Picking up the Pieces: Building Democracy in Post-Conflict Societies

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It's wonderful to be back at the University of Melbourne, my alma mater and my first employer as a full time academic. I am grateful to my old friend, Tim McCormack, for his gracious invitation.

It is a great honour for me to be here as Ninian Stephen Visiting Fellow. Sir Ninian is held in the highest esteem not only in Australia but in legal and diplomatic circles across the world. His brilliant career has had at least three distinct phases: as an Australian lawyer and judge; then as the resident head of state, as Governor-General; and more recently he has taken on many activities involving the international arena: as a judge of the ICTY, ad hoc judge of the ICJ, and in conflict resolution in Cambodia and Northern Ireland.

The pleasure of bring associated with Sir Ninian is a personal one as well. Over twenty years ago, I spent a heady and exciting 18 months in 1981-2 working as Sir Ninian's Associate at the High Court. I had got the job only by a fluke of fate because the brilliant graduate of Melbourne Law School who had been lined up for the position, Tom Reid, decided to take a job in OPC instead. It was a marvellous 18 months. I was recovering from a rather unsuccessful year as an articled clerk and was thinking about leaving the law entirely. Sir Ninian was a wise and good humoured employer and generous and patient with his last and most disorganised Associate. Unlike many lawyers of his generation, he assumed women were just as capable as men. He was – and is -- utterly without pomposity, much keener to ask questions than to talk about himself.

The chance to observe Sir Ninian's capacity to master arcane details of the law while keeping the big picture in mind gave me an entirely new perspective on the value of legal reasoning. Another aspect of Sir Ninian's skills that left a deep impression on me was his urbane, unruffled charm. In court, I was always struck by the courtesy he paid even the most muddled of arguments. Indeed, I began to observe that his courtesy would often increase as the legal arguments got worse. As a result, even today, I feel a little nervous when Sir Ninian is too well-mannered and polite with me.

So, I am very pleased to be here to honour Sir Ninian as both a wonderful human being and a brilliant jurist.

The topic of tonight's lecture is in one sense inspired by Sir Ninian's work in helping to devise post-conflict settlements in Northern Ireland and Cambodia. It also gives me the chance to sketch the outlines of a research project on which I'm about to start work, so you will find it full of questions rather than clear answers.

The past four years have provided many dramatic cases of attempts at democracy-building: for example, Afghanistan, Bougainville, Iraq, the Solomons.

While there have been some useful studies of these countries individually, there has been less attention paid to general trends in the project of democracy-building: what have been its successes and what have been its problems? What is the "democracy" that we are trying to build? Can we devise general principles to guide this ambitious task? Should we? What role, if any, can international law play in this area?

Tonight, I want to focus on democracy-building in Iraq as a type of case study of some of these issues. We have had many dramatic images from the invasion of Iraq and its aftermath, indicating the complexity of democracy-building: these have been triumphant, such as the toppling of the statue of Saddam Hussein, and they have also been disastrous, such as the looting of the Iraq National Museum, the assassination of Sergio Viera de Mello and other members of the UN mission and the constant massacre of police and civilians across Iraq.

1. Can there be 'pro-democratic invasion'?

The first issue I want to consider is a broad one: how is the task of democracy-building affected by the identity of the builder and the manner in which the builder has assumed this task?

In the case of East Timor, the task of democracy-building was assigned to the international community in the guise of the United Nations. Indonesia, the effective authority over the territory of East Timor in 1999, allowed UN forces in to deal with the post-referendum violence; and then the Security Council established a transitional administration to prepare East Timor for independence.

In the case of Iraq, by contrast, the democracy-builder is effectively the United States, leader of the self-styled 'Coalition of the Willing' which had invaded Iraq in March 2003, although other members of the coalition have had walk-on parts in this project.

The public rationale for the invasion was Iraq's failure to comply with Security Council resolutions relating to possible caches of WMD. Although it made references to the oppression of the Iraqi people by Saddam Hussein, the Australian government expressly ruled out regime change as a justification for the invasion.[1]

Shortly after the invasion, however, there was a shift in rationale for the war and participants in the Coalition of the Willing began to give the goal of Iraqi democracy new prominence, possibly to compensate for the failure to find evidence of the major justification for the war – Iraq's stockpiles of WMD.

