Conclusion: Hope and humility for weavers with international law

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I. Imperial international law

Much of the scholarship in this book implies that international law can be read as an imperialist institution with a history of dutiful service to the most powerful invading militaries. Note, however, that this charge is more about acquiescing in domination than in doing it. International law takes the form of Western law because almost all state law does. Only a tiny fraction of the world's Muslims are governed by Sharia law. Transplanted European legal systems govern in all of the largest Muslim societies.[1] There is no society in the Americas ruled by the legal systems of the pre-European nations of those societies. Nor is there in Africa or Asia or even more traditional societies in Oceania a nation that has not modelled most of its laws and the structure of its laws (the idea of having criminal law as distinct from other wrongs, for example) on those of one of the colonial powers, even if it did not experience direct colonial occupation – no Hindu-law state, nor Buddhist, nor Confucian, nor animist. All these regulatory traditions persist in sub-national normative orders. Wood was able to map 99 per cent of the world's population as governed by one or another Western European legal tradition in respect of its financial laws (broadly conceived), the largest being 33 per cent of the world governed by the common law.[2] Only seven Middle-Eastern Islamic law states accounted for the exceptions.

Whatever the vices and virtues of international law are, it seems reasonable to submit that they are not primarily its own, but reflect the fact that it is a superstructure built on national legal foundations that almost entirely emerged from Western Christendom. Post-conflict societies always confront an enforcement-swamping problem. So much murder, rape, arson and looting has occurred, so many judges and prosecutors have fled to safer havens of legal practice, that the state legal system has no hope of dealing with even a tiny fraction of the serious crime. As Laura Grenfell's chapter shows in relation to Timor-Leste and Phil Clark's in relation to Rwanda, majoritarian resort to processing of war crimes through traditional non-Western justice becomes the most common middle path between formal law and impunity.[3]

So we have the paradox that while armed conflict quintessentially mobilises international law, after a great many conflicts it has also led to a revitalisation of non-cosmopolitan legal orders. The latter are often like Sharia law in providing for more draconian forms of physical punishment than allowed in international law. Yet like Sharia law in practice, most customary law is much less punitive and degrading most of the time than Westernised state law with its embrace of the late-modern Western institution of the prison.[4] Polynesians, among others, often mention the way Western law stigmatises defendants by wrenching them from the embrace of their loved ones to stand alone in a dock while they are attacked by a professional character assassin. The rituals associated with the black gown or white wig are barbaric and degrading by the lights of many customary legal orders that persist in developing countries. So they were to Dickens.

The criminal-court architecture that elevates judges and isolates and degrades defendants is only replicated by the International Criminal Court because it is utterly globalised in state courts. The idea that it is good in itself that serious criminals are brought to justice and punished, rather than contingently good for certain consequentialist reasons, is a perverse philosophy according to much of the world's customary law. And so it is for many contemporary Westerners like myself who subscribe to a jurisprudence of restorative justice. Like the Rwandans in Phil Clark's chapter, restorativists blanch at the professional myopia of the International Criminal Tribunal for Rwanda judge who said: 'I have

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[1] Classifying whole societies is crude of course. The province of Aceh in the largest Muslim society, Indonesia, has a provincial Sharia law, though national Indonesian law modelled on Dutch law remains the dominant influence in Aceh. In the North-West Frontier Province of Pakistan, however, Sharia law is arguably a considerably more dominant governing force than the British common law system of the Pakistan state.

[2] Philip R. Wood, *Maps of World Financial Law* (London: Allen & Overy, 1997).

[3] See also Luc Huyse and Mark Salter (eds.), *Traditional Justice and Reconciliation after Violent Conflict: Learning from African experiences* (Stockholm: International Institute for Democracy and Electoral Assistance, 2008).

[4] Nehal Bhuta alludes to this point in his chapter when he cites Dirks' work on British colonial justice in India turning out to be more draconian than Islamic justice had been: Nicholas B. Dirks, *The Scandal of Empire: India and the creation of Imperial Britain* (Cambridge: Harvard University Press, 2006), 209.

never been to Rwanda and have no desire to visit. Going over there and seeing the effect we are having would only make my task more difficult.'[5] Judicial engagement with vindicating and healing victims is hard to accomplish while staying clear of their homes and camps for internally displaced persons.

Phil Clark's chapter is a nice contextual examination of choices between peace-oriented reconciliatory consequentialism and punitive justice as good in itself in international criminal law. The consequentialist rationale that Clark most finds in this embryonic jurisprudence is deterrence. This is already an odd choice in normal contexts for evidence-based criminologists who ponder the dismal evidence on the effects of calibrating for deterrence. It becomes odder in battlefield contexts where fear of bullets may do most of the shaping of choices via deterrence, washing over slim and remote prospects of custody for trial in The Hague. Perhaps this is another part of the explanation of the retreat of the ICC from consequentialism that Clark describes, as in the retreat to 'fulfil[ing] our legal mandate only' in Uganda. The great expectations of peace and reconciliation that advocates for the ICC sold to the world may be in tatters. Clark's account of motivations of international criminal-law officials to give priority to the reputations of their courts over substantive peace and justice aspirations, their willingness to be utterly consequentialist in dropping cases to secure co-operation and safety for their own staff (but not for the safety of others), are what Charles Dickens might have expected of law's integrity. Nevertheless, restorative-justice advocates believe that international, like national, criminal law can be reinspired with the vision that because crime hurts justice should heal. Properly articulated to a locally responsive restorative-justice transformation of criminal law, the ICC can fulfil good expectations for justice that is effective rather than self-serving for lawyers.

