

January 2003

Lessons from Conflict: The Role of a Strong Judiciary and the International Community in Protecting Human Rights for Successful Humanitarian Aid

Scot W. Greenwood

Follow this and additional works at: <https://digitalcommons.du.edu/djilp>

Recommended Citation

Scot W. Greenwood, Lessons from Conflict: The Role of a Strong Judiciary and the International Community in Protecting Human Rights for Successful Humanitarian Aid, 31 Denv. J. Int'l L. & Pol'y 551 (2003).

This Article is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Denver Journal of International Law & Policy by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, digitalcommons@du.edu.

Lessons from Conflict: The Role of a Strong Judiciary and the International Community in Protecting Human Rights for Successful Humanitarian Aid

Keywords

Human Rights Law, Judiciary, Immigration Law, Refugees, International Law: History

LESSONS FROM CONFLICT: THE ROLE OF A STRONG JUDICIARY AND THE INTERNATIONAL COMMUNITY IN PROTECTING HUMAN RIGHTS FOR SUCCESSFUL HUMANITARIAN AID

*Scot W. Greenwood**

Armed conflict between sovereign states creates many problematic issues that civilized societies must address. Reconstruction of war torn nations is restricted by human rights violations, both during and following armed conflict, and the difficulty of providing humanitarian aid to refugees and internally displaced persons (IDPs).¹ These problems often go hand in hand, as most refugees and IDPs are the victims of human rights violations suffered at the hands of conflicting parties.² In recent years, many conflict areas have received humanitarian aid and benefited from the involvement of foreign governments to the extent that “nation-building” has become a common term associated with humanitarian aid in post-conflict situations. However, due to the complexity of many of the problems faced by refugees and IDPs, the effectiveness of humanitarian aid and nation-building efforts as a whole is variable.

One of the most important elements to ensure that humanitarian aid is successful is the need to maintain protection for refugees and IDPs while assistance is being provided.³ Protection for refugees and IDPs must be provided concurrently with humanitarian efforts to facilitate proper reintegration with society.⁴ More importantly, ensuring that a legal system is in place to adequately address human rights violations is an essential component to providing protection and ensuring that humanitarian aid and nation-building efforts have sustainable, long-term positive effects.⁵ The necessary protection that must accompany

* J.D., University of Denver College of Law, 2003; B.S. Purdue University, 1996. Scot W. Greenwood is an associate with the law firm of Retherford, Mullen, Johnson & Bruce, LLC in Colorado Springs, Colorado. The author would like to thank Paolo Artini, Henry Lovat, and Rachel Bayani for the opportunity and their aid in studying these issues firsthand in Bosnia and Herzegovina.

1. See DAVID A. KORN, *EXODUS WITHIN BORDERS: AN INTRODUCTION TO THE CRISIS OF INTERNAL DISPLACEMENT* 3 (1999).

2. See NORTH ATLANTIC TREATY ORGANIZATION (NATO), *NATO'S ROLE IN RELATION TO THE CONFLICT IN KOSOVO* (July 1999), available at <http://www.nato.int/kosovo/history.htm> (last visited July 17, 2003).

3. See KORN, *supra* note 1, at 100-101.

4. See *id.* at 100.

5. See LAWYERS COMMITTEE FOR HUMAN RIGHTS (LCHR), *KOSOVO: PROTECTION AND PEACE-BUILDING, PROTECTION OF REFUGEES, RETURNEES, INTERNALLY DISPLACED PERSONS, AND*

returning refugees and IDPs cannot be adequately maintained if ongoing human rights violations go unpunished and unresolved.⁶ Refugees and IDPs will not feel safe and secure within the society in which they are attempting to be reintegrated without an effective legal system that addresses human rights claims.⁷ The efforts of humanitarian aid organizations will founder without the presence of an effective judiciary.⁸ The sense of protection provided by a just and functioning legal system will enable humanitarian aid efforts to reach their maximum potential.⁹

The necessity of protecting human rights with a functioning judiciary in order to support successful humanitarian aid effects can be evidenced by an examination of three recent post-conflict situations, namely Bosnia and Herzegovina (BiH), Kosovo, and East Timor. This article will briefly describe the conflicts that occurred in these areas, the human rights violations associated with these areas, and the major problems with the judicial systems of these areas following the cessation of hostilities that allowed on-going human rights violations to occur. The applicable human rights law and judicial mechanisms employed regarding

MINORITIES 4 (1999), available at http://www.lchr.org/archives/arc_refs/feature/kosovo/peacebuilding.htm (last visited July 17, 2003). Physical safety and other protection concerns can only be addressed in the presence of a functioning civil authority and security presence. *Id.* In the case of Kosovo, the initial absence of these institutions resulted in serious threats to the human rights protection situation of refugees, returnees, IDPs, and minorities, as well as effecting long-term prospects for reconciliation and future peaceful co-existence. *Id.* The delayed arrival of a functioning civil administration under the United Nations Mission in Kosovo (UNMIK) allowed for escalation of violence and crime to occur with virtual impunity, thus making the security situation more precarious. *Id.*

6. "The failure to address past and ongoing violations of international humanitarian and human rights law promptly and effectively, and to create a sense of law and order, can impede the broader objectives of a humanitarian operation." Hansjorg Strohmeyer, *Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor*, 95 AM. J. INT'L L. 46, 47 (2001). "A functioning judicial system can positively affect reconciliation and confidence-building efforts within often highly traumatized post-crisis societies, not least because it can bring justice to those responsible for grave violations of international humanitarian and human rights law." *Id.* at 60.

7. See Strohmeyer, *supra* note 6, at 46-47. "The lack of adequate law enforcement and the failure to remove criminal offenders can inevitably affect both the authority of the mission and the local population's willingness to respect the rule of law." *Id.* at 60. See LAWYERS COMMITTEE ON HUMAN RIGHTS (LCHR), KOSOVO: A FRAGILE PEACE (2000), available at http://www.lchr.org/archives/arc_refs/feature/kosovo/kosovofeature.htm (last visited July 17, 2003) [Hereinafter LCHR: KOSOVO]. "The lack of effective judicial and policing mechanisms is a key factor in perpetuating a climate of insecurity in Kosovo." *Id.*

8. The humanitarian experience gained from Kosovo has proven that, although the initial strategy of the operations of giving priority to traditional peace-building efforts (including ensuring peace and security and facilitating refugee return), the administration of justice must be considered a top priority from the outset. Hansjorg Strohmeyer, *supra* note 6, at 47. "When post-conflict reconstruction fails, international donors are discouraged, confidence is undermined within the society, and the very professional and business people needed for reconstruction may leave." KORN, *supra* note 1, at 119.

9. For humanitarian aid efforts to be successful on a society wide basis (i.e. "nation-building"), they must be able to "function within a framework of law and order," and there must be a judiciary that can perform "minimal judicial and prosecutorial functions" established at the earliest stages. See Strohmeyer, *supra* note 6, at 47-48. Successful humanitarian aid operations have been shown to "generate confidence between opposing parties or lessen tension between them, for instance by alleviating human sufferings on both sides." Tatsuro Kunugi, *The Strategy of Humanitarian Assistance*, 24 U.N. CHRON. 54 (1987).

protection of human rights in these areas will also be examined, with particular emphasis placed on the need for a strong judicial system in aiding these mechanisms to function. Also presented is (i) evidence that the protection of human rights is an important component in allowing humanitarian aid and nation building efforts to be successful and (ii) evidence demonstrating that the international community must play a vital role in strengthening the judicial systems of these post-conflict areas.

Lastly, this paper will examine the importance of insuring a strong, functioning judicial system to protect the human rights of refugees and IDPs in the context of two more recent conflicts, namely Afghanistan and Iraq. This article will demonstrate the vital role played by the international community in rebuilding post-conflict judiciaries; specifically, for any post-conflict judicial system to adequately protect human rights and allow for successful humanitarian aid efforts, discussion will highlight the necessity of international community involvement in Afghanistan and Iraq.

BOSNIA AND HERZEGOVINA

The Conflict in Bosnia and Herzegovina

Following the succession of the Republics of Slovenia and Croatia from the former Socialist Federal Republic of Yugoslavia in 1991,¹⁰ the wars that followed this succession and the recognition of Slovenia and Croatia as independent nations by the international community, BiH declared its own independence from the Socialist Federal Republic of Yugoslavia on April 5, 1992.¹¹ Following this declaration of independence, various ethnic groups vied for territorial control within BiH, most notably Bosnian Serbs, who desired to remain with Serbia to form a "greater Serbian" nation, and Croats, who desired Herzegovina to become part of newly independent Croatia.¹² This conflict was finally resolved with the

10. Slovenia and Croatia succeeded from the Socialist Federal Republic of Yugoslavia on June 25, 1991 following the results of an earlier national referendum. Bola Ajibola, *Human Rights in the Federation of Bosnia-Herzegovina*, 12 CONN. J. INT'L L. 189 (1997).

11. See MISHA GLENNY, *THE BALKANS: NATIONALISM, WAR AND THE GREAT POWERS, 1804-1999* 638 (1999). In January of 1992, Bosnia - Herzegovina (BiH) and Macedonia informed the European Community that they sought recognition as independent states, however BiH was denied at this time. Ajibola, *supra* note 10, at 189. "Bosnia-Herzegovina was the third largest republic in former Yugoslavia with an estimated population of 4.35 million. It had the most diverse population of the republics with no one nationality comprising a majority. Ethnic Muslims: a South Slavic, Serb-Croat speaking people of Islamic faith, have a plurality comprising 43.7 percent; next are the ethnic Serbs with 31.3 percent, and Croats with 17.3 percent. Approximately 5.5 percent of the population of Bosnia-Herzegovina consider themselves ethnic Yugoslavs. The ethnic distribution of Bosnia-Herzegovina before 1993 was quite diverse and different nationalities were not concentrated in any particular area." *Id.* at 190.

