

# Democratic Governance and Post-conflict Reconstruction

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## Abstract

The concept of democracy has long fuelled controversy among international legal scholars, especially concerning its definition. This article is an attempt to single out three constitutive elements of democracy that have been subject to extensive scrutiny in the practice of electoral assistance and the more comprehensive peace-building and state-building missions that the UN has taken up or supported since the end of the twentieth century: free and fair elections, freedom of association – with emphasis on the freedom to establish political parties – and freedom of expression. In doing so, this paper examines the role and the importance of each of these three constitutive elements in the practice pertaining to post-conflict reconstruction of Kosovo, East Timor, Afghanistan, and Iraq.

## Key words

democracy; free and fair elections; freedom of association; freedom of expression; human rights; international administration; state building; United Nations

In his opening address before the American Society of International Law in 1917, the then president Elihu Root regarded ‘the advance and spread of democratic government, and the correlative decrease in the extent and power of autocratic and dynastic governments’<sup>1</sup> as the greatest change of the nineteenth century. He also considered the advance of democracy to be a universal movement and ‘the result of a long-continued and persistent progress, varying in different countries . . . , but, in its nature, essentially the same in all countries’.<sup>2</sup> Gradually, the concept of democracy has been introduced in international law, as democratic governance has often been construed as protecting plural and stable societies and enhancing the peaceful coexistence of social groups.<sup>3</sup> This idea of the ‘democratic peace’ and the question of democratic governance have enjoyed a high priority in the foreign policy of many countries.<sup>4</sup> The link between democracy and peace has quite pragmatically

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1. E. Root, ‘The Effect of Democracy on International Law’, (1917) 4 *International Conciliation* 153, at 156.
2. *Ibid.*
3. L. Diamond, ‘Promoting Democracy in the 1990s: Actors and Instruments, Issues and Imperatives’, Report to the Carnegie Commission on Preventing Deadly Conflict, Carnegie Corporation of New York (1995), available at <http://www.csis.org/wwics.si.edu/subsites/ccpdc/pubs/di/fr.htm>.
4. See for example the speech delivered by the former EU External Relations Commissioner Chris Patten at a plenary session in Brussels: ‘Free societies tend not to fight one another or to be bad neighbours . . . That is why, over the last twenty years, we have made human rights and democratization in other countries

been explained by the former UN Secretary-General Boutros Boutros-Ghali, in his Agenda for Democratization, in which he considers that '[d]emocratic institutions and processes . . . minimize the risk that differences or disputes will erupt into armed conflict or confrontation. . . . In this way, a culture of democracy is fundamentally a culture of peace.'<sup>5</sup>

When the United Nations was established, the word 'democracy' was not, however, mentioned in the Charter. The question of democracy was only indirectly addressed by means of the then newly accepted concept of human rights, mentioned in the UN Charter and later embodied in the 1948 Universal Declaration of Human Rights (UDHR).<sup>6</sup> The first UN documents to consider a *right* to democracy are the UN General Assembly Resolution of 21 November 1997, entitled 'Support by the United Nations system of the efforts of Governments to promote and consolidate new or restored democracies'<sup>7</sup> and the report of the UN Secretary-General on Democratization, in which he summarized general principles of democratic governance as comprising, *inter alia*, 'effective participation of civil society/political empowerment; . . . political pluralism and freedom of association and expression; rule of law and respect for human rights, . . . free and fair elections'.<sup>8</sup> The UN Commission on Human Rights went further and adopted by 51 votes to none, with two abstentions, a resolution entitled 'Promotion of the Right to Democracy', confirming the mutually reinforcing character of human rights and democracy.<sup>9</sup> The Millennium Declaration of the UN General Assembly of 8 September 2000 added the political commitment of all states to the principle of democracy.<sup>10</sup> On 4 December 2000 the General Assembly adopted a specific resolution on democracy<sup>11</sup> which declared that no universal detailed model of democracy did exist. But the resolution did take a big step forward by trying to define the concept of democracy.<sup>12</sup> For the first time an attempt at a definition was written down, providing the basis for the concept in international law and its criteria for assessing the democratic nature of governments.<sup>13</sup>

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a matter of European concern'. (SPEECH/99/193 (30 November 1999), available at [http://ec.europa.eu/comm/external\\_relations/news/patten/speech\\_99\\_193.htm](http://ec.europa.eu/comm/external_relations/news/patten/speech_99_193.htm)). See also the declaration made by the ASEAN spokesman to the BBC following the adoption of the Bali Concord II: 'Through the Bali Concord II, ASEAN has subscribed to the notion of democratic peace, which means all member countries believe democratic processes will promote regional peace and stability'. (T. Luard, 'Asean: Changing, But Only Slowly', *BBC News Online*, 8 Oct. 2003, available at <http://news.bbc.co.uk/1/hi/world/asia-pacific/3173458.stm>).

5. Report of the Secretary-General, An Agenda for Democratization, UN Doc. A/51/761 (1996), para. 17.
6. R. Rich, 'Bringing Democracy into International Law', (2001) 12 *Journal of Democracy* 20, at 22.
7. Support by the United Nations System of the Efforts of Governments to Promote and Consolidate New or Restored Democracies, GA Res. 52/18 (21 November 1997).
8. Report of the Secretary-General, 'Support by the United Nations System of the Efforts of Governments to Promote and Consolidate New or Restored Democracies', UN Doc. A/52/513 (1997), para. 24.
9. UN Commission on Human Rights, Resolution 1999/57, UN Doc. E/CN.4/1999/L.55/Rev.2 (27 Apr. 1999).
10. GA Res. 55/2, United Nations Millennium Declaration, UN Doc. A/RES/55/2 (8 September 2000), Section V.
11. GA Res. 55/96, UN Doc. A/RES/55/96 (28 February 2001).
12. Point 1(a) of the Resolution: 'Pluralism, the protection of human rights and fundamental freedoms, maximizing the participation of individuals in decision-making and the accountable legislature and public service and an electoral system that ensures periodic, free and fair elections.'
13. On the question of legitimacy of governments in international law, see recently J. d'Aspremont, 'Legitimacy of Governments in the Age of Democracy', (2006) 38 *NYU Journal of International Law and Politics* 877.