Jeremy Farrall's chapter opens up the paradox that international law is increasingly an institution that valorises rights to indigenous pluralism and creates spaces for the practice of customary law. Farrall argues that it is and should be less a one-size-fits-all institution than it once was. It may be that the great expectation that the ICC might consistently apply the rule of Western punitive criminal law to the world's most evil war criminals has itself been an evil project of trans-legality led by a global profession intent on foisting its tunnel vision on those who grapple with the complexities of peace-building. Yet the struggle that we see in this

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[5] Clark's chapter in this volume.

book of international law with local demands to practice reconciliation and reconstruction on the ground has meant that international law has prospects of being the more open-textured force for good implied by Farrall. Like Dickens, customary law often places its greatest expectations in the redemptive power that comes from a society's outcasts. *Great Expectations*' Magwitch, who is transported to Australia whence he supports Pip, is an example. Particularly in the Hindu and Buddhist philosophies of the likes of Gandhi and the Dalai Lama, we find the idea that the more evil the crime, the greater the opportunity for grace to inspire compassion that transforms tyranny.[6]

No branch of legal theory and practice has been more skilled at believing its own fictions than criminal law. For this reason perhaps none of the enlightenment institutions of reformed government has been less effective in achieving its purposes than Western criminal courts and prison systems. Criminal law in all societies (and in international law) is like a sprinkler system that switches off when the fire gets hottest. Dickens realised this in the mid-nineteenth century; it is a theme that recurs in much of his work, including *Great Expectations*. Phil Clark rediscovers it in his exposé of how the ICC shies away from the politically hard cases, preferring politically soft and technically/logistically easy prosecutions in the Democratic Republic of the Congo and Uganda.

The biggest fiction of criminal jurisprudence is that formal law can punish the crimes of the ruling classes equally with those of the poor. This is not the place to recount the reasons why it is a structural universal of every state's law that this is a fiction. I simply wish to draw attention to the resilience of the fiction, to the belief that with more lawyers prosecuting more powerful criminals our great expectations for equality before the law can be realised. Over the past decade, however, practitioners of international law have begun to confront this fiction in a more honest way than domestic criminal lawyers. They have been willing to concede the necessity for amnesties for the most sadistic and serious of criminals in circumstances, for example, where they will not surrender to a peace process or dismantle apartheid without such a guarantee. This can be, and in some post-conflict contexts is being, done in an increasingly principled way.

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[6] Malcolm David Eckel, 'A Buddhist approach to repentance' in Amitai Etzioni and David Carney (eds.), *Repentance: A comparative perspective* (New York: Rowman & Littlefield, 1997), 122–42, 135. Or as Saint Paul put it: 'Where sin abounded, grace did much more abound.'

The emerging principle seems to be that while amnesty from formal criminal prosecution and imprisonment can be justified, impunity cannot. Truth and reconciliation, where willingness to speak truth to victims and listen to victims' truth and needs, has emerged as one path from impunity. Traditional justice has emerged as the other, as in the *gacaca* in Rwanda (see Phil Clark's chapter) and the Community Reconciliation Process of the Commission for Reception, Truth and Reconciliation in Timor-Leste (see Laura Grenfell's chapter) which attracted the attendance and participation of 40,000 people out of a population of 1 million (90 per cent of whom reported satisfaction with the justice they experienced). All of a sudden, international law has opened up a new front in the battle to transform failed Western legal systems to leave more space for customary normative regulation. And it seems we can have greater expectations for an international law that does not seek to solve the planet's problems itself, but that is an enabler, that constitutionalises, checks and balances justice, and that occurs in many rooms.[7]

II. Humble international law

This way of seeing international law as a humble institution that seeks to renounce its imperialism can also leave us more relaxed about the depth of its incoherences. Brett Bowden, Hilary Charlesworth and Jeremy Farrall's introduction for this reason takes the path of conceding Nehal Bhuta's observation that apparently universal notions like democracy are in fact 'highly particularised' historical products, and so contemporary 'Princes' of international law must attend to the interaction between *fortuna* and *virtu* rather than lock into static ideals that stand above the messy business of war and peace. Likewise the editors embrace Outi Korhonen's thinking about the rigidity of elevating form over substance (that the superficial realisation of formal sovereignty and other thinly and formally understood ideals is not useful). Korhonen suggests that we unravel state sovereignty so that we might be more open to partnering, to co-development support and to negotiating culturally specific conditions of the rule of law. Bowden and Charlesworth in their own chapter problematise democracy as something beyond elections, as does William Maley in his. Jeremy Farrall's chapter contends that the rule of international law is most powerful when it can mean different things to

different people, becoming an abstract political ideal with a 'constructive ambiguity' that allows people to commit to projects that are widely and reasonably believed to be concretely good, but for philosophically different and incompatible reasons. Perhaps that has indeed been the accomplishment of the norm entrepreneurs behind the 'responsibility to protect' as Outi Korhonen points out in her chapter, quoting José Alvarez on how the responsibility to protect can satisfy so many cross-purposes.[8]