And it was not just democracy in Iraq that was at stake; members of the Coalition of the Willing began to argue that the invasion could in fact achieve democracy in the whole of the Middle East.

[1] Alexander Downer Hansard September 2002.

This has been described as a 'tsunami' theory of Iraqi democracy. The idea is that a reconstructed Iraq could become a model democracy for the region, which will then be unable to resist the great wave of democracy.

Indeed in June 2003 Mr Howard followed the US government's approach and described the invasion of Iraq as 'the best opportunity in a long time to achieve a lasting settlement in the ongoing and painful dispute between the state of Israel and the Palestinians.'[2] Mr Howard made this prediction over two years ago and I suspect that, in light of the terrible ongoing violence of the insurgency, he would not make a similar comment today.

But, the Australian government has continued to make strong arguments to justify going outside international institutions to achieve its vision of regional security. Mr Downer has referred to multilateralism as 'a synonym for an ineffective and unfocussed policy involving internationalism of the lowest common denominator'[3] and foreshadowed Australia's participation in further 'coalitions of the willing' if they seem the right thing to do.

In a speech to the Asia Society in New York two weeks ago, Mr Howard re-stated this argument when he spoke of an Australian foreign policy that 'elevates results over process and form'.[4] And just last week, even the Treasurer, Peter Costello, weighed in on this topic in a speech to the Lowy Institute by predicting that Australia would continue to join 'like-minded countries' in coalitions outside the UN to deal with security threats.[5]

To the ears of an international lawyer, these statements are alarming. Giving priority to achieving particular outcomes without regard to international legal processes would take us back to a Hobbesian and violent world.

Imagine if such an ethic informed our domestic legal system. This would mean that people regarded as suspicious by the government could be imprisoned or punished in some way without the need to accord them due process – the right to be informed of the charges against them, the right not to be tortured while in custody, the right to legal advice and the right to a fair trial and proportionate punishment.

The rule of law at the heart of our legal system would be destroyed by such an approach, leading to arbitrary and unaccountable government.

This is precisely what is at stake when we endorse outcomes outside the framework of international law: we will end up with an arbitrary and unaccountable foreign policy that will only ratchet up international instability and resentment.

Can there be 'pro-democratic invasion' consistent with international law?

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[2] Quoted in Patrick Walters, 'Farewell to arms' *The Weekend Australian* 7-8 June 2003 p 24.
[3] Speech to National Press Club, May 2003.
[4] Speech to the Asia Society, New York City, 12 September 2005.
[5] Dennis Shanahan, 'Costello eyes new alliances' *The Australian* 22 September 2005 p 4.

Some American international lawyers have suggested that there may be legal justification for one country to invade another to bring democracy. For example, Professor Michael Reisman of Yale Law School has argued that one country should be allowed to depose a despotic government in another, given the difficulties of securing UN support for such an action.[6] The sovereignty of undemocratic governments, he suggested, should not be respected.

The Reisman view relied on an unsustainable interpretation of article 2(4) of the UN Charter. It has been pointed out that it would lead to arbitrary violence and would be unlikely to deliver the popular sovereignty or protection of human rights that Reisman saw as its goal

For similar reasons, it is generally accepted that the invasion of Iraq was illegal at international law. Many of those who supported the invasion at the time on the basis that Iraq had undeclared stocks of WMD, now concede that, had all the facts been made public, the invasion could not be justified.[7]

But, many of the supporters of the invasion, such as Prime Minister Howard, now say however that continuing to dwell on the legalities is irrelevant; that we must simply 'move on' and work out how best to achieve democracy in Iraq and then leave.[8] Foreign Minister Downer has urged us to focus on the results of the invasion: the world, he says, is a better place without the regime of Saddam Hussein and that is all that matters.[9]

I think however that the illegality of the war and the difficulties of achieving democracy in Iraq are connected: failure to acknowledge that the invasion was conducted on faulty intelligence and that the invaders were completely unprepared for the magnitude of the task of picking up the pieces has meant that the Coalition governments have felt the need to cling to completely unsustainable strategies in Iraq.

The political imperative has been to admit no false steps at all and this has led to a complete lack of realism about the current situation; a relentless and evidence-free optimism about the future of Iraq.