The foregoing does not mean that the content of democracy has been teased out. This question remains subject to wide-ranging debate. In that context, this article endeavours to identify the basic elements of democratic governance. In doing so it draws on the human rights doctrine that comprises universally accepted political rights.<sup>14</sup>

Human rights, proclaimed in numerous international documents, cover a vast range of rights, from family life to political participation. From the viewpoint of international law and interstate relations it clearly is not efficient or workable to expect that a state be considered democratic only if all human rights are respected. It may well be that such a requirement be only achieved following a long-term process, especially in the case of countries recovering from decades of dictatorship or internal conflict. Likewise, we should not narrow the concept of democracy to general elections. In this article we accordingly define the three key elements of the concept of democracy as being the principles of free and fair elections, freedom of association (with emphasis on the freedom to establish political parties), and freedom of expression. The last two are to be considered as ‘essential preconditions for an open electoral process’<sup>15</sup> and can therefore not be disconnected from the right to free and fair elections.<sup>16</sup> Against that backdrop we shall first depict our three-tiered approach to democracy (section 1) before analysing its relevance to the practice of the reconstruction of states after conflict (section 2).

## I. THREE DEFINING RIGHTS AS THE BASIC FOUNDATION OF DEMOCRATIC GOVERNANCE

Article 21(3) UDHR proclaimed the right to free and fair elections by stating that

The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free procedures.

Although worded ambiguously, this article may be construed as making elections the basis of every legitimate government. Even though the UDHR, as a UN General Assembly resolution, is formally not a legally binding instrument, the overwhelming majority who voted in favour of the Declaration and continuous affirmation

14. Rich, *supra* note 6, at 23.

15. T. Franck, ‘The Emerging Right to Democratic Governance’, (1992) 86 AJIL 46, at 61.

16. See Human Rights Committee General Comment 25 (57), The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25), UN Doc. CCPR/C/21/Rev.1/Add.7 (1996). In its General Comment 25, the Human Rights Committee confirms, in order to ensure the full enjoyment of rights protected by Article 25, the importance of ‘free communication of information and ideas about public and political issues between citizens, candidates and elected representatives, (which) implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion’ (§ 26). The Human Rights Committee equally considered the ‘right to freedom of association, including the right to form and join organizations and associations concerned with political and public affairs, [as] an essential adjunct to the rights protected by article 25’ (§ 27). The 1993 Vienna Declaration and Programme of Action adopted at the World Conference on Human Rights in Vienna, 14–25 June 1993, equally confirmed the interdependence of democracy and human rights (Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23 (12 July 1993)). See also A. J. Langlois, ‘Human Rights without Democracy? A Critique of the Separationist Thesis’, (2003) 25 *Human Rights Quarterly* 990, at 1008.

over the years have transformed many, if not all, the rules contained in the UDHR into customary international law.<sup>17</sup> Free and fair elections were again proclaimed by Article 25 of the 1966 International Covenant on Civil and Political Rights (ICCPR), thus binding states that have signed or ratified the Covenant.<sup>18</sup> This idea was confirmed in a series of documents such as the 1990 Charter of Paris for a new Europe of the Conference on Security and Co-operation in Europe (CSCE),<sup>19</sup> General Assembly Resolution of 18 December 1990,<sup>20</sup> and paragraph 12 of the Universal Declaration on Democracy of the Inter-parliamentary Union of 16 September 1997.<sup>21</sup>

As mentioned earlier, the right to free and fair elections can only function within a context where citizens are free to form associations, especially political parties. Indeed, as affirmed *inter alia* by General Assembly Resolution 45/150, 'determining the will of the people requires an electoral process that provides an equal opportunity for all citizens to become candidates and put forward their political views, individually and in co-operation with others'.<sup>22</sup> This is why the requirement of elections must be supplemented by other political freedoms.

The freedom of association is one of them. Indeed, it is a general freedom, but it has particular importance with respect to the freedom to establish, dissolve, or modify political parties and the right without previous authorization to establish and join trade unions for the protection of workers' interests.<sup>23</sup> Article 20 UDHR expressly mentions the right of association: 'Everyone has the right to freedom of peaceful assembly and association. . . . No one may be compelled to belong to an association.'

Political parties are the main instruments of a well-functioning democracy. In the case *United Communist Party of Turkey v. Turkey*, the European Court of Human Rights stated that 'political parties are a form of association essential to the proper functioning of democracy', and that 'political parties make an irreplaceable contribution to political debate, which is at the very core of the concept of a democratic society'.<sup>24</sup> This decision, based on Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) has a global significance, since the wording of Article 11 ECHR is essentially the same as that of Article 22 ICCPR. Freedom of association is also closely linked with freedom of expression, since, as confirmed by the European Court of Human Rights,

17. H. Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law', (1995-6) 25 *Georgia Journal of International & Comparative Law* 287, at 322. See also Franck, *supra* note 15, at 61.

18. See, on the role of the ICCPR in the promotion of democracy, A. Mavrommatis, 'The International Covenant on Civil and Political Rights and Its Role in Promoting Democracy', in K. Koufa (ed.), *Human Rights and Democracy for the 21st Century* (1999), 255.

19. 'The Charter of Paris for a New Europe', 1991 *SIPRI Yearbook* 603.

20. GA Res. 45/150, Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections, UN Doc. A/RES/45/150 (18 Dec. 1990).

21. Universal Declaration on Democracy, Adopted by the Inter-parliamentary Council at its 161st Session, Cairo (16 September 1997), available at <http://www.ipu.org/cnl-e/161-dem.htm>.

22. GA Res. 45/150, *supra* note 20, para. 3.

23. Art. 22 ICCPR; Art. 11(1) ECHR. See also Art. 1, 1948 ILO Convention (No. 87), concerning freedom of association and protection of the right to organize, 68 UNTS 17.

24. *United Communist Party of Turkey v. Turkey*, Decision of 30 January 1998, [1998] ECHR 1, paras. 25 and 43.