Peter Danchin's chapter in turn sees international law as both constructing and mediating between certain 'internal' and 'external' forms of rationality. Security Council resolutions are shown to be deeply philosophically contradictory, and like Western imperialism, persistently illiberal in how they seek to force peoples to be liberal. Ultimately, when the deals are done for a 'republican, federal, democratic and pluralist' Iraqi constitution that 'equalises' the principles of Islam and democracy, Art. 2 can read, as Danchin points out:

(a) No law that contradicts the established provisions of Islam may be enacted.
(b) No law that contradicts the established principles of democracy may be enacted.
(c) No law that contradicts the rights and basic freedoms stipulated in this constitution may be established.

Depending on one's philosophical position, this opens huge potential for contradiction and incoherence. Yet Art. 2 is still a rule of law that can rule out many things (like most of the crimes defined by all of the world's criminal codes). And perhaps Art. 2 highlights the very contradictions among Islam, democracy and basic freedoms that can only be resolved by Iraqis through practical reason. Perhaps it is therefore good that Art. 2 is incoherent in such a blunt way, signalling the hard contradictions where the Iraqi people must sit down together to make the deliberative side of their republic work, yield the rule of law to the rule of (wo)men. Of all the problems Iraq faces, this kind of incoherence between internal Iraqi rationalities and external legal ideals of pluralist republican democracy does not seem one of its deepest in practical terms. Peter Danchin's twin blades of shears that cut the future of the Iraqi constitutional order are certainly evocative: one abstract but reaching for the particular; the other concrete but reaching for the universal.

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[7] Marc Galanter, 'Justice in many rooms' in Mauro Cappelletti (ed.), *Access to Justice and the Welfare State* (Alphen aan den Rijn: Sijthoff, 1981), 147–81.

[8] José E. Alvarez, 'The schizophrenias of R2P: Notes from the president' (2007) 23(3) *ASIL Newsletter*, 1.

III. What to expect of international law

It is easy to pile on illustrations of international law acquiescing in imperialism, looking the other way when an illegal invasion of Iraq occurs, and worse. It is even easier to pile on examples of its impotence and irrelevance in cases where efforts are made in good faith to mobilise it. Yet there is nothing in the peace-building repertoire – not disarmament, not ceasefires, nothing – about which this is not true. The empirical literature on peacekeeping suggests that it is most effective when it is multidimensional, indeed that it is not effective at all when it is unidimensional.[9] In regulatory theory we talk about this as the problem of one thin reed that is bound to snap if we lean too heavily on it, but a reed that can be strong when woven together with a web of controls.[10] According to this theoretical tradition, it is better not to evaluate international law as a framework that sits alone above the fray, but as a strand in a web or fabric of controls.

Sometimes international law must face allegations, as in Phil Clark's chapter for the case of northern Uganda, that it is a strand which if pulled in the wrong way might unravel the whole fabric of peace-building.[11] Sometimes it can be a strand which, when disparate members of the international community tug at it, tightens an entire web of controls to secure peace. Perhaps Security Council resolutions calling on states to pull back on weapons-of-mass-destruction programmes do not have such a bad record of this kind. The mobilisation of international law as it applies to weapons of mass destruction on its own could not be effective without weapons inspectors on the ground, preventive diplomacy in many relevant capitals, proffering of carrots and implying that there are sticks, and other strands.[12] The right way to

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[9] Michael W. Doyle and Nicholas Sambanis, 'International peacebuilding: A theoretical and quantitative analysis' (2000) 94 *American Political Science Review*, 779–801; Michael W. Doyle and Nicholas Sambanis, *Making War and Building Peace: United Nations peace operations* (Princeton: Princeton University Press, 2006).

[10] John Braithwaite, Toni Makkai and Valerie Braithwaite, *Regulating Aged Care: Ritualism and the new pyramid* (Cheltenham: Edward Elgar, 2007), ch. 10.

[11] This is the allegation that a clumsy ICC prosecution of Lord's Resistance Army commanders might have led to the LRA walking away from the peace process in Juba, Sudan: see Clark's chapter in this volume.