Even Washington's closest allies are now expressing their concerns. Last week, Prince Saud al-Faisal, the Saudi Foreign Minister, warned President Bush that Iraq was on the verge of disintegration and that the whole region could be drawn into war.[10]

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[6] 'Coercion and Self-Determination: Construing Charter Art. 2 (4)' 78 AJIL 642 (1984).
[7] For example, earlier this year the UK Attorney-General, Lord Goldsmith's, full legal opinion on the invasion of Iraq became public in which it was clear that he doubted its legality without Security Council sanction; the summary of Lord Goldsmith's advice released at the time of the invasion had been heavily edited to present quite a misleading version of the legal position.
[8] May 2003.
[9] 2004.
[10] 'Saudi Warns U.S. May Face Disintegration' *New York Times* 23 September 2005.

There is a deep irony that another member of President Bush's axis of evil, Iran, has now achieved much greater influence in Iraq as a result of the invasion. Indeed, there is a Washington joke that goes: 'the war is over and the Iranians won'[11]

We are seeing recurring mistakes being made by the Coalition in Iraq: Nathaniel Fick, a former Marine captain who has served in Iraq, has identified three of these:

- The fuel for the insurgency – weapons, men and money – are still flowing freely from Syria and Iraq
- Many American military units have no sense of the cultural context in which they are working and there is a great shortage of translators
- There is great focus on statistics of dead insurgents, as if there were simply a finite number of people to be killed to end the insurgency.[12]

In this context, it seems to me that the only way forward would be first an acknowledgement by the US that the situation in Iraq is not on course for creation of security or democracy. Once this acceptance of responsibility has been made, there would be the chance to rethink and reshape the democracy-building strategy.

Members of the Coalition of the Willing typically present the options in Iraq as either 'staying the course' or 'cutting and running'. These glib phrases do not get us very far at all: staying on the present course is clearly disastrous; and packing up and leaving quickly would produce a violent civil war.

The options must be thought about much more broadly. One element in reshaping must be the issue of legitimacy.

Colin Powell famously observed before the invasion of Iraq that a "Pottery Barn" rule applied to invasions: if you break it, you own it. But this aphorism surely cannot apply in international relations.

A first step must be to bring Iraq within an international institutional framework and reduce the United States stranglehold on the policy of democracy-building. This will of course be a great challenge for the UN, but one that it must take on. As Simon Chesterman has said: 'the only thing worse than the world's most powerful country shoving you aside as irrelevant is when the country hugs you close and calls you the solution to all its problems.'[13]

Another step must be engagement of the region; A striking aspect of the US strategy has been that it has very much wanted to go it alone; little attempt has been made to engage other countries in the region in discussions on the future of Iraq, and yet their relationships to Iraq are really crucial.

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[11] Timothy Garton Ash, 'Stagger on, Weary Titan' The Guardian 26 August 2005.
[12] Nathaniel Fick, 'An Honest Victory' *New York Times* 20 September 2005
[13] Ibid 74.

Other options include a shift in focus from 'killing insurgents to protecting civilians'[14] by building what Mary Kaldor has called 'islands of civility' through spending money on infrastructure and daily security. These 'islands of civility' in conflict zones can be supported and extended to secure a general peace. By contrast, millions of dollars a week are being spent fruitlessly on a military solution to the conflict.

So, a lesson I draw is that would-be democracy-builders need to be acutely attuned to issues of legitimacy: Despite the scepticism about the UN by the Australian government, it seems to me that the way we go about promoting democracy in other countries is really critical; in other words, the processes *do* matter. Australia's preference for joining coalitions of the willing outside international institutions will undermine any hope of achieving a lasting and democratic peace.

2. Democratic Institution-building in Iraq

A related issue is the concept of democracy used by democracy-builders: We should note, first of all, that there are inevitable tensions caused by attempting to create the conditions for legitimate and sustainable national governance through a temporary foreign autocracy.[15] In other words, can democracy be imposed in an undemocratic way?

I have already suggested that this is very hard to achieve outside the framework of international institutions and even when they are involved, it remains a significant issue. I will leave aside the important issue of the legal framework for democracy-building and the rules of the Fourth Geneva Convention which require an occupying power to conserve as far as possible the governmental and legal system of the occupied country.[16]

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[14] Fick.