The protection of opinions and the freedom to express them . . . appl[y] all the more in relation to political parties in view of their essential role in ensuring pluralism and the proper functioning of democracy. . . . Their activities form part of a collective exercise of freedom of expression.<sup>25</sup>

Open and free public debate is also a key element of any democracy as an essential precondition for the holding of free and fair elections. This is why the freedom of expression, as enshrined in Article 19 UDHR, must be considered the third constitutive element of democracy:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

The ICCPR contains specific rights related to the freedom of expression, such as the freedom of thought (Art. 18), the freedom of opinion (Art. 19(1)), and the freedom of expression *as such*, including ‘the freedom to seek, receive and impart information and ideas of all kinds’.<sup>26</sup>

This article rests on an understanding of democracy constituted of these basic elements. Although minimalist, such a three-tiered approach ensures the holding of free and fair elections in a democratic context. The human rights perspective that is also adopted in this paper presents the advantage of being based on rights which have been incorporated in several major international legal instruments. Although the UDHR cannot be considered binding as such, several authors have claimed that the declaration – or at least part of it – has become customary international law.<sup>27</sup> By the same token, instruments such as the ICCPR and regional human rights treaties have made these human rights binding on states. We shall now verify the importance of these three human rights in the practice of the reconstruction of states. On this occasion, we shall demonstrate that the organization of free and fair elections, in conjunction with the implementation of freedom of expression and association, has had a crucial impact on the creation of a democratic environment in the reconstruction of states and territories in post-conflict situations.

## 2. THE UN, POST-CONFLICT (RE)CONSTRUCTION, AND DEMOCRATIC GOVERNANCE

This section argues that the practice pertaining to the post-conflict (re)construction of institutions demonstrates that the three aforementioned constitutive elements of democracy have boiled down to major components of the state-building operations supported by the United Nations.

25. *Socialist Party and Others v. Turkey*, Decision of 25 May 1998, [1998] ECHR 45, para. 43; *Incal v. Turkey*, Decision of 9 June 1998, [1998] ECHR 48, para. 46; *Jerusalem v. Austria*, Decision of 27 January 2001, [2001] ECHR 122, para. 36; S. Wheatley, ‘Democracy in International Law: A European Perspective’, (2002) 51 *International and Comparative Law Quarterly* 225, at 241.

26. Article 19(2) ICCPR.

27. For an overview see Hannum, *supra* note 17.

The link between military intervention, occupation, and the promotion of democracy has recently become a topic of scholarly research.<sup>28</sup> The complex and controversial question of forced democratization has also been addressed, even though the *lex lata* does not permit unilateral military action with the aim of imposing democracy.<sup>29</sup> UN assistance to democratization has been expanding significantly since the last decade of the twentieth century. Traditional peacekeeping missions have evolved from a mere military interposition force to providing assistance in the organization of elections and, more recently, to the takeover of the administration of states or territories. Recently, UN-mandated missions have been involved in introducing democratic governance in states or territories emerging from years of internal conflict, through international territorial administration or the military occupying powers, often mandated by the Security Council, as was the case in Iraq. This has also been the case in East Timor – which changed its name to Timor Leste after gaining independence – Kosovo, and Afghanistan.<sup>30</sup>

Drawing on our three-tiered approach, we shall sketch the evolution in the UN involvement in the promotion of democracy, both through electoral assistance in a first phase and, in a second, through the more comprehensive missions of state building that it has taken up. Although other cases may have had some importance in this evolution, we shall focus on four leading cases when analysing the introduction of democracy through post-conflict peace-building missions: Kosovo, East Timor, Afghanistan, and Iraq. The Security Council mandated the United Nations to assist these states or territories in the setting up of democratic institutions, therefore implying a duty to take into account the principles of democracy.<sup>31</sup>

The Security Council Resolution 1244, establishing the interim administration in Kosovo (UNMIK), is of particular relevance in that respect, since it determines one of the basic functions of the civil presence as being ‘organizing and overseeing the development of provisional institutions for democratic and autonomous self-government pending a political settlement, including the holding of elections’.<sup>32</sup> At the establishment of the United Nations Transitional Administration in East Timor (UNTAET), the Security Council adopted similar provisions, asking UNTAET to ‘carry out its mandate effectively with a view to the development of local democratic institutions, including an independent East Timorese human rights institution, and the transfer to these institutions of its administrative and public service functions’.<sup>33</sup> In Afghanistan, the peace conference held in Bonn on 5 December 2001 under UN auspices resulted in an agreement<sup>34</sup> which established a Special Independent Commission for

28. T. Carothers, ‘Promoting Democracy and Fighting Terror’, (2003) 83 *Foreign Affairs* 84; R. Sandbrook, ‘Democratisation and Institutional Reform’, in E. Nafziger and R. Vayrynen (eds.), *The Prevention of Humanitarian Emergencies* (2002), 151–72.

29. For an overview see B. R. Roth, ‘The Illegality of “Pro-democratic” Invasion Acts’, in G. H. Fox and B. R. Roth (eds.), *Democratic Governance and International Law* (2000), 328.

30. On the question of the creation of democratic states, see in general J. d’Aspremont, ‘La création internationale d’Etats démocratiques’, (2005) *Revue générale de droit international public* 889.

31. M. Salamun, *Democratic Governance in International Territorial Administration* (2005), 59.

32. SC Res. 1244, UN Doc. S/RES/1244 (10 June 1999), para. 11(c).

33. SC Res. 1272, UN Doc. S/RES/1272 (25 October 1999), para. 8.

34. Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions, UN Doc S/2001/1154 (5 Dec. 2001) (Bonn Agreement).

the Convening of an 'Emergency Loya Jirga' to decide on a Transitional Authority<sup>35</sup> which will govern the state until 'a fully representative government can be elected through free and fair elections'.<sup>36</sup> The Bonn Agreement equally acknowledged 'the right of the people of Afghanistan to freely determine their own political future in accordance with the principles of Islam, democracy, pluralism, and social justice'.<sup>37</sup> Security Council Resolution 1383 unanimously endorsed the Bonn Agreement, and the United Nations Assistance Mission in Afghanistan (UNAMA) was subsequently established to fulfil the tasks entrusted to the UN by the Bonn Agreement and to coordinate UN humanitarian and reconstruction activities in Afghanistan.<sup>38</sup> In Iraq, the Security Council did not explicitly refer to democracy, although it asked the United Nations Assistance Mission for Iraq (UNAMI) to 'promote the protection of human rights, national reconciliation, and judicial and legal reform in order to strengthen the rule of law in Iraq'<sup>39</sup> and to work with the Coalition Provisional Authority (CPA) to 'restore and establish national and local institutions for representative governance'.<sup>40</sup> The CPA was also asked to work towards the 'creation of conditions in which the Iraqi people can freely determine their own political future'.<sup>41</sup>

These four cases have been selected for various reasons. From the viewpoint of UN involvement in post-conflict reconstruction, Kosovo and East Timor represent the first cases of full-fledged administration by a UN subsidiary organ, and therefore somehow represent a culmination in the evolution of peacekeeping mandates.<sup>42</sup> As far as the other two cases are concerned, they can be considered as alternative approaches to post-conflict reconstruction,<sup>43</sup> considering that in Afghanistan the emphasis was placed on the maximum participation of local actors with a minimum of international participation,<sup>44</sup> while in Iraq the administrative functions were exercised by the occupying powers, based on the law of occupation, and a significant mandate extension through a Security Council resolution.<sup>45</sup> Their mandates thus reveal major similarities. However, this selection of leading cases does not imply that we shall not refer to other cases, if necessary, in order to illustrate the evolution

35. For an overview of the transitional political processes see A. Saikal, 'The UN and Democratisation in Afghanistan', in E. Newman and R. Rich (eds.), *The UN Role in Promoting Democracy: Between Ideals and Reality* (2004), 320 at 357.