[12] For a good discussion of nuclear non-proliferation, see Elisa Kaczynska-Nay, 'Compliance and community at the international level: A case study of the Treaty on the Non-Proliferation of Nuclear Weapons' (Unpublished PhD dissertation, Australian National University, Canberra, 2000).

think about the dismantling of Iraq's weapons-of-mass-destruction programme could be that international law worked, diplomacy worked, weapons inspections worked, not separately, but as a fabric of international regulation. In this, the most important case in recent history, the expectations that Mr Blair, Mr Bush and most commentators had of inspections backed by international law were not too great, but too gloomy.

In this vein, I was struck by the comparative social-survey datum in Helen Durham's chapter that while only 38 per cent of US citizens believed the Geneva Conventions assist in preventing atrocities, 86 per cent of Cambodians believe so, and that in general populations that have directly suffered the consequences of breaches of international law are less sceptical about the institution. This is not the only sense in which we might do better to listen less to the worldly-wise of the North and more to the world-weary voices of the South. Amy Maguire's chapter's focus groups found post-conflict women to believe law could help achieve dramatic change in their security situation but only if it was 'well-intentioned, well-designed and thoroughly implemented'. Maguire reads her focus groups as suggesting that law will not have a significant transitional role after armed conflict if its niche is reformation as opposed to transformation. Transformative justice means critical evaluation to identify justice gaps (for example legal silences and violent laws that oppress women) and to seize the opportunity for post-conflict preventive transformation of injustice.

The dilemma is that law's silences for women and children as victims are sometimes closed by law's violence – Amy Maguire's concern about the pain of what Austin Sarat calls 'the drama of law's sporadic vengeance as well as in the ordinary lives of those subject to legal regulation'.[13] Post-conflict prosecution for rape is historically sporadic and systematically directed against junior soldiers (sometimes even child soldiers) rather than commanders who promote rape as a reward and a policy of domination. In Europe during the Second World War, for example, all the United States GIs who were executed for rape were black.[14] While there were many prosecutions of GIs for the rape of French, English and other women

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[13] Austin Sarat, 'Situating law between the realities of violence and the claims of justice: An introduction' in Austin Sarat (ed.), *Law, Violence, and the Possibility of Justice* (Princeton: Princeton University Press, 2001), 3–16, 3.

[14] J. Robert Lilly, *Taken by Force: Rape and American GIs in Europe during World War II* (Basingstoke: Palgrave Macmillan, 2007).

during the Second World War, where the rapes were most sadistic, deadly and common – Germany – no invading soldiers were prosecuted.[15]

There is a wider dilemma here that even the most non-coercive, non-violent forms of justice ultimately lean on a capacity for violence. Criminals would not turn up to restorative justice conferences where they can be confronted by their victims if the alternative were impunity; they turn up because the alternative could be rather nasty. Similarly, even the most collaborative and deliberative kinds of peacekeeping can be underwritten by peacekeepers with guns. This does not mean Amy Maguire's ambitions for law without violence are wrong. Responsive regulatory theory shows how it is possible and desirable to craft justice systems where coercion can protect against domination by being threatening in the background while rarely threatened (and rarely used) in the foreground.[16]

Maguire's chapter also shows that women's NGOs, such as the Women's International League for Peace and Freedom (WILPF) and the Northern Ireland Women's Coalition, are important threads in a fabric that secures peace with justice and without violence. Like Maguire's, Helen Durham's chapter also shows that another strand in a web of controls – treaties – can be useful, but not if ratification is merely symbolic or expressive. Liberia signing 103 treaties on one day in 2005 means little unless compliance and training systems are put in place. Here international law can learn a great deal from what works in the design of organisational compliance systems for environmental, occupational health and safety, competition and tax laws.[17] So two general lessons suggested by these chapters are that for strands of international legal controls to shape a peace, they need to be more than just expressive strands, and they must be tied into a web of controls on violence and webs of supports for peace.

Annemarie Devereux's chapter suggests a third requirement may be that the controls themselves have integrity in terms of *their* compliance with international law. Jeremy Farrall's chapter evokes something similar in his discussion of 'principled governance' as essential to rule of law, as does Laura Grenfell's in her explication of UNTAET's absence of accountability to a rule of law it was seeking to impose in Timor-Leste.

[15] *Ibid.*

[16] See John Braithwaite, *Restorative Justice and Responsive Regulation* (New York: Oxford University Press, 2000), ch. 2.

[17] See the publications contained on the Regulatory Institutions Network's website www. regnet.anu.edu.au.

Again, this conclusion mirrors what is empirically known in socio-legal research on the legitimacy law enforcers need to secure compliance with domestic law.[18] It is meaningless for the UN to call a peace operation in Somalia 'Operation Restore Hope' when what peacekeepers restore is terror, torture and summary execution. Just as regulatees of international law need effective organisational compliance systems to make law more than symbolic, so international law enforcers such as peace-keeping forces need effective internal systems to ensure they comply with international law in the process of persuading others to do so. Compliance systems are needed that are apt for those who seek to get others to put compliance systems in place. That is the nub of what integrity means in the organisational management of the rule of law.