12. See GLENNY, *supra* note 11, at 638. "Six months after the outbreak of the war, the Yugoslav crisis had assumed serious international dimensions. The United States, Germany, Britain and France, Greece, Turkey, Russia, Iran and a number of Middle Eastern countries all pursued widely different policies with regard to Croatia and Bosnia-Herzegovina. The difficulty in reconciling these became

signing of the General Framework Agreement for Peace in Bosnia and Herzegovina (GFAP) in Paris on December 14, 1995.¹³ However, by the time the fighting had halted, it displaced an estimated 640,000 to 800,000 refugees and IDPs.¹⁴

The GFAP not only ended four years of conflict within BiH, but also ended a conflict "marked by brutal human rights violations on a scale not witnessed in Europe since the end of World War II."¹⁵ Human rights violations involving violence, such as rape and murder were common during the conflict, however, violent human rights abuses continued throughout BiH following the formal end of the conflict. Many of these abuses were experienced by refugees and IDPs returning to their homes following the signing of the GFAP, which guaranteed all displaced persons the right to return to their pre-war home of origin.¹⁶ Refugees and IDPs were subjected to ethnic discrimination, political intimidation, and discrimination in terms of employment, education, and violent abuses throughout BiH.¹⁷ More specifically, minority returnees and IDPs that returned to their former places of displacement were subjected to human rights abuses and thus could not adequately be re-integrated into a functioning civil society.

For example, in the northwestern Bosnian city of Velika Kladusa, a city that experienced one of the highest refugee return rates in BiH following the end of the conflict, returnees and IDPs that had been associated with the Demokratska Narodna Zajednica (DNZ) political party were subjected to ongoing human rights abuses.¹⁸ Supporters of the DNZ had actively fought against the Fifth Corps of the

insuperable when violence broke out in Bosnia, three months after the peacekeepers arrived in Croatia in January 1992. With encouragement from the Americans, Izetbegović opted for independence on 5 April, an injudicious move for a government with limited military resources and two potential enemies. The Bosnian Serbs rejected the declaration and the fighting began." *Id.*

13. Brett Dakin, *The Islamic Community in Bosnia and Herzegovina v. The Republika Srpska: Human Rights in a Multi-Ethnic Bosnia*, 15 HARV. HUM. RTS. J. 245, 247 (2002). See Christine Chinkin & Kate Paradine, *Vision and Reality: Democracy and Citizenship of Women in the Dayton Peace Accords*, 26 YALE J. INT'L L. 103 (2001). "The reconstruction envisaged by the GFA required attention to the 'most difficult problems of a modern society' . . . The GFA attempts to address these problems through three strategies: provision for democratic elections; international controls to ensure compliance with its vision; and human rights guarantees." *Id.* at 106. The negotiations for the GFAP were conducted in November, 1995 at the Wright-Patterson Air Force Base near Dayton, Ohio, and as a result, the GFAP is commonly referred to as the Dayton Peace Agreement. Dakin, *supra*, at 247.

14. UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR), OFFICE OF THE SPECIAL ENVOY – EXTERNAL RELATIONS UNIT, BH REFUGEES IN OTHER COUNTRIES OF FORMER YUGOSLAVIA, June 1996.

15. Dakin, *supra* note 13, at 247.

16. This is evidenced by the Constitution of the Federation of BiH which states, "All refugees and displaced persons have the right to freely return to their homes of origin." Ajibola, *supra* note 10, at 193.

17. Interview with Oliver Schmidt-Gutzat, Human Rights Officer and Head of Velika Kladusa Field Office, Organization for Security and Cooperation in Europe, in Velika Kladusa, BiH (June 7, 2001); Interview with Kanson Dean, Velika Kladusa Station Commander, International Police Task Force, in Velika Kladusa, BiH (June 7, 2001); Interview with Husein Delić, Mayor, Velika Kladusa, in Velika Kladusa, BiH (June 7, 2001).

18. Interview with Oliver Schmidt-Gutzat, *supra* note 17; Interview with Kanson Dean, *supra* note 17; Interview with Husein Delić, *supra* note 17. The Demokratska Narodna Zajednica (DNZ) was

Bosnian Army during the war. Following the return of DNZ affiliated individuals, tensions remained high between supporters of the Bosnian army and supporters of the DNZ.¹⁹ In the Summer of 2001, over five years after the signing of the GFAP, human rights violations continued to occur involving the local citizenry, largely associated with the DNZ (90%), and the local police force, which is affiliated with the Party of Democratic Action—the primary political wing of the opposition to Fikret Abdić's former army.²⁰ Human rights abuses by Velika Kladusa police became so widespread that the local citizens trusted only the international community and felt that only the local International Police Task Force (IPTF) presence kept the local police from initiating acts of revenge.²¹

In Velika Kladusa, DNZ affiliated returnees and IDPs also experienced human rights violations in other areas. Teachers affiliated with DNZ in the Velika Kladusa region were denied available jobs, even though the applicants were completely qualified (some having received teaching awards).²² Job postings were still advertised following the rejection of qualified DNZ-affiliated applicants.²³ Children of DNZ affiliated returnees were also removed from the local school and were not allowed to attend class based upon their parent's political affiliation.²⁴ These abuses are violations of the applicable human rights laws in place in BiH and could be countered by the presence of a strong judiciary enforcing these human rights laws. Although a mechanism had been created under the GFAP to investigate and address human rights violations, one of the primary causes of these on-going abuses was that the judicial system in BiH was too weak to enforce the applicable law.²⁵ The international community needed to address this issue and take steps to strengthen the judiciary. Before discussing this GFAP judicial mechanism, the steps taken to strengthen its effectiveness, and the impact of strengthening the judiciary on refugee return and humanitarian aid efforts, the applicable human rights law in BiH requires examination.

a political party created in part by Fikret Abdić. *Sarajevo Government; Muslim Rebel Fikret Abdić Returns to Politics with a New Party*, British Broadcasting Corporation Summary of World Broadcasts, Mar. 3, 1996, EE/D2551/A. Fikret Abdić was a former Bosnian businessman who started Agrokomerc, an agricultural firm that was one of the largest food processing companies in the former Yugoslavia. *Id.*; *Fikret Abdić Reaffirms Faith in Zagreb and Belgrade Peace Declarations*, British Broadcasting Corporation Summary of World Broadcasts, Nov. 3, 1993, EE/1836/C. During the conflict, Bosnians loyal to Fikret Abdić in and around the city of Bihać took up arms and fought against the Fifth Corps of the Bosnian army. *Bihać; Belgrade TV Says Rebel Muslims Refugees are Returning to Velika Kladusa*, British Broadcasting Corporation Summary of World Broadcasts, Apr. 25, 1995, EE/2286/C; Samantha Power, *U.N. Fears for Civilians in Bihać*, UPI, Aug. 11, 1994, LEXIS, Nexis Library, UPI File. As a result, many Bosnians returning to the area face hostility either because they fought with Abdić's army or they are affiliated with DNZ. Interview with Oliver Schmidt-Gutzat, *supra* note 17; Interview with Kanson Dean, *supra* note 17.

19. Interview with Oliver Schmidt-Gutzat, *supra* note 17.

20. *Id.*

21. Interview with Kanson Dean, *supra* note 17.

22. Interview with Oliver Schmidt-Gutzat, *supra* note 17.

23. *Id.*

24. *Id.*

25. *Id.*; Interview with Husein Delić, *supra* note 17.

Applicable Human Rights Law in BiH

The Constitution of BiH, contained within Annex 4 of the GFAP, incorporates international human rights instruments directly into enforceable domestic law, including the Universal Declaration of Human Rights (UDHR).²⁶ The GFAP provides that the governing bodies established under the treaty, "shall secure to all persons within their jurisdiction the highest level of internationally recognized human rights and fundamental freedoms."²⁷ Such rights "will be secured by adhering to a number of treaties including the European Convention and the International Covenant on Civil and Political Rights (ICCPR)."²⁸ "An extensive annex of conventions is also incorporated as law . . .," which includes the ICCPR, the 1966 and 1989 Optional Protocols thereto and the 1966 Covenant on Economic, Social and Cultural Rights (ICESCR).²⁹ According to Ajibola:

The instruments themselves were carefully selected with a view to ensuring that only those of United Nations or world-wide significance were incorporated. An additional feature is that with the exception of the Universal Declaration (which is of fundamental importance), all others are prescriptive and are intended to impose legal obligations. By incorporating them directly into the Constitution, they are enforceable domestically and require no separate incorporating legislation.³⁰

In fact, "the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), including its Protocols, is directly applicable law and has priority over all other law at both the national and entity level."³¹ The Constitution of BiH also requires that the country become or remain "a party to listed U.N. and regional human rights instruments, including treaties that are not yet in force and treaties that have attracted significant reservations from other state parties."³² Thus, laws guaranteeing internationally recognized standards of human rights are now in place in BiH and directly applicable as domestic law.³³ The

26. See Chinkin & Paradine, *supra* note 13, at 107; The Universal Declaration of Human Rights (UDHR), the 1966 International Covenant on Civil and Political Rights (ICCPR), and the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) collectively constitute the "International Bill of Rights." Carla Bongiorno, *A Culture of Impunity: Applying International Human Rights Law to the United Nations in East Timor*, 33 COLUM. HUM. RTS. L. REV. 623, 635 (2002).

27. Henry Perrit, Jr. & Christopher Lhulier, *Focus on Cyberlaw: Information Access Based on International Human Rights Laws*, 45 BUFF. L. REV. 899, 911 (1997).

28. *Id.*

29. Timothy W. Waters, *The Naked Land: The Dayton Accords, Property Disputes, and Bosnia's Real Constitution*, 40 HARV. INT'L L.J. 517, 530 n. 40 (1999).

30. Ajibola, *supra* note 10, at 192.

31. Waters, *supra* note 29, at 530. The governmental structure created under the GFAP includes a national level federal government and two subordinate government "entities," the Federation of Bosnia and Herzegovina and the Republika Srpska. *Id.*

32. Chinkin & Paradine, *supra* note 13, at 107.

33. "Each of these instruments is immediately enforceable at the domestic level, making Bosnia's system of human rights protection stronger, at least on paper, than that of most countries." Dakin, *supra* note 13, at 248. The UDHR was deemed to be applicable during the conflict preceding the signing of the GFAP. See Geoffrey S. DeWeese, *The Failure of the International Court of Justice to Effectively Enforce the Genocide Convention*, 26 DEN. J. INT'L L. & POL'Y 625, 635 (1998). Bosnia

international community had taken the initial step in strengthening the judicial system in BiH by determining the human rights law to be applied following the conflict.