36. Bonn Agreement, *supra* note 34, Article I(4).

37. *Ibid.*, Preamble.

38. SC Res. 1383, UN Doc. S/RES/1383 (6 December 2001), para. 1.

39. SC Res. 1546, UN Doc. S/RES/1546 (8 June 2004), para. 7(b)(iii).

40. SC Res. 1483, UN Doc. S/RES/1483, (22 May 2003), para. 8(c).

41. *Ibid.*, para. 4.

42. See M. Bothe and T. Maruhn, 'UN Administration of Kosovo and East Timor: Concept, Legality and Limitations of Security Council-Mandated Trusteeship Administrations', in C. Tomuschat (ed.), *Kosovo and the International Community* (2002), 217 at 218 ff.

43. On the relation between Iraq and other cases of international territorial administration, see R. Wilde and B. Delcourt, 'Le retour des "protectorats". L'irrésistible attrait de l'administration de territoires étrangers', in B. Delcourt, D. Duez, and E. Remacle (eds.), *La guerre d'Irak. Prélude d'un nouvel ordre international?* (2004) 219, and in particular part III, 'L'Irak: nouvel avatar de l'administration étrangère de territoires', at 237.

44. This has been referred to as the 'light footprint' approach (Report of the Secretary-General, *The Situation in Afghanistan and Its Implications for International Peace and Security*, UN Doc A/56/875-S/2002/278 (18 March 2002), para. 98).

45. See SC Res. 1483, UN Doc. S/RES/1483, (22 May 2003).

in UN reconstruction efforts. This will especially be the case in the analysis of UN assistance to free and fair elections.

### 2.1. Free and fair elections

Electoral assistance can vary from the observation of the election campaign, the guarantee of adequate media access for all political parties, prevention of possible misuse of government resources by one of the parties, and verification of the results, to the actual organization and conduct of elections. The preference of having the United Nations as an electoral monitor is logical, as its neutrality and universality makes it appropriate for it to deal with this difficult task in all regions of the world. This does not mean that the expertise acquired by some regional organizations in election monitoring is of no help.<sup>46</sup>

The initial involvement of the United Nations in electoral assistance has been in the context of decolonization and the self-determination of peoples.<sup>47</sup> The supervision of Namibian elections in 1989, following a *de jure* takeover by the United Nations of the administration of the territory, marked a decisive stage in future UN activities, beginning with the first comprehensive electoral observation mission in Nicaragua in 1990,<sup>48</sup> followed by the election monitoring mission in Haiti in 1990, which was far more than a mere ballot count.<sup>49</sup> From that time onwards, the United Nations has been actively involved in electoral assistance, observation, and verification in a large number of states in Africa, Asia, and Latin America.

In the light of the increasing demand for this assistance in electoral matters, the UN General Assembly requested the Secretary-General to appoint an officer to serve as a focal point in assisting him in the co-ordination and consideration of electoral assistance requests by UN member states.<sup>50</sup> A United Nations Electoral Assistance Unit, established in 1992, was redesignated the Electoral Assistance Division in 1994 and is formally part of the Political Affairs Division. Electoral assistance was fully

46. Regional organizations such as the Organization of American States (OAS) and the Organization for Security and Co-operation in Europe (OSCE), as well as the Council of Europe, have been important players. The European regional organizations have played a substantive role in election monitoring, not only by providing personnel for various missions, but also by attempting to draft guidelines for the conduct of elections. See, *inter alia*, OSCE Office for Democratic Institutions and Human Rights (ODIHR), Guidelines for Reviewing a Legal Framework for Elections (January 2001), available at [http://www.osce.org/odihr/item\\_11\\_13588.html](http://www.osce.org/odihr/item_11_13588.html); OSCE Office for Democratic Institutions and Human Rights (ODIHR), Election Observation Handbook, (2005), available at [http://www.osce.org/publications/odihr/2005/04/14004\\_240\\_en.pdf](http://www.osce.org/publications/odihr/2005/04/14004_240_en.pdf); Parliamentary Assembly of the Council of Europe Resolution 1264, Code of good practice in electoral matters, (8 November 2001), available at <http://assembly.coe.int/Documents/AdoptedText/TA01/ERES1264.htm> and European Commission for Democracy through Law (Venice Commission) Opinion No. 190/2002, Code of Good Practice in Electoral Matters, Adopted Guidelines and Draft Explanatory Report (9 October 2002), available at [http://venice.coe.int/docs/2002/CDL-EL\(2002\)005-e.asp?PrintVersion=True](http://venice.coe.int/docs/2002/CDL-EL(2002)005-e.asp?PrintVersion=True).

47. For an overview see R. Ludwig, 'The UN's Electoral Assistance: Challenges, Accomplishments, Prospects', in Newman and Rich, *supra* note 35, 169 at 174.