Annemarie Devereux's chapter has a helpful list of practical suggestions for delivering this. One that charmed me involved 'specific training initiatives undertaken in order to socialise the contents and provide better understanding of the application of international human-rights norms'. The charm was Devereux's use of 'socialise' in a manner different from the way it is used either in conversational English or in sociological theory. She uses 'socialise' the way Indonesians and Timorese use 'sosialisasi' in Bahasa and 'socializasaun' in Tetum – meaning to consult in advance and then convince citizens why a policy or law is desirable and what they need to do to comply. Devereux has extensive post-conflict field experience in Timor-Leste and this is reflected in her use of language. Some aspects of the integrity and accountability Devereux craves are rather susceptible to continuous-improvement philosophies. For example, militaries and police who serve in UN peace operations could be expected to improve each year in the average scores obtained on tests to measure knowledge of international humanitarian law.

IV. Strands of legitimacy, strands of democracy

William Maley's chapter, and Brett Bowden and Hilary Charlesworth's, suggest that one thing effective democracy-building may have in common with effective peace-building is that it must be multidimensional. Maley's chapter begins by describing some of the strengths in this regard of what increasingly looks like the failed democracy-building of the

[18] See, e.g., the work of the Russell Sage Project on the legitimacy of legal institutions: Tom R. Tyler (ed.), *Legitimacy and Criminal Justice: International perspectives* (New York: Russell Sage Foundation, 2007).

present decade in Afghanistan. Those of us who thought that Afghanistan never should have been invaded in the way it was might nevertheless agree that once the illusory military defeat was inflicted in 2001 with the capture of Kabul, some very astute things were done to attempt to build a stable democracy in Afghanistan. These were led by an experienced and wise diplomat who was 'exceptionally attuned to the complexities of Afghan politics' in Ambassador Brahimi. And this resulted in the democratic election of an able, honest and popular president (by any international standard) in Hamed Karzai. Maley's chapter forces us to ask how could so much go wrong in Afghanistan when so much went right?

I am inclined to go further than William Maley down this line because I think that one of the things that went right about Afghanistan was that the international community was willing to spend a very great deal of money on the case. Maley on the other hand points out that while greater resources might have gone on Afghanistan than on Timor-Leste or Kosovo, these cases attracted much more per capita. Yet until Iraq and Afghanistan became the two most expensive nation-building ventures we have seen, the former Yugoslavia and Timor-Leste were the previous holders of that record (with the Kosovo part of the former Yugoslavia at least matching spending on East Timor).[19] The gap between spending on these four cases and on peacekeeping and peace-building in Latin America and Africa, where most people have died since the end of the cold war, has been a wide one. If the world cannot afford to do democracy-building around the world at the current Afghanistan price-tag, perhaps it should not attempt it. By this I mean that it might be better simply to concentrate security and development transfers on health and education instead, an option I return to later. Of course democracy for Afghanistan was not as important to Messrs Bush and Blair as capturing the Al Qaeda leadership and stemming opium exports to Europe.[20] The question is whether negotiation with the Taliban in the shadow of a threatened invasion might have done better by these objectives. Another question, little asked at the time or since, was whether international law required this,

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[19] Some of the data that leads to this view can be found in Center on International Cooperation, *Annual Review of Global Peace Operations 2006* (Boulder: Lynne Rienner Publishers, 2006).

[20] It is worth noting that neither of these objectives have been achieved. In 2006 Afghan opium production rose 50 per cent, bringing global heroin production to a record 606 tonnes per annum; 92 per cent of world's heroin is from poppies grown in Afghanistan: United Nations Office on Drugs and Crime, *2007 World Drug Report* (New York: United Nations, 2007).

especially when the Taliban foreign minister warned the US of an impending attack on the US in July 2001 and offered to negotiate a handover of the Al Qaeda leadership to prevent bringing the Taliban government down.[21]

William Maley's analysis of both what went right and what went wrong are theoretically incisive. He highlights the insight of Brahimi as a nuanced understanding that 'no single strategy of legitimation ... would be effective with all the different micro-societal segments of Afghanistan's population'. Maley shows that Afghanistan's transitional governance design appealed to all three of Max Weber's bases of legitimacy – traditional, charismatic and rational. Features like mobilising the widespread legitimacy of village jirgas by crafting *Loya Jirgas* and bringing back the king mobilised *traditional* legitimacy; the promotion of the popular Karzai mobilised *charismatic* legitimacy; the drafting of a new comparatively secular constitution and the holding of elections endowed the transition with *rational* legitimacy. Maley also uses the