[15] Chesterman 2004; Knaus & Martin 2003

[16] There are also significant legal issues raised by an invading army setting out to change the political structure of the occupied territory. The Fourth Geneva Convention of 1949 provides that a fundamental duty is to restore and ensure public order and safety (article 6). The Fourth Geneva Convention provides that an occupying power must preserve as far as possible the existing governmental and legal system of the occupied country. The idea is that occupation of another country must be temporary. However, the United Nations Security Council adopted a lengthy resolution (1483) on the reconstruction of Iraq on 22 May 2003 which goes beyond the 'no change' rule of the Fourth Geneva Convention.[16] The United States recognised pretty quickly that some type of UN participation was crucial for this task, but it attempted to quarantine this participation. Despite talk of significant UN role, clear that the Authority (ie US) has upper hand in devising the interim administration. The UN's responsibilities as set out in SCR 1483 were ambiguous and vaguely drafted. The UN had no independent authority and was required simply to 'assist' or 'encourage' aspects of reconstruction. A major issue was that under Resolution 1483, the Authority, rather than the UN, was given power to disburse the proceeds of the sale of Iraqi oil. Although the Resolution required that the funds be used to benefit the people of Iraq, the benefit was to be judged by the coalition of the willing, allowing the coalition to use the funds to pay its own corporations to repair the Iraqi infrastructure that coalition forces themselves destroyed. It was also striking that Resolution 1483 calls for income to the Development Fund for Iraq to be independently audited, but not expenditures. The Resolution cancels all existing legal rights to Iraq's oil, giving the coalition the right to sell the oil to whoever they choose. See Gregory H. Fox, 'The Occupation of Iraq' 36 *Georgetown Journal of International Law* 195 (2005); Brett H. McGurk, 'Revisiting the Law of Nation-Building: Iraq in Transition' 45 *Virginia Journal of International law* 451 (2005) (arguing there is no relevant international law in this area).

What definitions of democracy are used internationally? International lawyers have debated whether there should be a 'two track' conception of democratic governance: a minimalist one for unstable states and a substantive one for more secure societies.

A minimalist account is usually based on the holding of periodic elections (Franck 1992); a less minimal one calls for or the creation of democratic institutions such as the separation of powers between a parliament, an executive and a judiciary (Barnes 2001). Susan Marks has proposed a substantive definition of democracy as the creation of conditions of equality between citizens.

How has the Coalition gone about building democratic institutions in Iraq? This has been a largely US initiative, with Americans such as Paul Bremer and now US Ambassador Khalizad playing crucial roles. The United States has relied on a version of democracy that involves a free market and free trade.

The draft constitution, to be voted on in two weeks, has some valuable provisions. For example, it grants all Iraqis the rights contained in international agreements accepted by Iraq; and it prohibits laws that breach 'the principles of democracy' and the fundamental rights set out in the Constitution. Some in Australia might see these as improvements on our own Constitution.

But the Constitution also prohibits laws that violate 'the provisions of the judgments of Islam' and the constitution defers many critical decisions, for example on family law, for debate by future members of the legislature and the judiciary. The Supreme Federal Court will include religious as well as secular judges.

It is premised on a problematic notion of democracy; it assumes that the deep religious and ethnic divisions in Iraqi society will be solved by a crude form of federalism. This has delivered what the Sunni population will see as a very unfair deal, with the Shia and the Kurds not making significant compromises. The Sunni regions may well be left with very little from oil revenues.

Federalism in this context has, then, entrenched ethnic and sectarian divisions, making a fertile ground for conflicts over land, oil and water.

A major issue has been the speed at which negotiations were conducted; the August deadline was not necessary and seems to have been chosen more to give American voters a sense of progress in Iraq than to achieve a lasting settlement. It allowed the Shia at the last minute to insist on the creation of a large Shiite region, squeezing the impoverished Sunnis between what are effectively Kurdish and Shiite states.

The Sunni are also deeply affected by a constitutional provision that prevents former Baath party members from the senior ranks of government.

One reason why the version of democracy is so compromised in the constitution is the lack of public participation in its drafting, itself connected to the lack of daily security in Iraq. The constitution was generated by a group meeting in the comparatively safe green zone in Baghdad and there was little sense of public ownership of the process.

The Iraq situation fits into a more general pattern where post-conflict elections are 'organized in conditions of haste, lacking information, political intimidation, boycotting, violence and general confusion'.[17]

Compare this with other constitutional drafting exercises, for example in East Timor (where the process was very fast indeed – 6 months) where 13 constitutional commissions were established to conduct popular consultation. This involved a series of public meetings all over East Timor involving some 38,000 people.