The next section will examine the judicial mechanism created under the GFAP to address violations of human rights in BiH. This section will be followed by a discussion of the effectiveness of this judicial mechanism, the necessity of the presence of the international community in allowing this mechanism to function, and the impact of increased judicial enforcement of human rights violations on the success of humanitarian aid efforts.

The Commission on Human Rights

The Agreement on Human Rights, contained in Annex 6 of the GFAP, established the Commission on Human Rights, which is composed of the Human Rights Ombudsman and the Human Rights Chamber.³⁴ According to Dakin:

The Ombudsman, appointed by the Organization for Security and Cooperation in Europe (OSCE), is responsible for investigating alleged or apparent violations of human rights guaranteed by the constituent agreements of the Dayton Peace Agreement. Following any investigation, the Ombudsman may issue a report setting out his or her findings and legal conclusions, facilitate a friendly settlement, or refer the case to the Human Rights Chamber.³⁵

The Human Rights Chamber issues decisions that are binding within all of the governmental entities in BiH.³⁶ The Human Rights Chamber allows individuals, associations, non-governmental organizations, and governments to bring a private right of action against all three of the governmental bodies in BiH.³⁷ Before an application to the Human Rights Chamber is accepted, “the Chamber must consider if effective remedies are available to the applicant through relevant

petitioned the International Court of Justice (ICJ) on March 20, 1993, claiming that the Federal Republic of Yugoslavia had violated the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the Geneva Conventions of 1949, the Hague Regulations on Land Warfare of 1907, the UDHR, the UN Charter, and other principals of customary international law. *Id.* at 634. In ruling on these claims, the ICJ “determined that both Bosnia and Yugoslavia had succeeded to the commitments of the former Socialist Federal Republic of Yugoslavia.” *Id.* at 635. Thus, by succession, the UDHR had been applicable in Bosnia before the GFAP was signed and the Bosnian Constitution drafted.

34. Dakin, *supra* note 13, at 249. “The Ombudsman system, which is of Scandinavian origin, has been employed and it has had a varying degree of success in many countries outside its native environment. Its success largely depends on how persistent (one might say stubborn) the Ombudsman is in unearthing abuses and pursuing remedies of redress.” Ajibola, *supra* note 10, at 194.

35. Dakin, *supra* note 13, at 249.

36. *Id.* The judges of the Human Rights Chamber represent the people of BiH in the following manner: “six judges are Bosnian (two Muslims and two Croats appointed by the Federation, and two Serbs appointed by the Republika Srpska), while the remaining eight judges, appointed by the Council of Europe, are citizens of countries other than Bosnia or any neighboring state.” *Id.* The president of the Human Rights Chamber is designated from the eight international judges by the Council of Europe. *Id.* at 250.

37. *Id.*

domestic courts or administrative agencies.”³⁸ Once the Chamber accepts an application, it requests written observations from the two parties involved.³⁹ Following the receipt of the written observations, the Chamber deliberates and chooses a course of action, which can include the facilitation of friendly settlement, the adoption and delivery of a legally binding decision, or the ordering of the respondent party to take provisional measures.⁴⁰ The Chamber handles cases involving the right of individuals to return to their pre-war homes and “has also issued decisions in cases concerning torture and detention, the death penalty (which it declared illegal), employment discrimination, pension rights, and environmental degradation.”⁴¹

Thus, the Human Rights Agreement created a system in Bosnia to specifically address human rights violations. However, violations continued to persist following the establishment of the Human Rights Ombudsman and the Human Rights Chamber, primarily as a result of lack of enforcement and overall judicial weakness. This mechanism could not function properly without the international community providing for enforcement of the Human Rights Chamber decisions and strengthening of the overall judicial system.

The Enforcement Problem, the Ferhadija Mosque Decision, and the Strengthening of the Judiciary by the International Community

The Human Rights Chamber has no enforcement body to carry out its decisions and it must therefore rely on the good faith of the respondent party for enforcement.⁴² Therefore, the Human Rights Chamber must rely on other international bodies, such as the North Atlantic Treaty Organization (NATO) Stabilization Force, the IPTF, the OSCE, and the United Nations (UN) Office of the High Representative to provide enforcement of the Human Rights Chamber decisions.⁴³ This lack of enforcement has caused decisions of the Human Rights Chamber to go unimplemented, however, following an overall strengthening of the judicial system throughout BiH, “implementation rates have steadily increased since the Chamber’s first decision was issued in 1996, but the Chamber still struggles to achieve full compliance.”⁴⁴ It appears from the necessity of international enforcement of the Human Rights Chamber’s decision regarding the Ferhadija Mosque, that without a strengthening of the judicial system by the international community, the Chamber would not be able to adequately address human rights violations in BiH.⁴⁵

38. *Id.* at 251.

39. *Id.*

40. *Id.* “A provisional measure allows the Chamber to stop the respondent party’s activity of which the applicant complains while the Chamber further deliberates on the merits of the case.” *Id.* at 255.

41. *Id.* at 252. “As of December 2001, 8481 applications had been registered with the Chamber.” *Id.* As of that time, the Chamber had issued 1033 decisions. *Id.*

42. *Id.* at 259.

43. *Id.* at 259-260.

44. See Dakin, *supra* note 13, at 260.

45. See *id.* at 267-268.

The Ferhadija Mosque, destroyed during the conflict, was one of the largest and most famous mosques in Bosnia. Permits for its reconstruction had been repeatedly denied following a Human Rights Chamber decision holding that disallowing reconstruction was a violation of the right of Muslims to freely manifest their religion as guaranteed by Article 9 of the ECHR.⁴⁶ Following this decision, the respondent party, the Republika Srpska, initially failed to grant the reconstruction permit.⁴⁷ Thus, the respondent party did not adequately address an on-going violation of human rights. Therefore, the goal of humanitarian aid agencies in restoring a civil society was being undermined by the refusal to protect the fundamental human right of returnees to “freely manifest their religion.” The judgment of the Human Rights Chamber was eventually implemented following “persuasive action against the Republika Srpska by the international community.”⁴⁸

The authorities of the Republika Srpska eventually issued the permit to reconstruct the Ferhadija Mosque;⁴⁹ however, judicial enforcement had to be strengthened by the international community before the decision would be honored. This case demonstrates that in order for humanitarian aid efforts to be a success, there lies a need for a strong judiciary with the purpose of enforcing human rights laws. If the judiciary was unable to enforce the decision of Human Rights Chamber regarding the Ferhadija Mosque, violations of the right to freely manifest one’s religion would continue and the goal of restoring a civil society where human rights are protected would be unobtainable. In this case, the international community had to provide the enforcement to strengthen the judiciary and render the decision of the Human Rights Chamber effective. Lacking the presence of a strong judiciary to enforce the decisions of the Human Rights Chamber, this mechanism would be inadequate in protecting the human rights of individuals in BiH, especially refugees returning to areas where they are a minority. A strong judiciary must be present in BiH, especially considering that there exists an agreement, which merges the Human Rights Chamber with the BiH court system.⁵⁰

As for wide scale human rights abuses, such as those described in Velika Kladusa, the High Representative⁵¹ has recognized the need for a strong judiciary

46. *Id.* at 259.

47. *Id.* at 267.

48. *See id.* at 268. “Some members of the Islamic Community argued that the only way to begin reconstruction would be for the High Representative to simply impose the Chamber’s decision on the local authorities.” *Id.* at 267.

49. *Id.* at 268. The permit for the Mosque’s reconstruction was granted on March 24, 2001. *See* Human Rights Co-ordination Center, HRCC Human Rights Report: 01 September 2000 – 31 March 2001 I (2001).

50. *See* Dakin, *supra* note 13, at 265. Under an agreement signed on November 10, 2000, the Human Rights Chamber is to operate in the same manner as it has since 1995 until December 31, 2003. *See* Human Rights Co-ordination Center, *supra* note 49, at 49.

51. The Office of the High Representative (OHR) is the working arm of the United Nations High Representative. With the complete backing of the international community, the High Representative represents the highest rule of law currently existing in BiH. The High Representative has the authority to enact laws that are binding on the government entities and citizens of BiH. *See* <http://www.ohr.int/>.

in protecting the human rights of returnees and IDPs. In December 2000, "the High Representative established the Independent Judicial Commission (IJC) to provide a consolidated, comprehensive, and assertive approach to the identification and implementation of reforms to the justice sector."⁵² The IJC "has become the lead international agency for judicial reform and promotion of the rule of law throughout BiH, and will co-ordinate, consolidate and accelerate reform activities."⁵³ Furthermore, training in human rights law was employed to help guard minority returnees from human rights abuses:

A comprehensive three-year training program on the ECHR and European legal standards was initiated in June 2000 by the Council of Europe with one year of funding provided by the United States of America. Between September 2000 and June 2001 over 250 judges and prosecutors will have attended a one week training course, out of which a selected few will therefore receive specialized training on how to conduct training courses themselves. Despite the fact that the ECHR has been part of domestic law since, at least, December 1995, most judges were ignorant of both the substance of the Convention and its status in the country. Strengthening the functioning and independence of the judiciary through developing local capacity is an important element of this programme.⁵⁴

Mandated by the international community, these improvements to the judiciary will help address widespread human rights abuses in BiH.

The positive effect of the international community's bolstering of the enforcement of Human Rights Chamber decisions and overall strengthening of the judiciary on refugee and IDP return can be demonstrated by the increase in the number of property claims that were resolved by the government.

"In February and March 2001, the Human Rights Chamber ruled that the non-enforcement of the decisions of the (CRPC) [Commission for Real Property Claims] constitutes a violation under the European Convention for the Protection of Human Rights and Fundamental Freedoms and awarded the CRPC decision-holders non-pecuniary damages. The Human Rights Chamber's decisions further protect the rights of CRPC decision-holders. . . With the consistent pressure of the International Community, more and more displaced persons and refugees have been able to return with the assistance of CRPC decisions, which operated as a check on a domestic system which is not yet fully impartial or independent."⁵⁵

Thus, as demonstrated above, a strong judiciary is crucial to the success of humanitarian aid efforts. As a result of the international community strengthening the judiciary by enforcing the Human Rights Chamber decisions and reforming domestic judicial institutions, protection of the human rights of refugees and IDPs has increased. In addition, their prospects for integration into a post-war civil society have greatly improved.