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[21] Kate Clark, 'Revealed: The Taliban Minister, the US Envoy and the Warning of September 11 that was Ignored', *The Independent*, 7 September 2002. The Taliban Foreign Minister Wakil Ahmed Muttawaki sent an aide to tell the US Consul-General and another US official who was possibly an intelligence officer that bin Laden was planning a 'huge attack' inside the US. The leader in whose safe house the meeting occurred has confirmed the aide's account that the meeting did occur. When the aide reported back that the US had no interest in striking bin Laden or taking the warning seriously in any way, the Foreign Minister instructed him to take the same message to the UN leadership in Afghanistan, which he did. The Taliban Foreign Minister feared bin Laden would provoke a US attack that would bring them all down. 'The guests are going to destroy the guesthouse', he is reported to have told his aide. *The Independent* story also reveals that after September 11 an Afghan religious council had recommended that bin Laden be forced to leave Afghanistan. As early as 1998 Wakil Ahmed Muttawaki was in regular communication with US officials about handing over bin Laden. A US State Department report of 28 November 1998 reports that according to Muttawaki, 'Taliban leaders are caught between "a rock and a hard place" since, if they expel bin Laden without cause they will have internal problems and, if they do not, they will have external ones due to the US. Ahmed suggests that the Saudis have a key to the solution. Afghan and Saudi religious scholars could convene a joint meeting and issue a ruling that bin Laden had acted illegally ... He could then be expelled without this causing internal unrest in Afghanistan' (Cooperative Research History Commons: Profile: Mullah Wakil Ahmed Muttawakil, 28 November 1998). White House terrorism adviser under Bill Clinton and George W. Bush, Richard Clarke, has revealed that the view of the Clinton State Department had been that Al Qaeda and the Taliban could be separated: Richard A. Clarke, *Against All Enemies: Inside America's war on terror* (New York: Free Press, 2004), 274. William Maley does not think this could have been accomplished and it may indeed have been a naïve view. My own thought is that, even if there would have been a 90 per cent probability of failure, these negotiations should have been attempted.

metaphor of 'weaving' a fabric of legitimacy from these multiple threads. Yet one thing we have noted about fabric is if we tug at some threads it tightens, but with others it unravels. Part of Maley's multidimensional analysis is that the electoral strand put the democracy under great strain by being too presidential. The danger of a strongly presidential system in a fractionated society is that it creates one winner and many losers. Unfortunately, Maley finds most respected traditional tribal leaders have counted among the losers.

Perhaps the greatest source of unravelling is the simple fact that there is a safe haven on the north-west frontier of Pakistan from which forces hostile to Karzai and the foreign forces that back him can pull at any number of strands of the fragile fabric of Afghan democracy to destabilise it. The Taliban and Al Qaeda had adequate contingency plans to retreat there when NATO attacked. Commanders of the time tell me if the 2001 campaign had been better resourced they would have killed and captured many more than they did, but that no amount of military resources was going to prevent a large number of fighters from escaping through the mountains. We might therefore think of Afghanistan as a likely failure of peace- and democracy-building because there was never a peace agreement to keep. Weaving a fabric of democracy for the first time in the midst of a militarily contested foreign invasion is something for which there are not encouraging precedents in human history.

Yet it is an interesting way to read Afghanistan in the current decade as at least in certain ways a sophisticated attempt to think multidimensionally about legitimacy and democracy. Democracy-building is, as both William Maley's and Brett Bowden and Hilary Charlesworth's chapters argue, more than about having an elected legislature. It is also about an independent judiciary and a variegated and robust executive government that has within it also many separations of powers from the head of state – an ombudsman, an electoral commission, a civil-service selection and training system, a central bank and an auditor-general. Indeed further separations of power beyond the state are also needed – universities, autonomous legal and accounting professions, business and NGO critics who are protected by the courts from persecution by the state. Maley is surely right that robust democracy usually only comes when electoral democracy is built on the foundations of at least a good number of the other separations of powers just mentioned. He is also undoubtedly right that it follows that in future the UN might rush at election-followed-by-exit rather less than it has in the past. This is particularly so when the point is yet to be reached where the potential of elections to divide

can be contained. In their chapter Bowden and Charlesworth discuss the risks of elections in Iraq widening the cracks of division that are engendering violence there.

V. The problematic Western historical model of state-building and democracy

What I am less certain about is the mainstream view among peace-building scholars and in the UN that history teaches us that Western democratisation is preceded in the words of William Maley by 'establishment and consolidation of the modern state first' and therefore this is what is needed in the South today. Stock exchanges and other institutions of the market, like the institutions of law and the institutions of political democracy in the West, mostly developed in 'cities' that were really small towns by contemporary standards. These were scattered across the non-nation-states thought of by contemporaries as Christendom.[22] Guilds struggling to assert countervailing power against the nobility and the church provided much of the regulatory and resource infrastructure to grow these institutions. Acemoglu, Johnson and Robinson[23] argue that England and the Netherlands surged ahead of France, Spain and Portugal both economically and in the development of republican, liberal democratic institutions precisely because the central state was stronger in the latter three cases. Bourgeois power-bases in the towns were more formidable countervailing powers to weaker central courts in the Netherlands and England, enabling republican victories and parliamentary limitations on the Hapsburgs and the Stuarts. Most critically, this led to a different mode of exploitation of the lucrative Atlantic trade – in France, Spain and Portugal under the control of crown monopolies, in England and the Netherlands more under the control of entrepreneurial individuals and partnerships. While this made the French, Spanish and Portuguese nation states comparatively stronger still, it left them with weaker democracies and weaker economies.