Or in South Africa, where two million submissions were made about the drafting process.

Indeed, some commentators now argue that the best course would be a rejection of the constitution on 15 October, so that a better and more inclusive round of negotiations can begin.[18]

Lesson 2: If we accept Susan Marks' substantive definition of democracy as the creation of conditions of equality between citizens, this involves taking enough time to involve citizens in the creation of the constitution and a complex understanding of what equality means. Amartya Sen has put this well:

> [D]emocracy has demands that transcend the ballot box. To ignore the centrality of public reasoning in the idea of democracy not only distorts and diminishes the history of democratic ideas but it also detracts from the interactive processes through which a democracy functions and on which its success depends.[19]

3. Clash of international standards and culture

A third recurring issue in democracy-building after conflict has been the tension between the introduction of international standards, particularly in relation to human rights, and local cultures. This issue has been particularly acute in the context of women's rights and it has been a feature of democracy-building in East Timor and Afghanistan.

Women have featured in the official White House material on nation building in Iraq. It has said that "women's rights are at the core of building a civil, law-abiding

[17] Korhonen & Gras.
[18] Noah Feldman, 'Agreeing to Disagree in Iraq' *New York Times* 30 August 2005; George Monbiot, 'How to stop civil war' *Guardian Weekly* 9-15 September 2005 p 14.
[19] 'Why Democratization is not the Same as Westernization: Democracy and its Global Roots' *New Republic Online* 25 September 2003.

society, a prerequisite for true democracies,"[20] and President Bush has mentioned regularly his concern for the women of Iraq.[21]

But this rhetorical commitment has often given way in Iraq -- One problem has been that the U.S. has regularly found it necessary to sacrifice Iraqi women's participation in public life to pacify vocal religious groups.[22] Members of the U.S. military have said that they are anxious not to antagonize local religious groups by supporting women's appointments until proper security has been established.[23] An immediate problem with this approach is, of course, that it will be much harder to involve women after conservative religious and community leaders become entrenched in power.[24]

The Coalition Provisional Authority was slow to involve women in the various Iraqi interim governing councils it established.[25] Iraqi women's groups sought a 50% quota for women in the National Assembly which drafted the Constitution,[26] but in the end, the interim Constitution prescribed a *goal* (rather than a quota) that 25% of the seats will be held by women; the new constitution maintains this percentage, but only in the transitional section which has an unclear legal force and duration.

The January elections brought Shiite fundamentalists to power and this is reflected in the constitutional settlement.

From the perspective of Iraqi women, the beginning of the Constitution is inauspicious: 'we the sons of Mesopotamia'; but there is a reference to women's rights; and to the right to equality before the law.

- Islam is official religion and *a* 'basic source' of law; (indefinite article used in deference to the US) no inconsistent laws will be valid (article 2)
- This is different to 1959 Iraqi law pre invasion where women has equal rights under civil law in re marriage, divorce and inheritance
- Raises issue of, say, if equal inheritance rights are allowed, whether this would be struck down

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[20] Paula Dobriansky, Women and the Transition to Democracy: Iraq, Afghanistan, and Beyond, Heritage Foundation Lecture to the Conservative Women's Network (April 11, 2003), *available at* http://www.heritage.org/research/middleeast/hl793.cfm (last checked June 1, 2005).
[21] Karen Engle HILJ 2005.
[22] Swanee Hunt & Cristina Posa, *Iraq's Excluded Women*, 143 FOREIGN POL'Y 40 (July/Aug. 2004).
[23] *Id.* at 43.
[24] *Id.*
[25] Of the twenty-five member Iraqi Governing Council created by the CPA after the invasion, only three were women, and there was only one woman in the Cabinet. No women were on the twenty-four member constitutional drafting committee, which produced the interim Constitution. The Iraq Interim Government (appointed from 1 July, 2004) had six women out of thirty members. The CPA was reluctant to support a quota for women's seats in the new National Assembly because this was seen as inconsistent with U.S. anti-affirmative action policies.
[26] *See e.g.*, Letter from Basma Fakri, President, Women's Alliance for a Democratic Iraq (May 12, 2004), *available at* http://www.womenwagingpeace.net/content/articles/ElectionCommissionLetter.pdf (last checked June 1, 2005).

