

4. Clause Two of Article Thirty-Eight. [restrictions on power to search personal residences]

Article 146. The Constitution shall not be amended during the state of emergency.

Article 147. If the presidential term or the legislative term of the National Assembly expires during the state of emergency, the new general elections shall be postponed, and the presidential as well as parliamentary terms shall extend up to four months. If the state of emergency continues for more than four months, the President shall call the Loya Jirga. Within two months after the termination of the state of emergency, elections shall be held.

Article 148. At the termination of the state of emergency, measures adopted under Article One Hundred Forty-Four and One Hundred Forty-Five of this Constitution shall be void immediately.[106]

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105 Art. 64(8) provides that the President has the power to proclaim *and terminate* a state of emergency 'with the endorsement of the National Assembly'.

106 The constitution of Afghanistan (2004), available at http://www.mfa.gov.af/Documents/The%20Constitution.pdf.

These provisions broadly correspond to the relevant provisions of the 1964 constitution, with the role of the King being taken by the President and slightly greater power being granted to the National Assembly than was enjoyed by the Loya Jirga (Great Council).[107]

The threshold established by the Constitution is significantly higher than that in Timor-Leste and more closely follows the model of the ICCPR — though not its limitation of any derogation 'to the extent strictly required by the exigencies of the situation'.[108] Significantly greater checks do exist on the potential exercise of powers, including enumeration of those rights from which derogation is possible (rather than saving of specific rights) and oversight of such derogation by both the legislature and the Chief Justice.

As with Timor-Leste, however, it is difficult to generalize from the case of Afghanistan to a larger non-Western or Asian context. Afghanistan's regional identification is weak, though unlike Timor-Leste it successfully resisted colonization and thus lacked an externally-derived legal system that could be reintroduced. In any case, the resurgence of the Taliban and the limited ability of the central government to exercise power in much of the country continues to pose grave threats to the life of the nation. It is not clear that a declaration of a state of emergency — as opposed to enhanced international military support — would alter this.[109]

In fact, despite its troubled recent history Afghanistan has never invoked its state of emergency provisions. Some Afghan scholars and watchers wryly speculate that the government might instead one day declare a state of 'normality'.[110]

III. Conclusion: The 'Ways of Orientals'?

This brief survey of the ways in which the United Nations has supported and compromised the rule of law in Asian contexts may, in the end, offer more heat than light on the themes uniting this book.

On the relationship between formal and informal institutions, recurrent tensions in UN peace operations have been between form and substance and between short-term stability and longer-term sustainability. In Timor-Leste the government inherited a country that was both the newest and the poorest in the region, with a constitutional structure that set in place an inevitable clash of personalities. Remarkably, the

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107 The 1964 constitution is available at http://www.moj.gov.af/pdf/constitution1964.pdf. See Title Nine: State of Emergency.

108 ICCPR, art. 4(1).

109 Contrast the experience of Pakistan and Thailand, discussed in the chapters by Anil Kalhan and Andrew Harding in this volume.

110 Cf. Maitrii Aung-Thwin's chapter on Myanmar (Burma) in this volume.

consequences of that clash were managed within the four corners of the constitution, though this depended heavily on the ongoing support of the United Nations and military contributions from Australia and other states. In Afghanistan the rule of law was seen by some UN officials as a luxury for a state that could hope for, at best, a kind of organized anarchy even in good times. This essentially acknowledged through default the ongoing importance of informal institutions at the local level, even as such local commanders (*sc.* warlords) were formally denounced as undermining the hopes of stability. In both cases area specialists have been critical of foreign receptiveness to existing local institutions, though it is not clear that either suggests broad lessons for a coherent non-Western narrative.

On the relationship between emergency powers and the rule of law, one interesting dimension of the examples considered here is the manner in which the invocation of extraordinary powers at the international level is grounded on a claim to establish or support the rule of law. As indicated earlier, these powers are properly understood as 'exceptions' both in the formal sense that the Security Council only enjoys *any* power to intrude upon the domestic jurisdiction in a time of crisis, and also in the practical sense that the powers are invoked infrequently. As that frequency has increased and they have been applied to general rather than particular problems (to 'terrorism' rather than to Libyan support for terrorism, for example), so has the controversy about the limits to be applied to them. At the national level, where these extraordinary powers have been used to impose order it would be too much to imply a kind of original sin to the institutions thus created. Nevertheless, the contradictions between what international administrators say and what they do have complicated administration of territory while under international control and left an uncertain legacy for those who inherit it.

On the larger question of Asian versus Western discourses on emergency powers, it is hard to draw general conclusions. Timor-Leste does not identify strongly as Asian in a constitutional sense: its colonial and post-conflict baggage, ongoing ties to Portugal and Australia, and continuing UN presence bind it to a global (and perhaps Western) discourse. Certainly the two occasions on which states of emergency were declared more closely approximate the Western constitutionalist approach to dealing with crises than, say, similar experiences in recent Indonesian history. Afghanistan for its part suffers from such weakness of central institutions that it is barely a meaningful state — in the sense of an organized polity with institutions that can offer some basic public goods and claim a monopoly over the legitimate use of violence. As with Timor-Leste, much of the discourse on emergencies is offered in language compatible to the Western ear, though this may bear little reality to the conflict as it plays out on the ground.

This disconnect between rhetoric and reality is perhaps the most interesting and troubling aspect of the cases considered here. Upon his return from an 1889 trip to Persia, Lord Curzon noted thoughtfully the different perspectives on governance held by Europeans and 'Orientals', who might legitimately regard their own systems of government as more appropriate than those of Europeans, and in any case would

generally prefer to misgovern themselves than be well governed by foreigners.[111] Such observations were insightful but uncharacteristic. As Viceroy of India a decade later, Curzon did not appoint a single Indian to his advisory council; when asked why he replied, absurdly, that in the entire country there was not an Indian fit for the post.[112] If there is, indeed, an 'Asian' approach to the development of constitutional structures emerging from conflict, it is that those structures inevitably reflect the varied colonial heritage of the region, are cast with an eye to international legitimacy, but stand or fall on the basis of local politics.

111 Curzon, *Persia*, p. 630.

112 David Gilmour, *Curzon* (London: J. Murray, 1994), p. 168.