52. See Human Rights Co-ordination Center, *supra* note 49, at 16.

53. *Id.*

54. *Id.* at 17.

55. *Id.* at 46. The Commission for Real Property Claims of Displaced Persons and Refugees (CRPC) collects claims by refugees and IDPs related to properties in BiH and issues decisions. *Id.*

KOSOVO

The Conflict in Kosovo

Kosovo is a small region within Serbia and Montenegro, the state formerly known as the Federal Republic of Yugoslavia (FRY).⁵⁶ Located in southern Serbia, the province of Kosovo is bordered by Montenegro, Albania, and the Former Yugoslav Republic of Macedonia.⁵⁷ Totalling around 90 percent of the inhabitants of Kosovo in 1991, ethnic Albanians comprised the majority of the population.⁵⁸

High tensions between Serbs and Albanians flared in 1998 and resulted in open conflict between Serbian military and police forces and Kosovar Albanians, organized into the Kosovo Liberation Army (KLA).⁵⁹ Throughout 1998, over 1,500 Kosovar Albanians were killed and more than 400,000 people were driven from their homes.⁶⁰ The international community soon became concerned over the situation in Kosovo. Considering the impacts that had resulted to the former republics of Yugoslavia from earlier wars, NATO threatened the use of air strikes unless Serbian leaders accepted an agreement that would limit the presence of Serbian troops in Kosovo.⁶¹ Under this pressure, President Milošević agreed to withdraw the bulk of Serbian and Yugoslav army forces from the region, thus preventing the air strikes.⁶² However, tensions again flared at the beginning of 1999 and the continuation of the threat of air bombardment resulted in the ill-fated Rambouillet Agreement of February 1999.⁶³

The negotiations known as the Rambouillet Agreement ended problematically with the Kosovar Albanian delegation signing the proposed agreement and the Serbian delegation refusing to sign.⁶⁴ Following the rejection of the Rambouillet Agreement, Serbian military forces began to increase their efforts against the

56. See UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR), OFFICE OF THE SPECIAL ENVOY – EXTERNAL RELATIONS UNIT, *BH REFUGEES IN OTHER COUNTRIES OF FORMER YUGOSLAVIA*, June 1996. Following the breakup of the Socialist Federal Republic of Yugoslavia, the Federal Republic of Yugoslavia was comprised of the republics of Serbia and Montenegro. *Id.* On February 4, 2003 the Yugoslav parliament approved a constitution creating the state of Serbia and Montenegro and formally dissolving the Federal Republic of Yugoslavia. Jean-Eudes Barrier, *Serbia and Montenegro on Thin Ice: Djukanovic*, Agence France Presse, Feb. 7, 2003.

57. See NATO, *supra* note 2.

58. *The National Composition of Yugoslavia's Population, 1991*, YUGOSLAV SURVEY 1, 3-24 (1992).

59. See NATO, *supra* note 2. The KLA was demilitarized and officially disbanded on September 20, 1999, thus it no longer formally exists. LAWYER'S COMMITTEE FOR HUMAN RIGHTS, *A FRAGILE PEACE: LAYING THE FOUNDATION FOR JUSTICE IN KOSOVO 16* (1999), available at <http://www.lchr.org/pubs/descriptions/kosovofull11099.htm> (last visited June 20, 2003) [hereinafter *A FRAGILE PEACE*].

60. See NATO, *supra* note 2.

61. *Id.*

62. *Id.*

63. See *id.*

64. *Id.*

ethnic Albanians in Kosovo.⁶⁵ This acceleration of artillery and manpower caused thousands more to flee their homes as refugees and IDPs.⁶⁶ On March 23, 1999, air strikes initiated by NATO began against the FRY.⁶⁷

The air campaign lasted a total of seventy-seven days and ended on June 10, 1999 with the full withdrawal of Yugoslav forces from Kosovo.⁶⁸ Following this withdrawal, NATO changed its mission objectives to returning refugees and IDPs to their homes and restoring a lasting peace in Kosovo.⁶⁹ This mission was to be carried out under the auspices of the UN, which had sanctioned Yugoslavia's acceptance of a peaceful solution by announcing the Security Council's intention to deploy an international civil and security presence in Kosovo.⁷⁰ The UN Mission in Kosovo (UNMIK) was established on principles that it would end the violence in Kosovo, demilitarize the KLA, deploy an international security force, establish a political process providing for self government, establish an interim administration, and facilitate the safe return of all refugees.⁷¹ The Kosovo Security Force (KFOR) was deployed simultaneously with the withdrawal of the Federal Republic military presence.⁷² During the course of the ethnic cleansing, thousands of ethnic Albanian Kosovars were killed "by Serb forces and tens of thousands more were subjected to arbitrary arrest, torture, rape, and other human rights crimes."⁷³ Once peace was finally restored in Kosovo, refugees began to return at a speed unparalleled following past conflicts.⁷⁴ By the time the first official UN sanctioned return of 300 ethnic Albanians to Kosovo occurred on June 28, 1999, "nearly half of the 860,000 refugees who fled to Albania and Macedonia had already ignored warnings of danger and returned home."⁷⁵

Following the conflict, humanitarian aid reached Kosovo and efforts to restore a civil society and increase the general welfare began.⁷⁶ However, human rights violations were widespread, causing many refugees and IDPs not to return. In fact some fled abuse, frustrating humanitarian aid and nation-building efforts.⁷⁷ For example, upon the return of refugees to their homes, many Serbs remaining in Kosovo were driven north due to reprisals or fear of ethnic Albanians.⁷⁸ The United Nations High Commission for Refugees (UNHCR) has estimated that 210,000 non-Albanian refugees have fled Kosovo following the arrival of NATO

65. *Id.*

66. *See id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. LCHR: KOSOVO, *supra* note 7, at 2.

74. *See id.*

75. *Kosovo Refugees Go Home*, THE MIRROR, June 29, 1999, at 2.

76. *See* NATO, *supra* note 2.

77. *See* A FRAGILE PEACE, *supra* note 60, at 2.

78. *See* UN: 210,000 Non-Albanian Refugees from Kosovo, UPI, May 23, 2000, LEXIS, Nexis Library, UPI File.

troops during June 1999.⁷⁹ In September 1999, the number of Serbs left in Kosovo was estimated at around 97,000 and it is estimated that by October 1999, 75 percent of Kosovo's Serbs had left the province.⁸⁰ Those that remained in Kosovo were subject to the fear and perpetration of ongoing human rights violations.⁸¹ Preceding the cessation of violence in Kosovo, Serbs and other minorities were reportedly confined to their apartments 24 hours a day, or at least, could not leave their enclaves without KFOR escorts.⁸² Because the human rights of these Serbs could not be protected, their access to markets, health care, and other services were seriously restricted, which forced them almost entirely to depend on direct assistance delivered by UNHCR and other humanitarian organizations.⁸³ This situation demonstrates that the initial weakness of the legal system established by UNMIK was eroding efforts of humanitarian organizations to provide effective humanitarian aid.⁸⁴ A sense that human rights were not being protected and remedies for violations were unavailable had undermined the sense of protection that must accompany humanitarian efforts in order for them to be successful.⁸⁵

Applicable Human Rights Law in Kosovo

UN Security Council Resolution (UNSCR) 1244 (1999) authorized the Special Representative of the Secretary General to determine the laws that were applicable within the framework of the newly established legal system.⁸⁶ This resulted in Regulation No. 1999/1 on the Authority of the Interim Administration in Kosovo, which stipulates:

The laws applicable in the territory of Kosovo prior to 24 March 1999 shall continue to apply in Kosovo insofar as they do not conflict with the standards referred to in section 2(16), the fulfillment of the mandate given to UNMIK under UN Security Council resolution 1244 (1999), or the present or any other regulation issued by UNMIK.⁸⁷

UNMIK's interpretation was that those provisions of FRY and Serbian laws in force on March 23, 1999, "insofar as they were consistent with internationally

79. *Id.*

80. A FRAGILE PEACE, *supra* note 60, at 2.

81. *See id.* "Serbs continue to be the primary target of violent attacks, including killings, beatings and forced evictions, which are often followed by the looting and torching of houses. In addition, threats and intimidation against Serbs continue to be reported almost daily by UNHCR and KFOR." *Id.*

82. *Id.*

83. *Id.*

84. *See Strohmeier, supra* note 6, at 60. "The inability to react swiftly to crime and public unrest, particularly in postconflict situations when criminal activity tends to increase, and the failure to detain and convict suspected criminals promptly and fairly, can quickly erode the public's confidence in the United Nations. . . . Thus, the establishment of effective judicial institutions can be critical to the long-term success of a mission and the sustainability of its governance and democratic-institution-building efforts." *Id.* at 60.

85. *See A FRAGILE PEACE, supra* note 60, at 2-3.

86. *See id.* at 4.