- Art 39: allows choice of personal status law – raises issues – what if conflict between husband and wife over law to apply?
- Establishment of an independent judiciary,[27] but may mean little if Islam is seen as the fundamental law and if there is a mandate to stike down legislation that is interpreted to contravene the Sharia law
- also fears courts will be staffed by fundamentalist judges; the composition is yet uncertain

Dr Raja Kuzai, who was a member of the Assembly drafting the constitution, has said in the wake of the draft that she will leave Iraq because clerics will be in control of the new government.[28]

Noah Feldman, an American constitutional lawyer who worked with the Coalition Provisional Authority, has concluded that international standards should not be imposed or even influence new democracies.[29] New constitutions, he says, should 'get off the ground through a process of adoption by localized self-interest, not out of episodic external pressure that will soon be lifted.'[30]

The trouble with Feldman's prescription of deference to 'localised self-interest' in the context of women's rights is that it allows particular (and in the context of Iraq, fundamentalist) local male elites to define the substance of the constitutional settlement. Women's rights are unlikely to appeal to self-interest of such elites. It also assumes that there is one set of 'local' views that should be respected and ignores the role and aspirations of 'internal reformers'[31] within Iraqi society.

The respect claims to culture attract from the international community are based on a monolithic view of 'culture', as though it had no internal diversity. We often see such an assumption made in the context of religious culture, as though religion cannot have 'a critical tradition or commitment to rights.[32]

Lesson 3:

Investigate the politics of the culture being invoked. first, whose culture is being invoked? Second, what is the status of the interpreter? Third, in whose name is the argument being advanced? and finally, who are the primary beneficiaries of the claim?[33]

4. Transitional justice

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[27] Article 19
[28] 'Secular Iraqis say new Charter May Curb Rights' *New York Times* 24 August 2005.
[29] *After Jihad: American and the Struggle for Islamic Democracy* 2003 29-33.
[30] 29-30.
[31] Madhavi Sunder, 'Enlightened Constitutionalism' 37 *Connecticut Law Review* 890, 892 (2005).
[32] Sunder 895.
[33] Arati Rao

Another issue is the relationship between democracy-building and what is often called transitional justice. The term 'transitional justice' is used to mean accountability for human rights abuses or atrocities in societies emerging from periods of conflict or repression, as well as in societies where systemic injustices have gone unresolved. Is it necessary to have a process to determine responsibility for serious abuses in order to achieve some form of lasting democracy?

One well-known example of transitional justice is the South African Truth and Reconciliation Commission. The TRC was set up in early 1990s to investigate the nature and causes of gross violations of human rights committed between 1960 and 1994. Between 1996 and 1998 the TRC heard from more than 21,000 victims and documented allegations of thousands of crimes, including 10,000 murders. The TRC was able to give amnesty from prosecution if offenders told the complete truth. Although the TRC has been criticised for the inadequate reparations it awarded to survivors and victims, and for the grants of amnesty, it has been seen as promoting restorative rather than retributive justice: concerned not so much with punishment but with healing, harmony and reconciliation.[34]

Other types of mechanism for transitional justice have since emerged. For example in East Timor a series of institutions have been developed. The Reception, Truth and Reconciliation Commission has dealt with minor crimes committed during the Indonesian occupation without prosecution. Some victims have criticised the process because it gave priority to the reintegration of militia members over the search for justice by individuals and it has been said to have been too lenient. Allegations of major crimes committed in 1999 have been referred to the UN's Serious Crimes Unit, but this too has been criticised for not being able to bring to justice many members of the Indonesian military and the militias they supported. Indonesia established an ad hoc Human Rights Court to deal with responsibility for the 1999 violence, but this has only successfully convicted two East Timorese civilians, with all sentences against Indonesian military officers being overturned on appeal.

The East Timor example raises the value of transitional justice in a newly democratic country. A UN Commission of Experts recommended this year that Indonesia be given six months to prosecute its citizens involved in the 1999 violence or that they face a UN war crimes tribunal. Timor Leste rejected this recommendation. President Xanana Gusmao has emphasised the importance of maintaining good relations with Indonesia and rebuilding the country rather than on war crimes trials. The government has now created a Commission for Truth and Friendship which will be charged with establishing the truth about the 1999 violence and will able to grant amnesties from prosecution.