48. SC Res. 637, UN Doc. S/RES/637 (27 July 1989).

49. GA Res. 45/21, UN Doc. A/45/490 (1991), para. 12.

50. Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections, GA Res. 46/137, UN Doc. A/RES/137 (17 Dec. 1991).



endorsed by the then UN Secretary-General in his 1997 supplement to his Agenda for Democratization.<sup>51</sup>

After the decolonization process, UN engagement in electoral support has shifted towards the setting-up of democratic institutions under comprehensive peace-building missions. Electoral assistance and elections as such are indeed not the only building blocks of a democratic regime. Free and fair elections go together with the two other key components, namely the freedom of association and freedom of expression. One of the first UN operations that extended beyond the holding of elections was the work of the United Nations Transitional Authority in Cambodia (UNTAC), which was still closely linked to the organization and monitoring of elections, but we already see a clear commitment to include other aspects of democratic capacity building. This broader peace-building mission followed the signature of the 'Agreement on a Comprehensive Political Settlement of the Cambodia Conflict' on 16 February 1991 (Paris Agreement),<sup>52</sup> which encompassed not only the organization and conduct of the elections but also the definition of the applicable electoral legal apparatus. UNTAC had the authority to establish, 'in consultation with the SNC [Supreme National Council], a system of laws, procedures, and administrative measures necessary for the holding of a free and fair election in Cambodia'.<sup>53</sup> Article 6 of the Paris Agreement, and more specifically Annex 1 to the Agreement, requested 'a United Nations Transitional Authority in Cambodia . . . with civilian and military components under the direct responsibility of the Secretary-General of the United Nations'. The civil functions envisaged in the Paris Agreement were comprehensive and included the exercise of control over the existing administrative structures that would have impact on the outcome of the elections. According to Section B of the Paris Agreement, UNTAC had been accorded the right to issue binding directives whenever necessary. The UN mission even had the power to suspend or abrogate provisions of existing laws which could defeat the objects and purposes of the Agreement.

The enshrinement of the right to create and organize political parties, and therefore to hold legitimate multiparty elections, has been one of the major achievements of UNTAC. The unprecedented success of this mission was a major achievement for the United Nations, since UNTAC was the first peacekeeping operation with such a large mandate relating to civil administration and the organization of free and fair elections. The number of political parties in Cambodia has risen from 19 in 1993 to 39 in the 1998 election. In the communal elections, eight political parties, representing more than 76,000 candidates, participated in the election process.<sup>54</sup> In general, the United Nations succeeded in creating a political environment favourable to political

51. Report of the Secretary-General, Support by the United Nations System of the Efforts of Governments to Promote and Consolidate New or Restored Democracies, UN Doc. A/52/513 (21 Oct. 1997), para. 40.

52. 1992 Agreement on the Comprehensive Political Settlement of the Cambodia Conflict, 1663 UNTS 56 (Paris Agreement).

53. *Ibid.*, Section D, Art. 3(a).

54. S. Peou, 'The UN's Modest Impact on Cambodia's Democracy', in Newman and Rich, *supra* note 35, 258 at 264.

parties as well as individuals, to realize the right to freedom of assembly and freedom of expression.<sup>55</sup>

Following the launch of the election-monitoring wave, and building further on the Cambodia experience, the United Nations embarked on a series of comprehensive actions in the promotion of democracy and legitimate government in post-conflict reconstruction, through the establishment of democratic institutions based on free and fair elections.

### 2.1.1. Kosovo

The Security Council considered the holding of elections as an essential part of the development of democratic institutions pending the political settlement of the territorial status of Kosovo.<sup>56</sup> Without wanting to address this particular issue,<sup>57</sup> the creation of democratic institutions is one of the main objectives of the interim administration and its success was considered as a precondition engaging in the debate on Kosovo's final status.<sup>58</sup>

UNMIK decided to hold the first local elections on 28 October 2000, following the creation in August 2000 of 'provisional institutions for democratic and autonomous self-government at the municipal level'.<sup>59</sup> The preference for holding municipal elections first has to be considered in the context of Kosovo's uncertain final status. National elections were not yet feasible in 2000, since there was no agreement on provisional institutions. Moreover, UNMIK feared that early elections would be beneficial to radical groups such as the UCK/KLA (Kosovo Liberation Army).<sup>60</sup> In addition, and more generally, the United Nations has learned that the holding of national elections can no longer be a mere exit strategy by itself, but needs to be considered as no more than a part of the long-term institution-building process. The requirement of a stable political environment can therefore necessitate a postponement of national parliamentary or presidential elections.<sup>61</sup> We shall see that a similar gradual approach towards the holding of elections has been taken in the other cases discussed in this paper.

55. J. Sanderson, 'The Cambodia Experience: A Success Story Still?', in R. Thakur and A. Schnabel (eds.), *United Nations Peacekeeping Operations: Ad Hoc Missions, Permanent Engagement* (2001), 155 at 267.

56. SC Res. 1244, UN Doc. S/RES/1244 (10 June 1999), para. 11(c).

57. See J. d'Aspremont, 'Regulating Statehood: The Kosovo Status Settlement', in this issue.

58. UNMIK, 'Standards for Kosovo', presented by the Special Representative of the Secretary-General on 10 December 2003, available at [http://www.unmikonline.org/standards/docs/leaflet\\_stand\\_eng.pdf](http://www.unmikonline.org/standards/docs/leaflet_stand_eng.pdf). See also UNSC Presidential Statement 2003/26, UN Doc. S/PRST/2003/26 (12 Dec. 2003), expressing support for the 'Standards for Kosovo', comprising 'functioning democratic institutions' as a standard that Kosovo must research in order to fully comply with UNSC Resolution 1244 and which will condition the process to determine the future status of Kosovo.

59. UNMIK Regulation No. 2000/45 on Self-Government of Municipalities on Kosovo, UN Doc. UNMIK/REG/2000/45 (11 Aug. 2000), Section 1.1.

60. R. Caplan, *International Governance of War-Torn Territories: Rule and Reconstruction* (2005), 123.

61. See S. Chesterman, *You The People – The United Nations, Transitional Administration, and State-Building* (2004), 208–10, and R. Ludwig, 'The UN's Electoral Assistance: Challenges, Accomplishments, Prospects', in Newman and Rich, *supra* note 35, at 169. See also the comments made by former High Representative in Bosnia, Paddy Ashdown: 'in Bosnia we thought that democracy was the highest priority, and we measured it by the number of elections we could organize. The result seven years later is that the people of Bosnia have grown weary of voting. In addition, the focus on elections slowed our efforts to tackle organized crime and corruption, which have jeopardized quality of life and scared off foreign investment. In hindsight, we should have put the establishment of the rule of law first, for everything else depends on it: a functioning economy, a free and fair political system, the development of civil society, public confidence in police and the courts. We would

The elections to the municipal assemblies were generally seen as free and fair, and, despite some logistical problems,<sup>62</sup> no serious incidents have been reported.<sup>63</sup> However, due to the boycott by the three Serb-dominated municipalities in the north of the province, only 27 of the 30 municipalities successfully elected a municipal assembly. As far as the three other municipalities were concerned, the outcome was not certified as a result of insignificant voter turnout,<sup>64</sup> and the Special Representative of the Secretary-General decided to appoint the members of these three municipal assemblies.<sup>65</sup> The next municipal elections were held on 26 October 2002 and again, according to the observers, were held in accordance with international standards.<sup>66</sup> Again, the turnout of Kosovo Serb voters was very low, due to mixed signal from the rump Yugoslav authorities with regard to participation and also to doubts among the Serbs themselves concerning the benefits of participating.<sup>67</sup>