Trading companies were also important beyond Europe, especially in what eventually became the large democratic states of India, Pakistan,

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[22] Michael Mann, *The Sources of Social Power, Volume 1: A history of power from the beginning to AD 1760* (Cambridge: Cambridge University Press, 1986).

[23] Daron Acemoglu, Simon Johnson and James Robinson, *Institutions as the Fundamental Cause of Long-Run Growth* (Cambridge: National Bureau of Economic Research, Working Paper No. 10481, 2004), 66–70.

Bangladesh and Indonesia.[24] The Virginia Company was quite insignificant and short-lived commercially, but it did settle the first English colony in America, and wrote a constitution for Virginia that provided for the first representative legislature in America.[25] It was private corporate governance that first tilled the soil of democracy in Virginia which later grew a Jefferson and a Madison. Similarly the Massachusetts Bay Company developed a democratic constitution of Massachusetts with checks and balances and a separation of legislative and judicial powers which, along with that of Virginia, became a model for other colonies aspiring to governance by elected representatives constrained by a rule of law. 'The constitution of the colonial trading company was therefore perpetuated to a large extent in the State and Federal constitutions of the United States.'[26] In America, governmental institutions originating from corporations had a democratic vitality that was lacking elsewhere because they took root in American soil clear of feudal institutions.[27]

So it seems that a strong nation state as a prerequisite of democracy is too simple a reading of the complexity of Western history. Perhaps we should use it less as a template for a hoped-for Southern democratic future. In developing countries a strengths-based approach to governance might flourish less in the capital than in the villages and small towns (as in the time of the Hanseatic League in medieval Europe).[28] The micro-finance revolution is after all recognising that this is where there may be many of the best opportunities for business development in the South.

In the context of Afghanistan, Wardak argues that village *jirga* rather than city courts, just as with Germanic *moots* and Scottish *assythment* and *lettre of slanis* in recent centuries,[29] are the promising seedbeds for a legal system that actually protects people from violence and pillage.[30]

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[24] Though as Acemoglu, Johnson and Robinson show, trading corporation private governance of these the very wealthy, densely populated parts of the world favoured extractive, exploitative political and economic institutions. Conversely, the poor, thinly populated continent of North (as opposed to South) America (like Australia and New Zealand) made democratic capitalist development most lucrative: *ibid.*

[25] John P. Davis, *Corporations: A study of the origin and development of great business combinations and their relation to the authority of the state* (New York: Capricorn Books, 1961), 168.

[26] *Ibid.*, 201.   [27] *Ibid.*, 205.

[28] See Bowden and Charlesworth's chapter in this volume.

[29] Braithwaite, *Restorative Justice and Responsive Regulation*, 5–7.

[30] Ali Wardak, 'Building a post-war justice system in Afghanistan' (2004) 31 *Crime Law and Social Change*, 319–41.

In her chapter on Timor-Leste, Laura Grenfell reports, citing research by Hohe and Nixon and Advocats Sans Frontières, that Timorese overwhelmingly preferred customary law because they wanted to avoid contact with the state. Grenfell identifies the challenge as one of institutionalising checks and balances against abuse of rights within such non-state law. It may even be that in some Muslim societies multinational corporations providing jobs to women under their equal employment opportunity polices might accomplish things for women that the state does not (as with the Virginia and Massachusetts Bay Companies and democracy), and that NGOs (like the suffragettes' organisations once were in the West) could be more important than the state in that regard. This is just to say that the stew of democracy in the South may sometimes have to simmer for decades rather than years, centuries rather than decades, and on many different hot plates, not just on the heat the nation state can generate. And of course quite often, as in the history of the West, the heat generated by the state is anti-democratic and anti-growth. The hope for Burma lies with the merchants, the students, the NGOs and the monks in a way not so different from the way it lay with those forces in the Dutch Revolt of 1568–1648 (protestant clerics instead of monks though!).

VI. Reconstruction, transformation and evidence

I have concluded that peace-building and democracy-building might have in common requirements for multi-centric, multi-strand approaches, where strands are not just symbolic but reflexively self-strengthening through devices like internal compliance systems in organisations, where thought is given to how to tie strands together, where spoilers who purposely set out to unravel are regulated or brought in from the cold in the mountains, where states are important but not everything and where rule of law is reinvented locally and as something with rather more integrity (less entranced by its own fictions) than law within hegemonic Western frames.

Universities have a niche in contributing evidence-based perspectives on all these things. Is this Nehal Bhuta's 'techno-politics' (see Chapter 2)? 'Yesterday's modernisation theories and today's "transitology" are both premised on a simplifying homogenisation of political and social space that renders the politics of other societies seemingly more tractable to a "policy science" of governance.'[31] Perhaps I am advocating

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[31] Nehal Bhuta's chapter in this volume.