87. *See id.*

recognized human rights standards," constituted the law that was to be applied to human rights violations.⁸⁸ However, this applicable law was contested by Kosovar judges, prosecutors, and lawyers who refused to apply the Serbian Criminal Code.⁸⁹ They saw it as discriminatory and argued that the applicable law should include the Kosovo Criminal Code, which had been in force until it was revoked by the Serbian Parliament in 1989.⁹⁰ These members of the legal system saw the revocation of the Kosovo Criminal Code as unconstitutional in relation to the FRY Constitution and, therefore, illegitimate.⁹¹ Less resistance was shown to the application of the FRY Criminal Code because it had applied to all parts of Yugoslavia before 1991 and had been passed in 1977 with the participation of Kosovo.⁹² To resolve this dispute, the UN:

adopted Regulations 1999/24 and 1999/25, which identified applicable law to be the law in force in Kosovo prior to March 22, 1989, and repealed the provision of Regulation 1999/1 applying contemporary FRY/Serbian law. With this decision, UNMIK identified an acceptable body of law and effectively ended the question of which law to apply. However, this decision was not made, nor was the issue resolved, until the transitional administration had been on-ground for six months.⁹³

Thus, law that had been in force in Kosovo was applied to the extent that it met international standards for human rights protections. International standards became substituted where the law of Kosovo did not meet this level of protection.⁹⁴ It should be noted that during the conflict in BiH, the International Court of Justice had determined that Yugoslavia, and thus the province of Kosovo, was bound to the agreements that were been previously entered into by the former Socialist

88. *Id.*

89. *Id.*

90. *Id.* Interestingly, the Kosovo Criminal Code does not contain provisions covering war crimes or crimes against humanity while the FRY Code details provisions covering these crimes. *Id.*

91. *Id.* During the period of Titoist Yugoslavia, which was assembled following World War II and lasted until the late 1980s, Kosovo existed as an autonomous province within Serbia and participated within the Yugoslav parliament. See MISHA GLENNY, *THE FALL OF YUGOSLAVIA: THE THIRD BALKAN WAR* 31-33 (1996). In the wake of the collapse of communism and the removal of Soviet influence in Yugoslavia, Serbian leader Slobodan Milošević stripped Kosovo of its autonomy in 1989 and brought it directly under the control of Belgrade. See NATO, *supra* note 2. The Kosovar Albanians were left under the control of the Serbian government, with which ethnic Albanians had little sympathy. See *id.*; F.H. Knelman, *Kosovo: A Retrospective*, 32(2) PEACE RES. 48 (2000). "There is no question that the general mood of the ethnic Albanian population of Kosovo welcomed separation and sympathized with the KLA [Kosovo Liberation Army]." *Id.* at 52.

92. A FRAGILE PEACE, *supra* note 60, at 4.

93. Wendy S. Betts et al., *The Post-Conflict Transitional Administration of Kosovo and the Lessons-Learned in Efforts to Establish a Judiciary and Rule of Law*, 22 MICH. J. INT'L L. 371, 375 (2001).

94. The law established to handle human rights violations in Kosovo was formulated by "[u]sing the code of criminal procedure of the Federal Republic of Yugoslavia as its basis, but applying those laws within the framework of recognized international human rights standards." Strohmeyer, *supra* note 6, at 49.

Federal Republic of Yugoslavia, which included the UDHR.⁹⁵

Therefore, the law to be domestically applied to human rights violations in Kosovo was consistent with internationally recognized human rights standards. However, unlike in BiH, a judicial mechanism similar to the Human Rights Commission was not established. Instead, human rights violations were addressed by the newly established UNMIK judicial system applying domestic law that included human rights protections that met international standards. The next section will discuss the problems encountered under this system, steps taken to remedy these problems, and the effects of a stronger judiciary on human rights protections and their effects on refugee and IDP return.

The Problem with the Judiciary in Kosovo, Remedies to Address these Problems, and the Effects of a Stronger Judiciary

The newly established judicial system in Kosovo faced the major problem of the lack of a basic legal framework.⁹⁶ This included confusion as to applicable law,⁹⁷ the lack of resources, and the lack of a physical infrastructure.⁹⁸ The previous administration that had governed Kosovo was completely driven out, therefore, an operating judicial system had to be constructed from the ground up.⁹⁹ The personnel required to administer judicial functions had fled the province or were “tainted by their perceived affiliation with the previous regime;” the courthouses and facilities had been destroyed, looted, and mined; and the laws that were in existence were “politically charged and no longer acceptable to the population and the new political classes.”¹⁰⁰ To remedy these problems, the international community had to strengthen the newly established judiciary by

95. See DeWeese, *supra* note 33, at 634.

96. See Strohmeyer, *supra* note 6, at 58.

97. See A FRAGILE PEACE, *supra* note 60, at 7. At the end of September 1999, the LCHR sent a delegation to Kosovo to assess the effectiveness of the legal system that the international committee had established in Kosovo. *Id.* at 1. The LCHR opinion resulting from this mission stated that, “The fair and effective functioning of the judiciary, and respect for its role within a democratic society, are cornerstones for a viable future in Kosovo based on the rule of law. As a consequence, laying the groundwork for an independent and impartial justice system is an essential task for UNMIK – and one of its most pressing challenges. The persistent lack of effective judicial institutions is a key factor in perpetuating a climate of insecurity in Kosovo. The impact is severe: in the absence of any effective deterrent, the level of crime and violence continues to be high. This applies to ethnically motivated crime against minorities, including murders, abductions, beatings, looting, arson, forced evictions, threats and intimidation, and increasingly also to organized criminal activities which impact on the security situation of all inhabitants of Kosovo. Moreover, enabling the domestic justice system to administer justice with regard to the crimes committed in Kosovo under the previous regime, most notably war crimes and crimes against humanity after March 1998, is of utmost importance for the future of Kosovo. If justice is seen to be done in such cases, tensions between Kosovar Albanians and others, particularly Serbs, may decrease, improving the conditions for dialogue, and, eventually, for peaceful co-existence in Kosovo. If justice is not seen to be done, this will inevitably increase the tension between the Albanian and Serb communities.” *Id.* at 7.

98. See Strohmeyer, *supra* note 6, at 57.

99. See *id.*

100. *Id.* at 48.

deciding the question of applicable law, creating a new legal framework, and rebuilding the legal infrastructure. Otherwise, human rights violations would not be sufficiently addressed and returnees, especially Serbs, would continue to flee the province following return.

A major problem that UNMIK encountered early in the process of establishing a legal framework was the question of applicable law.¹⁰¹ The application of disputed law could cause discrepancies in rulings, which could weaken the confidence of refugees and IDPs in regard to whether they would receive a respectable trial and judgment.¹⁰² If the fear that a high margin of error existed in regard to legal proceedings, a sense of security would be hard to maintain. A flood of appeals due to error could also overload a system already under strain and further weaken confidence in the judiciary.

In the power vacuum present following the end of the hostilities in Kosovo, the judiciary had no clear guidance on what law to apply until the United Nations resolved the problem by issuing Regulations 1999/24 and 1999/25.¹⁰³ As described above, this action by the international community established the applicable domestic law to be consistently applied to human rights violations in Kosovo. This strengthened the judiciary and increased the level of human rights protection for individuals in Kosovo.

Another problem that hampered the development of a legal framework in Kosovo was the lack of substantial resources dedicated to development of an effective and just judiciary.¹⁰⁴ Once the applicable law was established, it was deemed of paramount importance that the resulting codes be translated into all necessary languages and that the laws be reviewed to ensure compliance with the standards set forth by the international community.¹⁰⁵ Furthermore, a system to print and distribute the body of applicable law was recommended to increase reliance on the proper law and reduce the possibilities of procedural error.¹⁰⁶

Translation of draft legislation formulated following the conflict was constricted due to the absence of personnel that possessed the necessary language and specialist knowledge.¹⁰⁷ Four months following the withdrawal of the FRY military presence, UNMIK was not equipped with the financial resources needed to hire qualified translators.¹⁰⁸ This facilitated a period of time in which applicable law was still uncertain and allowed the KLA to fill the power vacuum with an authority that most refugees and IDPs were unlikely to trust.¹⁰⁹ Adequate

101. See A FRAGILE PEACE, *supra* note 60, at 5.

102. See *id.* at 5. Suspects may have been arrested following one set of legal principles and then had a differing set of principles applied during subsequent hearings, therefore, the possibility of procedural error could be quite high. *Id.*

103. See Betts et al., *supra* note 94, at 375.

104. See A FRAGILE PEACE, *supra* note 60, at 3.

105. See *id.* at 5.

106. See *id.* at 6.

107. *Id.*

108. See *id.* at 3.

109. See *id.*; Strohmeyer, *supra* note 6, at 49.

resources were also needed to ensure that qualified personnel were made available to the newly established judiciary to reduce the possibility of procedural error and ensure the fairness of proceedings.¹¹⁰ Without proper resources, the international community struggled to strengthen the presence of the newly established judicial system that would address the human rights issues that plagued returning refugees and IDPs. The need to allocate resources was made apparent by these problems and the international community had to respond by providing funds for the judiciary.

The physical infrastructure of the judicial system also had to be reconstructed.¹¹¹ According to Strohmeier:

In Kosovo, virtually all public buildings, including the courts, had to be cleared of mines and booby traps before they could be reclaimed for public purposes. In the course of the conflict, files had been dislocated, official forms and stationary had been destroyed, and valuable office equipment had been appropriated by the withdrawing security apparatus. The situation was so grave that the first UN-appointed judges and prosecutors had to bring their own dated typewriters to the initial hearings to be able to draft decisions and court records.¹¹²

Thus, the international community had to rebuild the physical infrastructure, as well as provide the resources for the legal framework, and decide the question of applicable law. However, once the international community solved these problems, the judicial system became stronger and more effective in protecting the human rights of refugees and IDPs.¹¹³ The presence of a stronger judiciary in Kosovo had positive effects on the humanitarian aid and nation-building efforts initiated by the international community. This is evidenced by the gradual reduction in both the number of returnees, especially Serbs, leaving the province, and in the levels of post-conflict violence.¹¹⁴ As a result of the strengthening of the judiciary in Kosovo and the increased protection of human rights, a sense of civil responsibility and a semblance of normalcy has returned to the province, thus improving the effectiveness of humanitarian aid and nation-building efforts of the international community.

110. See Strohmeier, *supra* note 6, at 55. "The scarcity of experienced legal personnel affected the legal-assistance sector as well." *Id.*

111. See *id.* at 57.

112. *Id.*

113. See *id.* at 60.

114. See *id.* "In Kosovo, a total of 14,878 criminal offenses were reported from January to August 2000 alone; over the same period 3,734 people were arrested. Thus, the establishment of effective judicial institutions can be critical to the long term success of a mission and the sustainability of its governance and democratic-institution-building efforts." *Id.*

EAST TIMOR

The Conflict in East Timor

On August 30, 1999, East Timor voted to (i) reject a proposal for special autonomy within the Republic of Indonesia and (ii) seek independence.¹¹⁵ "Following the announcement of the result, pro-integration militias, at times with the support of elements of the Indonesian security forces, launched a campaign of violence, looting, and arson throughout the entire territory."¹¹⁶ Indonesia was responsible for maintaining peace in the territory, however, the lack of effective response led to many people being killed and as many as 500,000 being driven from their homes as refugees and IDPs.¹¹⁷ After the start of the violence, Indonesian armed forces and police effectively withdrew completely from the territory.¹¹⁸ The UN Security Council then adopted Resolution 1272 (1999) to establish the United Nations Temporary Administration for East Timor (UNTAET), "an integrated, multi-dimensional peacekeeping operation fully responsible for the administration of East Timor during its transition to independence."¹¹⁹

Refugees soon began to arrive after this resolution. In the first half of 2000, more than 167,000 refugees returned from other areas of Indonesia, while an estimated 85,000 to 120,000 remained in camps in West Timor.¹²⁰ In the wake of returns, human rights violations were widespread.¹²¹ "Many East Timorese returning from West Timor were abused for alleged militia links by local officials of the National Council of East Timorese Resistance (CNRT) . . . and by members

115. UNITED NATIONS TEMPORARY ADMINISTRATION FOR EAST TIMOR (UNTAET), EAST TIMOR – UNTAET BACKGROUND (2000) available at <http://www.un.org/peace/etimor/UntaetB.htm> (last visited July 21, 2003).