An important step in the creation of democratic institutions was the adoption of the Constitutional Framework for Provisional Self-Government in 2001.<sup>68</sup> The Constitutional Framework comprised the formation of 'Provisional Institutions of Self-Government' (PISG), including a Kosovo assembly, a president, and a government, to which extensive but not unlimited competences were transferred.<sup>69</sup> The transfer of all competences listed in the Constitutional Framework was completed by the end of 2003.<sup>70</sup> Subsequent to the creation of these provisional institutions, elections to the assembly were held on 17 November 2001. Again, the elections were considered a success, in spite of some reports of intimidation of voters in the northern part of Kosovo.<sup>71</sup> As provided for by the 2004 Kosovo Standards Implementation Plan,<sup>72</sup> the 2004 elections to the Kosovo Assembly were organized by the people of Kosovo themselves, under the supervision of the Central Election Commission.<sup>73</sup>

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do well to reflect on this as we formulate our plans for Afghanistan and, perhaps, Iraq' (P. Ashdown, 'What I Learned in Bosnia', *New York Times*, 28 October 2002).

62. Report of the Secretary-General on the United Nations Interim Administration Mission on Kosovo, UN Doc. S/2000/196 (15 Dec. 2000), § 3.
63. See Y. Hysa, 'Kosovo: A Permanent International Protectorate?', in Newman and Rich, *supra* note 35, 282 at 296; and A. Yannis, 'The UN as Government in Kosovo', (2004)10 *Global Governance* 67, at 76.
64. Report of the Secretary-General on the United Nations Interim Administration Mission on Kosovo, UN Doc. S/2000/196 (15 Dec. 2000), para. 4; and OSCE Mission in Kosovo, Kosovo Municipal Elections 2000 – Final Results (8 Nov. 2000), available at <http://www.osce.org/kosovo/13208.html>.
65. Report of the Secretary-General on the United Nations Interim Administration Mission on Kosovo, UN Doc. S/2003/113 (29 Jan. 2003), § 18.
66. Council of Europe, Final report of the Election Observation Mission for the 2002 Kosovo Municipal Assembly Elections (CEEOM III), Doc. Nr. SG/Inf(2002)49 (26 Nov. 2002), paras. 140–145.
67. Report of the Secretary-General on the United Nations Interim Administration Mission on Kosovo, UN Doc. S/2000/196 (15 Dec. 2000), para. 3.
68. UNMIK Regulation 2001/9 on the Constitutional Framework for Provisional Self-Government (UNMIK/REG/2001/9) (15 May 2001). See C. Stahn, 'Constitution without a State? Kosovo under the United Nations Constitutional Framework for Self-Government', (2001)14 *LJIL* 531.
69. The Special Representative of the Secretary-General retained several important competences. See Chapter 8, UNMIK Regulation 2001/9 on the Constitutional Framework for Provisional Self-Government (UNMIK/REG/2001/9) (15 May 2001).
70. Report of the Secretary-General on the United Nations Interim Administration Mission on Kosovo, UN Doc. S/2004/471 (26 Jan. 2004), § 4.
71. Report of the Secretary-General on the United Nations Interim Administration Mission on Kosovo, UN Doc. S/2002/62 (15 Jan. 2002), paras. 3–4.
72. UNMIK, Kosovo Standards Implementation Plan (31 March 2004), available at [http://www.unmikonline.org/pub/misc/ksip\\_eng.pdf](http://www.unmikonline.org/pub/misc/ksip_eng.pdf), at 8.
73. UNMIK Regulation 2004/9 on the Central Election Commission, UN Doc. UNMIK/REG/2004/9 (27 Apr. 2004).

The Kosovo Serb turnout in these elections was nevertheless ‘negligible’,<sup>74</sup> and resulted in their seats in the Assembly being limited to the ten allocated to Kosovo Serbs.<sup>75</sup>

If the elections as such have generally been deemed free and fair according to international and European standards, the overall impression of the work and functioning of the Assembly has been rather negative. Its working methods consistently violated the Constitutional Framework and the adopted rules of procedures,<sup>76</sup> although some improvement has been observed since 2005.<sup>77</sup> Moreover, the number of proposed laws has been quite limited, and the Special Representative of the Secretary-General has not promulgated several of these laws, since the Assembly impinged on the reserved competences of the Secretary-General’s Special Representative.<sup>78</sup> However, it has to be recalled that the conditions in which the provisional institutions have to function, especially the Assembly, are not ideal, considering in particular the persistence of parallel structures.<sup>79</sup> In addition, the unwillingness of the Serb minority to participate in the functioning institutions hinders their integration in the decision-making process. Increasing the participation of Kosovo Serbs in the elections and decision-making process is probably one of the most urgent priorities in Kosovo.<sup>80</sup>

### 2.1.2. *East Timor*

While the political situation of East Timor differed substantially from that of Kosovo, the holding of free and fair elections as part of the process of the creation of democratic institutions has been approached in a similar way. As in Kosovo, elections were not seen as the priority on UNTAET’s arrival, and the first elections were held only some 18 months after the setting-up of the operation.<sup>81</sup> Obviously, the fact that East Timor’s independence was a clear objective of the transition process influenced the institution-building process, and accelerated the handover to East Timorese institutions. In addition, in UNTAET’s view, the size of the country did not necessitate

74. Special Representative of the Secretary-General for Kosovo, Annex 1 to the Report of the Secretary-General on the United Nations Interim Administration Mission on Kosovo, UN Doc. S/2004/907 (17 Nov. 2004), para. 6.

75. See European Commission, Kosovo (under UNSCR 1244) 2005 Progress Report, Doc. Nr. SEC (2005) 1423 (9 November 2005), at 9.

76. See *inter alia* the Report of the Secretary-General on the United Nations Interim Administration Mission on Kosovo, UN Doc. S/2004/907 (17 November 2004), § 5, and its first annex: Technical Assessment of the Implementation of Standards, Prepared by the Special Representative of the Secretary-General for Kosovo, paras. 8–9.