'techno-politics' if 'policy science' means systematically collecting data that compares histories of conflicts in terms of which institutions that are built are more predictive of peace or prosperity. While I am sure this is not Bhuta's intent, critics must be careful not to imply a 'simplifying homogenisation' of policy science and where it fits in global deliberation. The IMF/World Bank doing quantitative research and then imposing conditionalities to roll-out templates of 'good governance' implications of the research is one thing. Researchers, including quantitative ones, contributing to a local conversation about how to weave together a fabric of governance in a local way (including how to interpret, use and discard international law within it) is another thing. It seems a noble vocation to be involved in a conversation as a participant who attempts to summarise and abstract what have been the different outcomes in other societies when those societies sought to weave their governance fabric in this way versus that. And it can be a humble one. The key to humility is not the eschewing of systematic data collection, nor of global visions for a world that respects human rights for example. The key to humility could be to see reconstruction as a weaving activity of networks of actors. For males, humility might mean seeing collaborative weaving as something we can learn to do better from women.

While peace-building and democracy-building might have the above things in common, Bowden and Charlesworth point out that empirically the process of building democracy can be bad for peace. Michael Mann implicates the quest of nations for democratic self-determination in the sharp increase in ethic cleansing during the past century.[32] Mann concludes that both stable authoritarian regimes and stable democracies have less armed violence than regimes embarked upon democratisation.[33] The latter is also the argument of Amy Chua as discussed in Bowden and Charlesworth in Chapter 3. More historical sociology within the Mann tradition is needed to identify what are more and less violent pathways from authoritarianism to democracy.

There is also a strong correlation between economic stagnation and lives lost in armed conflict.[34] The nature of that evidence suggests that poverty is both a cause and an effect of war and that democratic

[32] Michael Mann, *The Dark Side of Democracy: Explaining ethnic cleansing* (Cambridge: Cambridge University Press, 2005).
[33] *Ibid.*, 4.
[34] See, e.g., Doyle and Sambanis, 'International peacebuilding'. Paul Collier, *The Bottom Billion: Why the poorest countries are failing and what can be done about it* (Oxford: Oxford University Press, 2007).

institutions do not grow under the joint effects of internal warfare and rising poverty. The economic literature shows that particularly strong predictors of levels of economic development are education levels and how widespread are health problems such as malaria and HIV-AIDS.[35] Investments in solving these problems are therefore long-term keys to democracy and peace-building. Equally clearly, these problems are at their worst in most of the most war-ravaged parts of the planet. The aid to ameliorate them cannot be delivered while someone is burning down the schools, hospitals and clinics and causing the doctors and educators to flee to the West. Worse, sometimes the that aid is captured and channelled by warlords in ways that strengthen them and perpetuate suffering. So the world cannot begin to conquer poverty, disease and tyranny without grappling with the complexities of peace-building. Making a contribution to that understanding is an obligation the universities of the world must not shirk. This book has made a contribution to understanding the limits and possibilities for a role of international law in that journey.

Literature was a source of hope for Matilda as she studied Dickens at university in Lloyd Jones's novel *Mister Pip*.[36] It helped her imagine a different future for herself than the one she was dealt by war-torn Bougainville. University study of international law inspires hope in other students that they might make a contribution to combating global impunity for rape in war, preventing future genocides or promoting human rights for refugees. That hope is an uplifting thing when tempered with the kind of humility Matilda learned from Dickens and from the man who taught her Dickens in an open Bougainville schoolhouse. Too many of those idealistic students, however, graduate to become more like Dickens' constables in *Great Expectations*, who, coming down from London to arrest obviously wrong people, 'ran their heads

[35] William Easterly, *The Elusive Quest for Growth: Economists' adventures and misadventures in the Tropics* (Cambridge: MIT Press, 2001). Sambit Bhattacharyya, 'Root causes of African underdevelopment' (Bandung: Padjadjaran University, Working Paper in Economics and Development Studies No 200704, 2007); Francesco Caselli, 'Accounting for Cross-Country Income Differences' in Philippe Aghion and Steven N. Durhayf (eds.), *Handbook of Economic Growth: Volume 1A* (Amsterdam: Elsevier, 2005), 679–716; Abhijit V. Banerjee and Esther Duflo, 'Growth theory through the lens of development economics' in Philippe Aghion and Steven N. Durhayf (eds.), *Handbook of Economic Growth: Volume 1A* (Amsterdam: Elsevier, 2005), 474–545.
[36] Lloyd Jones, *Mister Pip* (Melbourne: Text Publishing Company, 2006).

against very wrong ideas, and persisted in trying to fit the circumstances to the ideas, instead of trying to extract ideas from the circumstances'.[37] Extracting ideas from circumstances and stakeholders, in preference to engineering and extirpating ideas from above, is the path of the humble weaver of peace taken by all the authors of this book.

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[37] Charles Dickens, *Great Expectations* (London: Collins, 1953), 113.

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