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* "UNTAET was given 'all legislative and executive authority, including the administration of justice.'" Bongiorno, *supra* note 26, at 628.

120. UNTAET, *supra* note 116.

121. See HUMAN RIGHTS WATCH, HUMAN RIGHTS WATCH WORLD REPORT 2001: EAST TIMOR: HUMAN RIGHTS DEVELOPMENTS (2001), available at <http://www.hrw.org/wr2k1/asia/etimor.html> (last visited July 21, 2003). For example, one East Timorese woman reported that she was driven from her home by militia violence and witnessed the beheading of an East Timorese man by the Indonesian National Army. See AMNESTY INTERNATIONAL, *Eyewitness Accounts by Timorese Refugees*, (1999) available at <http://www.etan.org/et99c/october/17-23/21eyewit.htm> (last visited July 21, 2003). The woman, who was displaced to Australia, has experienced sleeplessness and weight loss as a result of witnessing the execution. *Id.* A student, also displaced to Australia after voting in the referendum for independence, reported observing Indonesian soldiers and police shooting people and burning houses. *Id.* As a result of witnessing these atrocities the student claims that, "I still get nightmares and panic attacks when I see someone wearing a black T-shirt. I still feel frightened and jumpy all the time, especially when I see someone with a gun. I felt like a hunted animal. I have difficulty pushing my mind to remember things and then I remember things I want to forget. I cannot rest. I cannot sleep." *Id.*

of the former guerilla army, Falintil.”¹²² Furthermore, Protestant, Muslim, and ethnic Chinese minorities also suffered human rights abuses for their alleged “ties to the Indonesian power structure.”¹²³ A functioning judiciary was needed to address these human rights violations. UNTAET was in a position similar to that of Kosovo, in that a functioning judiciary needed to be established from the ground up.¹²⁴ Again, the judicial infrastructure had to be re-built with limited resources and the question of applicable human rights law needed to be decided.¹²⁵ These responsibilities were shouldered by the international community.

Applicable Human Rights Law in East Timor

As in Kosovo, UNTAET had assumed initial responsibility for complete administration of the judicial system; therefore, UNTAET had the authority to determine the applicable law to be applied domestically to adjudicate human rights violations.¹²⁶ “Because almost all of East Timor’s lawyers had been trained in Indonesian universities, UNTAET decided in November 1999 that Indonesian law would be the applicable law except where it conflicted with international standards.”¹²⁷ Unlike the former Socialist Federal Republic of Yugoslavia, Indonesia was not a signatory nation to the ICCPR or the ICESCR.¹²⁸ Therefore, the International Bill of Human Rights was not applicable in East Timor until UNTAET established the applicable law following the move for independence.

Thus, applicable domestic law in East Timor regarding human rights violations met international standards, however, the infrastructure problems kept the judicial system from operating effectively. When the first East Timorese judges, prosecutors, and public defenders were ready to begin operation on January 7, 2000, the court building was not ready and there was no place to house

122. See HUMAN RIGHTS WATCH, *supra* note 122. The National Council of East Timorese Resistance (CNRT) was the local governing partner of UNTAET. *Id.* “Several returnees were killed.” *Id.*

123. *See id.*

124. *See id.*

125. See Strohmeier, *supra* note 6, at 50. “The preexisting judicial infrastructure in East Timor was virtually destroyed. Most court buildings had been torched and looted, and all court equipment, furniture, registers, records, archives, and – indispensable to legal practice – law books, case files, and other legal resources dislocated or burned. In addition, all judges, prosecutors, lawyers, and many judicial support staff who were perceived as being members de facto of the administrative and intellectual privileged classes, or who had been publicly sympathetic to the Indonesian regime, had fled East Timor after the results of the popular consultation were announced. Fewer than ten lawyers were estimated to have remained, and these were believed to be so inexperienced as to be unequal to the task of serving in a new East Timorese justice system. In this situation, it quickly became apparent to UNTAET officials that a justice system in East Timor, including the necessary regulatory framework, first had to be built– and built within the shortest possible time – before it could be administered, as called for in Security Council Resolution 1272.” *Id.*

126. See Bongiorno, *supra* note 26, at 628.

127. Human Rights Watch, *supra* note 122.

128. UNITED NATIONS, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, STATUS OF RATIFICATIONS OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES 5 (2002).

suspects.¹²⁹ Investigations into violations, including killings, were slow because it took time to rebuild the judicial system.¹³⁰ Initially, investigations into rape cases were virtually non-existent; "serious investigations into rape as an element of crimes against humanity only began in July."¹³¹ Therefore, the newly established judiciary was not effectively addressing human rights violations. In order to alleviate some of the burden on this barely functioning system, the establishment of the National Return and Reconciliation Commission was proposed.¹³² This judicial mechanism would strengthen the overall judiciary by allowing minor human rights violations to be addressed.¹³³ This judicial mechanism will be described in the next section, followed by a discussion of its impacts on the East Timorese judicial system and its effects on humanitarian aid efforts.

Commission for Reception, Truth and Reconciliation in East Timor

The Commission for Reception, Truth, and Reconciliation in East Timor (Commission) was originally formulated in June 2000 by the CNRT Congress. "[B]y August, a coordinating committee led by UNTAET was considering a plan that would allow perpetrators of lesser offenses, such as arson or looting to make a full confession of their misdeeds before the commission."¹³⁴ "Traditional justice mechanisms at the local level would then assign the perpetrator to some form of community service, but the misdeeds, the confession, and the 'sentence' would be registered with the formal court system."¹³⁵ The text of the regulation that established the Commission was approved by the National Council of East Timor in June 2001.¹³⁶ The first meeting of the National Commissioners took place on February 4, 2002.¹³⁷ This mechanism allowed for lesser human rights abuses to be addressed at the local level. Thus, the more formal judicial system was not

129. Human Rights Watch, *supra* note 122. The court building had been destroyed by militias and was not ready until March. *Id.* "At one point, UNTAET's own police stopped making any arrests of suspected criminals, including those involved in the 1999 violence, because it had no place to put them; the one detention center in the entire country, a former Ministry of Tourism building, had long since exceeded capacity, and the main prison in the capital, Dili, was only rehabilitated in May." *Id.*

130. *Id.*

131. *Id.*

132. Commission for Reception, Truth and Reconciliation in East Timor, Background (2002) available at <http://www.easttimor-reconciliation.org/bgd.htm> (last visited July 21, 2003).

133. See Human Rights Watch, *supra* note 122.

134. *Id.*; Commission for Reception, Truth and Reconciliation in East Timor, *supra* note 133. The Commission has three main functions: 1) Truth Seeking: The Commission will seek the truth regarding human rights violations in East Timor within the context of the political conflicts. *Id.* The Commission will establish a truth-telling mechanism for perpetrators to describe, acknowledge, and record human rights abuses. *Id.* 2) Community Reconciliation: The Commission will facilitate a method for dealing with past cases of lesser crimes such as looting, burning and minor assault. In each case, a panel comprised of a Regional Commissioner and local community leaders will mediate between victims and perpetrators to reach agreement on an act of reconciliation to be carried out by the perpetrator. *Id.* 3) Recommendations to Government: The Commission will report on human rights and make recommendations to the government for further action regarding the protection of human rights. *Id.*

135. See Human Rights Watch, *supra* note 122.

136. See Commission for Reception, Truth and Reconciliation in East Timor, *supra* note 133.

137. *Id.*

burdened with these claims and could concentrate its limited resources on more serious violations. The success of the Commission can be demonstrated by the fact that (i) the transition period in East Timor has been stabilized and (ii) East Timor became an independent country on May 20, 2002.¹³⁸ The utilization of this judicial mechanism strengthened the overall judicial system of East Timor and provided a means for returnees to quickly and adequately address human rights abuses. This allowed humanitarian and nation-building efforts to be successful, as is evidenced by their efforts culminating in the acceptance by the UN, and the world, of East Timor as the world's newest nation.

AFGHANISTAN AND IRAQ

The Conflict in Afghanistan

Following the terrorist attacks on the United States that occurred on September 11, 2001, the United States began the war on terrorism. A major event in this war was the removal of the Taliban regime in Afghanistan that harbored and supported al-Qaeda terrorists bent on attacking U.S. and Western interests at home and abroad. Military action against the Taliban regime began on October 7, 2001, which led to the eventual removal of the Taliban in Afghanistan by year's end and the establishment of an interim administrative government led by Hamid Karzai.¹³⁹

After the establishment of the new government in Afghanistan, security remained one of the most pressing problems facing Afghan refugees and IDPs returning to Afghanistan. In February 2002, a United Nations representative stated that "security continues to be of the foremost concern."¹⁴⁰ This security problem was demonstrated during the return of refugees that followed the establishment of the interim government.¹⁴¹ Afghan refugees and IDPs were in a situation where

138. See UNTAET, Completed Peacekeeping Operations, East Timor: UNTAET (2002) available at <http://www.un.org/peace/etimor/etimor.htm> (last visited July 21, 2003).