77. Special Representative of the Secretary-General for Kosovo, Technical Assessment of Progress in Implementation of the Standards for Kosovo, Annex 1 to the Report of the Secretary-General on the United Nations Interim Administration Mission on Kosovo, UN Doc. S/2006/45 (25 Jan. 2006), para. 3.

78. For example, the Assembly adopted a Resolution on the Protection of the Territorial Integrity of Kosovo which questioned the borders, questioning a treaty concluded in 2001 between the Federal Republic of Yugoslavia and the former Yugoslav Republic of Macedonia. See UNSC Presidential Statement, UN Doc. S/PRST/2002/16 (24 Mai 2002).

79. See on this issue OSCE Mission in Kosovo, Department of Human Rights and Rule of Law, Parallel Structures in Kosovo (October 2003), available at [http://www.osce.org/documents/mik/2003/10/698\\_en.pdf](http://www.osce.org/documents/mik/2003/10/698_en.pdf).

80. See also Special Representative of the Secretary-General for Kosovo, Technical Assessment of Progress in Implementation of the Standards for Kosovo, Annex 1 to the Report of the Secretary-General on the United Nations Interim Administration Mission on Kosovo, UN Doc. S/2007/134 (9 Mar. 2007), paras. 22–23.

81. For a critique see J. Chopra, ‘The UN’s Kingdom of East Timor’, (2000) 42 *Survival* 27.

the creation of local municipal institutions.<sup>82</sup> Security Council Resolution 1272 explicitly mentioned the task of developing local democratic institutions,<sup>83</sup> and the Security Council asked UNTAET to consult closely with the East Timorese in developing local institutions. Notwithstanding the absence of an explicit reference to the holding of elections, the setting up of democratic institutions based on free and fair elections was seen as a part of UNTAET's mandate.<sup>84</sup>

The first elections were held exactly two years after the popular consultation leading to the creation of UNTAET. The East Timorese were called to elect a Constituent Assembly charged with the drafting of a constitution for the territory.<sup>85</sup> UNTAET designed an electoral system based both on proportional representation on the basis of a single nationwide constituency and, second, on regional representation through the election of one representative for each of the 13 districts.<sup>86</sup> The 30 August 2001 Constituent Assembly elections were certified as free and fair by key international observers<sup>87</sup> and by the Independent Electoral Commission, set up to oversee the fairness of the election process.<sup>88</sup> In conjunction with the election of the Assembly, the Special Representative appointed a second, exclusively Timorese, Transitional Government, based on the results of the 2001 Constituent Assembly elections, although the Special Representative included several independents and members of minority parties.<sup>89</sup> The elaborated constitution was signed on 22 March 2002, and provided for the direct election of a president and a national parliament.<sup>90</sup> The first presidential elections were held on 14 April 2002, and were viewed as free and fair by international observers.<sup>91</sup>

82. See Chesterman, *supra* note 61, 208.

83. SC Res. 1272, UN Doc. S/RES/1272 (25 October 1999), para. 8.

84. Report of the Secretary-General on the Situation in East Timor, UN Doc. S/1999/1024 (4 Oct. 1999). See also d'Aspremont, *supra* note 30, 900.

85. UNTAET Regulation 2001/2 on the Elections of a Constituent to Prepare a Constitution for an Independent and Democratic East Timor (UNTAET/REG/2001/2) (16 March 2001).

86. *Ibid.*, Section 3. On this issue see P. W. Galbraith, 'The United Nations Transitional Administration in East Timor: Building a Nation from the Ground Up', in N. Azimi, M. Fuller, and H. Nakayama (eds.), *Post-conflict Reconstruction* (2003), 153 at 160 ff.

87. European Union Election Observations Mission, Final Report of the European Union Election Observations Mission in East Timor – 30 August 2001 Constituent Assembly Elections (2001), 37, available at [http://ec.europa.eu/comm/external\\_relations/human\\_rights/eu\\_election\\_ass\\_observ/east\\_timor/report01.pdf](http://ec.europa.eu/comm/external_relations/human_rights/eu_election_ass_observ/east_timor/report01.pdf). See also Report of the Secretary-General on the United Nations Transitional Administration in East Timor, UN Doc. S/2001/983 (18 Oct. 2001), § 5; and M. Juvenal dos Reis, 'East Timor and the Role of International Assistance', in Azimi, Fuller, and Nakayama, *supra* note 86, 179 at 182.

88. UNTAET Press Release, East Timor: certified voting results presented to head of UN mission, (10 Sep. 2001), available at <http://www.un.org/peace/etimor/news/01sep10.htm>; and UNSC Press Release, Security Council Hears Details of Free and Fair Elections in East Timor, UN Doc. SC/7139 (10 Sep. 2001). On the Independent Electoral Commission, see Section 11, UNTAET Regulation 2001/2, *supra* note 85.

89. S. Cliffe, 'The East Timorese Reconstruction Programme: Successes, Problems and Tradeoffs', in N. Azimi and L. L. Chang (eds.), *The United Nations Transitional Administration in East Timor (UNTAET): Debriefing and Lessons* (2003), 95 at 104.

90. For an overview of the drafting of the constitution, see J. Morrow and R. White, 'The United Nations in Transitional East Timor: International Standards and the Reality of Governance', (2002) 22 *Australian Yearbook of International Law* 1.

91. European Union Election Observations Mission, East Timor Presidential Elections – 14 April 2002, European Union Election Observations Mission Final Report (2002), at 12, available at [http://ec.europa.eu/comm/external\\_relations/human\\_rights/eu\\_election\\_ass\\_observ/east\\_timor/report02.pdf](http://ec.europa.eu/comm/external_relations/human_rights/eu_election_ass_observ/east_timor/report02.pdf). See also the Report of the Secretary-General on the United Nations Transitional Administration in East Timor, UN Doc. S/2002/432 (17 Apr. 2002), § 7.