Little attention has been paid to transitional justice in Iraq. The only institution yet established is the Iraqi Special Tribunal for Crimes against Humanity to try Saddam Hussein and some of his close lieutenants. The tribunal is funded by the US (US $128 million) and mainly staffed by US personnel; and the Iraqi judges were all US appointees. The Tribunal's statute does not require guilt to be proved beyond reasonable

[34] TRC Chairman Archbishop Desmond Tutu

doubt and allows interrogation without defence counsel being present and also execution after conviction. This form of justice is certainly retributive rather than restorative. It also suffers from being seen as a form of victors' justice.

There has been little attention to abuses of human rights and atrocities during the invasion by members of the Coalition of the Willing. Since the eerie and sadistic photos of torture at Abu Ghraib prison became public last year, there have been at least 10 official military investigations into the activities in the prison. Not a single inquiry has yet questioned the US claim that there was no high-level policy condoning the abuse explicitly or implicitly, despite the clear evidence that the perpetrators believed that they had official sanction.[35]

It has been reported that there was a policy that prosecutions stop with the actual perpetrators of the torture and not proceed up the chain of command.[36] This report is supported by the actual record: seven enlisted men and women have either been charged with, or have pleaded guilty to, offences at Abu Ghraib while no officer has been charged with a criminal offence.

Lesson 4:
Although transitional justice is strongly supported by international institutions, we need to recognise that it may well be in conflict with short-term democracy-building because it can threaten stability.[37] President Jabal Talabani's hope that Saddam's trial will combat the insurgency in Iraq is, I suspect, misplaced.

The lessons from the extensive literature on transitional justice suggest that there is no 'one size fits all' mechanism. There has to be an extensive process of consultation about the appropriate form of transitional justice institutions, especially with the victims of abuses. Such institutions must be seen as impartial and able to deal with human rights abuses on all sides. The imposition of models from outside is not likely to be successful.

Conclusions

How can we best pick up the pieces after conflict and try to build democracy? The case of Iraq I have sketched illustrates some of the complexities of this task.

It also shows the hollowness of the notion that there is a discrete 'post-conflict' phase after the use of force: there is a 'general rush to the 'post'-phase', partly to mitigate the impact of illegal uses of force.[38] But, as we see in Iraq, there is not much difference in terms of violence and insecurity between the invasion and post-conflict periods.

[35] Seymour Hersh, "Abu Ghraib lesson unlearned" *Guardian Weekly* May 27-June 2 2005 p 15.
[36] Ibid.
[37] Knaus & Martin 2003
[38] See discussion by Outi Korhonen, '"Post" as Justification: International Law and Democracy-Building after Iraq' 4 *German Law Journal* 709 (2003). She argues that the "post' as the justification for the use of force 'is nothing but the platitude of 'the end justifying the means' writ anew.' 710

There is also the issue that democracy-building by outsiders can easily become a new field for colonialism. We need to ask why almost all UN peacekeeping and governance missions have been in non-Western countries.[39] We need to question the credentials of liberal democracies as shapers of the international legal order even as they breach its fundamental rules.[40]

We need also to consider whether a universal notion of democratic governance can allow powerful international actors to advance their own interests while claiming to act on behalf of the international community?[41]

For example, in Iraq we have seen members of the Coalition of the Willing, including Australia, being 'rewarded with projects and contracts' for rebuilding the infrastructure of a country they have helped destroy.[42]

Even when international institutions are involved, we cannot assume that the power of the international community will always be benign. For example, the role of the international community in Bosnia has been compared to the British Raj, with its unaccountable powers held by international civil servants.[43]

Perhaps the major problem with experiments in democracy-building is that they have settled for very limited forms of democracy and have been based on impoverished ideas of security.

Defining security narrowly, as has been done in Iraq, justifies military responses that erode any real collective security. We have to develop a framework of human security that recognizes that poverty, social breakdown, inequality and civil conflict are the core components of the global security threat.[44] The most important pieces that need to be picked up after conflict are those of human lives.

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[39] Ghosh 1994

[40] Anghie

[41] Anghie 1999. Another under-theorised aspect of the impact of international law in post-conflict societies to be explored in the project is the increasing privatization of many state functions (Gerson 2001). With security, policing and even military activities being taken over by the private sector, traditional international rules which focus on the behaviour of states may only have indirect relevance.

[42] Korhonen 710.

[43] Knaus & Martin

[44] UNDP 179.