139. See *The Patient Accumulation of Successes*, THE ECONOMIST, Dec. 22, 2001, at 9; *A Little More Clearing Up To Do*, THE ECONOMIST, Dec. 22, 2001, at 11. Talks in Bonn, Germany between four Afghan factions on December 5, 2001 led to the agreement establishing the interim government to be headed by Mr. Karzai. *Afghanistan's Government: Suddenly, in Bonn*, THE ECONOMIST, Dec. 8, 2001, at 18. These talks also led to the affirmation that a tribal council, the *loya jirga*, would convene in June of 2002 in order to further define the shape and future of the Afghan government. See William Riley, *UN Official: Security No. 1 Afghan Problem*, UPI, Feb. 27, 2002, LEXIS, Nexis Library, UPI File. Although the Taliban was removed from power in Kabul within two months from the beginning of the conflict, fighting against al-Qaeda persisted in Afghanistan until the spring of 2002. See *Satellites and Horsemen*, THE ECONOMIST, Mar. 9, 2002, at 27.

140. Riley, *supra* note 140. Security was initially provided by the International Security Assistance Force (ISAF), which operated primarily in Kabul. See *Afghanistan: Guns Before Butter*, THE ECONOMIST, Apr. 6, 2002, at 13. Outside of Kabul, however, security was deficient as Afghanistan lacked a functional national army or police force. *Id.*

141. See Riley, *supra* note 140. "... [A] new wave of refugees from Afghanistan to Pakistan highlighted a chronic lack of stability in the region. Hundreds continued to arrive everyday, many of them, according to the Office of the U.N. High Commissioner for Refugees, ethnic Pashtuns fleeing human rights abuses." *Id.*

security was not properly provided and the risk of human rights abuses existed. Thus, to develop a sense of security and successful humanitarian aid efforts, a strong judiciary bolstered by the international community is necessary.

The Role of the International Community in the Afghan Judiciary

The need for a strong judiciary and the necessity of the involvement of the international community in Afghanistan to allow for proper post-conflict humanitarian aid has been recognized.¹⁴² Early in the development of the interim government in Afghanistan, “[t]he interim authority and the office of Lakhdar Brahimi, Secretary-General Kofi Annan’s special representative, had turned their attention to the establishment of the Judicial Commission and the Human Rights Commission, which would provide for the foundations of the rule of law.”¹⁴³ This focus on strengthening the judiciary was implemented in conjunction with activities by non-governmental organizations and the interim Afghan government to facilitate the return of refugees and IDPs to their homes.¹⁴⁴ Furthermore, the UN established the UN Assistance Mission in Afghanistan (UNAMA) to oversee post-conflict humanitarian aid activities within the borders of Afghanistan.¹⁴⁵ Thus, to protect the human rights of Afghan refugees and IDPs, the international community recognized the need for quickly establishing a strong judiciary and took steps to promote its foundation.

International donor support for Afghan reconstruction has been quite large. As of October 1, 2001, the U.S. had committed 840 million dollars for humanitarian aid and reconstruction efforts.¹⁴⁶ This includes the majority of the 297 million dollars pledge by the United States at the Tokyo Donors’ Conference in January 2002, where the international community as a whole pledged 5 billion dollars for Afghanistan.¹⁴⁷ Of the monies donated by the United States, 5 million dollars has been given to promote the work of three commissions established by the Afghan government “to draft a new constitution, promote judicial reform, and encourage respect for human rights.”¹⁴⁸ Considering that the international

142. See Harold Hongju Koh, *The U.S. Can't Allow Justice to Be Another War Casualty*, LOS ANGELES TIMES, Dec. 17, 2001, pt. 2, p. 11. “The precise shape of the emerging Afghan judicial system, created under the transitional administration now headed by interim Prime Minister Hamid Karzai, remains to be determined. Whatever happens, United Nations transitional support and involvement will be necessary to stabilize the post-conflict environment, to address pressing humanitarian needs of returning refugees, to promote the Bonn process of building a representative post-Taliban government and to address justice, accountability and truth telling about past human rights abuses by all parties to the Afghan conflict.” *Id.*

143. Riley, *supra* note 140.

144. *Id.*

145. See STATE DEPARTMENT, *State Department Documents U.S. Support for Afghan Women and Children; Report to Congress on Afghan Women and Children Relief Act of 2001*, Federal Information and News Dispatch, Inc., June 12, 2002.

146. See STATE DEPARTMENT, *Fact Sheet: Rebuilding Afghanistan; U.S. Support for Afghan Reconstruction Totals \$840 Million*, Federal Information and News Dispatch, Inc., January 10, 2003.

147. *Id.*

148. *Id.* The U.S. has also contributed to the reformation of the judiciary “by providing infrastructure for legal professionals and support for effective functioning of the courts.” *Id.* The

community has recognized the importance of an effective judiciary to allow for successful humanitarian aid, this support should translate into a solution to the security problem initially faced by refugees and IDPs in Afghanistan and allow for the humanitarian aid efforts of the international community to be effective.

The Conflict in Iraq

Upon the conclusion of the Gulf War in 1991, the United Nations passed UN Security Council Resolution 687, which provided for a cease-fire of hostilities and the formation of a UN inspection program to disarm Iraq of weapons of mass destruction (WMD).¹⁴⁹ This UN action led to the creation of the UN Special Commission for the Disarmament of Iraq (UNSCOM), which worked in tandem with the International Atomic Energy Agency (IAEA) to dismantle Iraq's nuclear and other WMD programs.¹⁵⁰ However, the Iraqi regime continually frustrated the efforts of UNSCOM and the IAEA, eventually leading to the cessation of inspections in 1998.¹⁵¹ The expulsion of the UNSCOM inspectors in 1998 spelled an end to UN inspection of Iraqi WMD programs at that time. However, UN Resolution 1284 later established the UN Monitoring and Verification Commission (UNMOVIC).¹⁵² This inspection commission was seen as a weaker version of UNSCOM and did not lead to an inspection program that ultimately disarmed Iraq.¹⁵³

In November of 2003, the UN reaffirmed its 12-year-old instruction to Iraq to disarm with the unanimous passage of Security Council Resolution 1441.¹⁵⁴ This resolution allowed weapons inspectors to return to Baghdad on November 27, 2002.¹⁵⁵ Resolution 1441 threatened serious consequences if Iraq failed to disarm. The United States felt that this resolution provided the authority it needed to justify military action to implement the disarmament of Iraq.¹⁵⁶ The United States indicated that it would consider the disarmament of Iraq using military force with a

Italian government, however, is taking the lead role in rebuilding the judiciary. *Id.*

149. See KENNETH M. POLLACK, *THE THREATENING STORM: THE CASE FOR INVADING IRAQ* 52 (2002).

150. *Id.* at 61-62. During these initial inspections, discoveries prompted Iraq to admit that it had been attempting to develop nuclear weapons, as well as turn over large quantities of weapons developed under other WMD programs. *Id.* at 62.

151. See *Burden of Proof*, *THE ECONOMIST*, Feb. 8, 2003, at 13. The Iraqi National Assembly voted to end cooperation with the UN weapons inspectors on August 4, 1998. POLLACK, *supra* note 150, at 90. By October of that year, Baghdad announced it would no longer co-operate with the inspectors. *Id.* at 91.

152. POLLACK, *supra* note 150, at 100.

153. *Id.* at 234-235. The purpose of the UN Monitoring and Verification Commission (UNMOVIC) was to determine the tasks remaining for the disarmament of Iraq and to determine the progress made toward reaching those goals. *Id.* at 100.

154. *Burden of Proof*, *supra* note 152, at 13.

155. See *Special Report: Dealing With Iraq*, *THE ECONOMIST*, Feb. 8, 2003, at 24.

156. *Burden of Proof*, *supra* note 152, at 13. As for inspectors, under Resolution 1441 Iraq "promised the weapons inspectors immediate, unimpeded and private access." *Special Report: Dealing with Iraq*, *supra* note 156, at 24.

coalition of allies.¹⁵⁷ Conversely, the United States also expressed support for further UN resolutions that would have sanctioned military action against Iraq.¹⁵⁸ However, lacking UN resolutions sanctioning immediate military action, the United States, leading a “coalition of the willing” to remove the regime of Saddam Hussein, attacked Iraq on March 20, 2003.¹⁵⁹

Prior to the use of military force against Iraq, fears existed that a climate where the human rights of refugees and IDPs could be abused would be created.¹⁶⁰ For example, following the Gulf War, the destabilization of the Iraqi regime prompted an uprising of Kurds in northern Iraq that led to the displacement of a massive number of refugees and horrific human rights violations.¹⁶¹ Furthermore, Iraqi society is traditionally tribal in nature.¹⁶² Following the armed conflict, tribal rivalries and divisions could cause the widespread abuse of human rights. Thus, the conflict in Iraq could potentially give rise to the same types of problems experienced in Bosnia, Kosovo, and East Timor—namely, returning refugees and IDPs being subjected to human rights abuses with no judiciary in place strong enough to protect their rights.

The Role of the International Community in the Iraqi Judiciary

The legal system that existed in Iraq under the regime of Saddam Hussein was characterized by one UN report as “incompatible with human rights because President Saddam Hussein controlled the judiciary, the armed forces, police, and politics.”¹⁶³ The pre-conflict legal system in Iraq was comprised of two separate systems: one of civil law, and one of Islamic law that operated “through separate courts with different jurisdictions.”¹⁶⁴ As is evidenced by the poor human rights record of the Iraqi regime, this system was unable to address human rights violations.¹⁶⁵ In fact, the UN Special Rapporteur on Human Rights in Iraq stated in 1997 “that there was no rule of law in Iraq.”¹⁶⁶ Given the status of the pre-

157. *Id.*

158. *See id.* at 25.

159. *See In the Fog of War*, THE ECONOMIST, Mar. 29, 2003, at 11.

160. *See The Coming Dash for Safety*, THE ECONOMIST GLOBAL AGENDA, Economist.com, Mar. 4, 2003, available at http://www.economist.com/agenda/PrinterFriendly.cfm?Story_ID=1620357 (last visited July 21, 2003). “America is talking of up to 2 million people uprooted internally by the war. The United Nations refugee agency, the UNHCR, is planning for 600,000 to 1.5 million refugees, plus 2 million more displaced within Iraq.” *Id.*

161. *See POLLACK, supra* note 150, at 51. The Iraqi regime killed as many as 20,000 Kurds in Kurdistan and drove more than 500,000 from their homes. *Id.* Conflict also erupted in other areas of the country leading to the deaths of an estimated 30,000 to 60,000 Shi’ah Muslims. *Id.*

162. *See id.* at 112-114.

163. *UN Says Human Rights Abuses Worsening in Iraq*, AGENCE FRANCE PRESSE, Nov. 3, 1999.

164. *Iraq: Country Profile*, Middle E. Rev. World of Info., Oct. 2, 2002.

165. *See U.S. DEPARTMENT OF STATE, Iraq Human Rights Practices, 1992*, U.S. Department of State Dispatch, March 1993. “The Iraqi regime’s abysmal record on human rights continued without improvement in 1992. Systematic violations of human rights in virtually all categories continued. There were mass executions of political opponents, widespread use of torture, extreme repression of ethnic groups, disappearances, denial of due process, and arbitrary detention.” *Id.*

166. *UN Commission Adopts Measures on Humanitarian Standards, Slavery, Women and Girls*,

conflict legal system and its inability to handle human rights abuses, the judicial system, following the removal of Saddam Hussein, must be equipped to adequately address human rights violations occurring in Iraq.¹⁶⁷ As in the post-conflict situations described above, the presence of the international community is vital to ensuring that a strong judiciary is maintained to protect the human rights of refugees and IDPs. As demonstrated, the international community must be willing to devote the initial resources and expertise developed from strengthening the judiciaries in other post-conflict situations to the judicial system in Iraq in order for humanitarian aid efforts to be successful.

Prior to the conflict in Iraq, the United States had not firmly stated its commitment to “nation-building” in Iraq following a military action.¹⁶⁸ At that time, Ari Fleischer, the White House Press Secretary, responded to a question regarding the use of US troops for nation-building and whether the president has changed his position on nation-building by stating that, “. . . [T]he president continues to believe that the purpose of the military should be to fight and to win wars.”¹⁶⁹ However, Fleischer went on to state:

Our government, broadly speaking, has a variety, however, of agencies that are well-situated, whose mission is to help protect the peace after a war is fought. And by that I mean in the event that there is a war with Iraq, the president has made it very plain in numerous conversations to foreign leaders that immediately upon military action, if it comes to military action, plans are in place to provide humanitarian aid and relief for the people of Iraq.¹⁷⁰

Thus, it appeared that the US was willing to provide assistance to Iraq following any armed conflict precipitated by US action.¹⁷¹

Following the conflict, the US led coalition has demonstrated a commitment

Justice Issues, M2 Presswire, Apr. 15, 1997. As applicable human rights law, Iraq has signed and ratified the ICCPR and the ICESCR. See United Nations, *supra* note 129, at 5. However, Iraq has not adopted the Optional Protocols to the ICCPR. *Id.*

167. While meeting to discuss the possibilities for governing a post-Saddam Iraq, Iraqi opposition leaders have already identified the need to reform the Iraqi legal system. See *Plans Made to Bring Iraqi Leader to Justice*, THE IRISH NEWS LTD., Dec. 16, 2002, at 8.

168. See *Ari Fleischer Holds White House Briefing*, FDCH Political Transcripts, Feb. 6, 2003.

169. *Id.*

170. *Id.* However, Roy Gutman, senior fellow at the United States Institute of Peace, director of American University's Crimes of War Project, and Newsweek magazine's chief diplomatic correspondent has stated, “the Pentagon is already ‘blue-skying’ the coming conflict, even suggesting that troops could be out of Iraq in 60 to 90 days. This administration is ‘viscerally opposed to nation-building. . . .’” Ann McFeatters, *Iraqi Civilian Toll, Postwar Trauma Apt to be More Dire than in 1991*, PITTSBURGH POST-GAZETTE, Feb. 12, 2003, at A12. Gutman further adds that although the administration opposes nation-building “it is exactly the direction the president is going with his Iraq policy.” *Id.*

171. The United States has been working with a civilian UN administrator on plans to flood the country with food and medicine and to rebuild the infrastructure following the conflict. *Iraq's Humanitarian Needs: If Things Go Badly. . .*, THE ECONOMIST, Feb. 8, 2003, at 26. Non-governmental Organizations (NGOs) have been gathering in Jordan and have been “told that an American Humanitarian Operations Center may be established in Jordan or Kuwait, and that ‘safe havens’ would be established for NGOs in Iraq.” *Id.*

to providing the humanitarian aid necessary to rebuild Iraq. An interim administrative government, headed by American Paul Bremer, has been established and reconstruction efforts are underway.¹⁷² However, during the period immediately following the conflict, Iraq was plagued with widespread looting. Violence and instability continue to threaten humanitarian aid efforts, reconstruction, and the formation of government.¹⁷³ Thus, the international community needs to increase the level of its cooperation and assistance in order to allow for humanitarian aid and reconstruction efforts to be successful in Iraq.¹⁷⁴

This assistance must, at the forefront, include the establishment a strong judiciary or immediate help in reforming the existing judiciary to meet international standards of human rights protection and address human rights violations suffered by refugees and IDPs.¹⁷⁵ Regardless of whether a specific mechanism to protect human rights is employed, as described in regards to BiH and East Timor, if the international community does not lend its efforts to facilitate a functioning judiciary capable of protecting human rights, humanitarian aid and nation-building efforts will ultimately be unsuccessful. According to Tarek Ben Halim, "Successful nation-building in Iraq is vital for real stability in the region."¹⁷⁶

CONCLUSIONS

Recently, military actions by the international community have been justified as necessary for humanitarian reasons. If the international community continues to allow interference with the sovereignty of states, it must be ready to ensure that the results promised will indeed come to fruition. In order for humanitarian aid and "nation-building" efforts by the international community to succeed, a strong judicial system must be in place in post-conflict areas that ensures human rights are protected. The need for a strong judicial system is evidenced particularly by the situation in BiH and Kosovo. The methods employed to address human rights violations in these areas were ineffective prior to the strengthening of the judicial system by the international community. When the judicial systems and

172. See *Post-war Reconstruction: False Start*, THE ECONOMIST, May 17, 2003, at 24. The interim government was initially headed by General Jay Garner, however, General Garner was replaced in May 2003 by Paul Bremer, the former head of counter-terrorism in the State Department, as the head of the Office of Reconstruction and Humanitarian Assistance in Iraq. *Id.*

173. *Id.* Six weeks after the occupation of Baghdad, looting still continued with the majority of looters unpunished. See *Freedom, But Without Law and Order*, THE ECONOMIST, May 24, 2003, at 50.

174. A UN Security Council resolution is expected to be passed in early June 2003 that would increase UN responsibilities in the reconstruction of post-war Iraq. See *Iraq and the UN: Making It Legit*, THE ECONOMIST, May 24, 2003, at 52.

175. Prior to the conflict, the US State Department had already initiated the Future of Iraq Project, which has brought about 30 exiled Iraqi judges and lawyers together to read a report of recommendations for reforming Iraq's legal system. See Caryle Murphy, *Area's Exiles Plot a Model Iraq: Talk of War Propels Groups as They Plan a Shift to Democracy*, THE WASH. POST, Jan. 13, 2003, at B1.

176. Tarek Ben Halim, *Waging a "Good War" for Arabs; If Democracy Takes Root in Iraq, It Can Sweep Across the Middle East*, LOS ANGELES TIMES, Feb. 9, 2003, at M5.

mechanisms for protecting human rights were weak, refugees and IDPs returning to their homes experienced on-going human rights violations that undermined the effectiveness of humanitarian aid efforts. After the international community solved the major problems with the judiciary in both BiH and Kosovo, increased protection of human rights was provided, and humanitarian aid efforts became more successful in allowing returnees to live in a peaceful, sustainable society. Applicable human rights laws must be quickly determined and resources must be made available to carry out important judicial tasks. When mechanisms such as the Human Rights Chamber are employed, the judiciary must be made strong enough in its own right to enforce the decisions of these bodies. The international community must provide the needed aid to strengthen the judiciary in a post-conflict situation.

The use of the Truth and Reconciliation Commission in East Timor allowed human rights violations to be handled in an efficient manner at the local level. This aided the re-establishment of the rule of law and hastened a return to normal society in a post-conflict situation. East Timor is a definitive example of how a strong judiciary addressing human rights violations can lead to the successful and speedy establishment of a civil society in post conflict situations. Once again, the role of the international community was vital in assuring the presence of a strong judiciary.

Humanitarian aid efforts can only be said to be truly successful if refugees and IDPs can return to lives that are somewhat comparable to lives they were forced to leave because of armed conflict. If human rights violations are not quickly addressed and adequate protection against on-going violations is not provided, then return to a civil life is more difficult. Protection of human rights is an essential constituent of a civilized society and there is no question that they are essential to all citizens of that society, be they refugees or IDPs. As is demonstrated by the post-conflict situations in BiH, Kosovo, and East Timor, a strong judicial system that protects human rights is a key factor in ensuring that humanitarian aid and "nation-building" efforts are successful. The need for the presence of the international community to facilitate a functioning judiciary, regardless of any specific judicial mechanism employed, is unquestionable.

In Afghanistan, the need for a strong judiciary was quickly identified and funds were made readily available by the international community. Past conflicts and the conflict in Afghanistan have taught the international community not to ignore this need when providing humanitarian aid to refugees and IDPs and rebuilding war-torn societies. For example, following the conflict in Afghanistan, the Deputy Secretary-General of the UN stated:

Now more than in the past, we recognize the need to address in a coherent fashion the multiple problems facing societies emerging from conflict: security, political reconciliation, human rights, restoration of judicial institutions and the rule of law, disarmament and reintegration of armed combatants but also reconstruction, return of refugees, employment creation, restoration of civil

services and many more.¹⁷⁷

In the case of Iraq, the pre-existing judicial system was unable to deal with human rights violations. Whether the system is completely replaced or completely reformed following the removal of Saddam Hussein's regime, the judicial system is under an even greater strain and will require strengthening by the international community. The international community must be intimately involved and not abandon Iraqi refugees and IDPs to a situation where no judiciary is in place that can adequately protect them from human rights violations following the conflict. To do so would cause the humanitarian aid and nation-building efforts of the international community in Iraq to be unsuccessful.

177. *UN Deputy Secretary-General Outlines 'Dominant Concepts' in Development Policy at Interaction CEO Retreat*, M2 Presswire, Dec. 11, 2002.