Despite the fairness of the electoral process,<sup>92</sup> some issues of concern have been raised with regard to the transformation of the Constituent Assembly into a National Parliament. Whereas the relevant UNTAET Regulation authorized such a transformation if so provided by the constitution,<sup>93</sup> this raised serious doubts as to the democratic nature of such a conversion. Although the transitional process might necessitate the creation of unelected governmental bodies in anticipation of the creation of a stable political environment, this transformation was in our view a violation of the right to free and fair elections, considering that elections had already been held in the state, and that democratic institutions been provided for in the constitution. Ideally, a second round of elections should have been organized in order to elect the Parliamentary Assembly, as the Constituent Assembly was elected solely for the purpose of drafting a constitution, and not to function as a legislative body.<sup>94</sup>

The United Nations did, however, achieve one of the primary goals of the administration, namely a successful transition to independence through the creation of democratic institutions based on free and fair elections.<sup>95</sup> The question remains, however, whether the success of the discussed elections will be repeated. One of the criticisms of the UN's involvement has indeed been the failure to create sufficient capacity to strengthen government institutions.<sup>96</sup> In the meantime, the National Assembly has adopted new laws to regulate the presidential and parliamentary elections which took place April and June 2007 respectively.<sup>97</sup>

### 2.1.3. *Afghanistan*

The situation in Afghanistan was different, since the military intervention and the consequent occupation were not primarily in the hands of the United Nations. After the military intervention a peace conference, held in Bonn on 5 December 2001 under UN auspices, resulted in an agreement acknowledging the 'right of the people of Afghanistan to freely determine their own political future in accordance with the principles of Islam, democracy, pluralism and social justice'.<sup>98</sup> Notwithstanding the different situation, the timeline for the holding of elections was similar to the previous cases. The Bonn Agreement expressly asked the Afghan Transitional Administration to 'lead Afghanistan until such time as a fully representative government can be elected through free and fair elections to be held no longer than

92. Some concerns have nevertheless been raised with regard to the registration process. UNTAET faced the difficult task of defining the electoral *system* and, in fact, used different systems in the different elections. With regard to the 2001 elections for the Constituent Assembly, UNTAET engaged in the nationwide registration process to identify voters. Conversely, since certain independent experts had questioned the accuracy of the registry, the Independent Electoral Commission decided not to use the same registry for the 2002 presidential elections and relied on a system where voters were free to choose the place of voting, on presentation of certain identity documents. See on this issue Juvenal dos Reis, *supra* note 87, at 182.

93. UNTAET Regulation 2001/2, *supra* note 85, para. 206; and Section 167, Constitution of the Democratic Republic of Timor-Leste, available at <http://www.timor-leste.gov.tl/constitution/constitution.htm>.

94. J. M. Saldanha and M. X. Magno, 'UNTAET: Mandate, East Timorese Role, and Exit Strategy', in Azimi and Chang, *supra* note 89, 161 at 165.

95. C. Valenzuela, 'Towards Elections', in Azimi and Chang, *supra* note 89, 179 at 180 and 182.

96. See, e.g., Saldanha and Magno, *supra* note 89, 161 at 164.

97. See UNSC Resolution 1745, UN Doc. S/RES/1475 (2007), (22 Feb. 2007), § 7.

98. Preamble, Bonn Agreement, *supra* note 34.

two years from the date of the convening of the Emergency Loya Jirga'.<sup>99</sup> Again, the agreed two-year period has to be seen in the context of creating a stable democratic environment in which the elections could take place, without jeopardizing the entire peace process.<sup>100</sup> The importance of conducting free and fair elections on a regular basis has equally been emphasized by the Security Council.<sup>101</sup> The Constitutional Loya Jirga<sup>102</sup> elaborated a constitution retaining a bicameral National Assembly, consisting of a directly elected Wolesi Jirga and an indirectly elected Meshrano Jirga, or house of elders, and a directly elected president,<sup>103</sup> thereby laying the basis for a democratic political system. Beside the national institutions, the 2004 constitution created provincial, district, and village councils, to be elected through free elections.<sup>104</sup>

The presidential elections were held on 9 October 2004, and were monitored by the Joint Electoral Management Body (JEMB), an Afghan–UN body established to oversee the electoral process. The presidential elections were relatively peaceful, despite some shortcomings relating to logistical problems and complaints of violation of the electoral rules and procedure by candidates' representatives and even JEMB staff.<sup>105</sup> The elections to the Wolesi Jirga and provincial councils were held on 18 September 2005, and were seen as relatively fair, although the main observer, the EU, did not send its staff to 'high-risk' areas and reported the killing of several voters during and after the election process.<sup>106</sup> The JEMB, which monitored the electoral process, reported several cases of intimidation by agents and attempts at fraud, but these did not, in the view of the JEMB, undermine the legitimacy of the results.<sup>107</sup>

Although UNAMA was not mandated to participate principally and actively in the administration of the territory, it provided efficient support to the transitional authorities. With regard to the convening of the emergency Loya Jirga, UNAMA participated in the elaboration of the rules of selection of its delegates, and provided technical support and advice during the assembly. The same assistance was given for the preparation of the Constitutional Loya Jirga. UNAMA also participated actively in the election process by supporting the Electoral Commission appointed by the

99. *Ibid.*, Art. I(4).

100. Cf. C. Johnson, W. Maley, A. Their, and A. Wardak, 'Afghanistan's Political and Constitutional Development' (Overseas Development Institute, January 2003), 32, available at <http://www.odi.org.uk/hpg/papers/evaluations/afghandfid.pdf>.

101. SC Resolution 1563, UN Doc. S/RES/1563 (17 September 2004).

102. For a critique on the 'democratic' nature of the Constitutional Loya Jirga and the constitutional developments in Afghanistan, see S. A. Arjomand, 'Constitutional Developments in Afghanistan: A Comparative and Historical Perspective', (2004–5) 53 *Drake Law Review* 943.

103. Chapters 3 and 5, Constitution of Afghanistan. An unofficial English translation can be found on the official website of the Ministry of Foreign Affairs of the Islamic Republic of Afghanistan, available at <http://www.mfa.gov.af/Documents/Constitution%20of%20afghanistan.pdf>.

104. *Ibid.*, Arts. 138–141.

105. See AIHRC–UNAMA, AIHRC's Report on 2004 Presidential Elections and Its [sic] Recommendations, (November 2004), available at [http://www.aihrc.org.af/rep\\_eng\\_election04.pdf](http://www.aihrc.org.af/rep_eng_election04.pdf).

106. European Union Election Observations Mission, Afghanistan Parliamentary and Provincial Council Elections – 18 September 2005, European Union Election Observations Mission Final Report (2005), at 28, available at [http://ec.europa.eu/comm/external\\_relations/human\\_rights/eu\\_election\\_ass\\_observ/afghanistan/final\\_report.pdf](http://ec.europa.eu/comm/external_relations/human_rights/eu_election_ass_observ/afghanistan/final_report.pdf).

107. Joint Electoral Management Body, National Assembly and Provincial Council Elections 2005, Final Report, at 16, available at <http://www.jemb.org/pdf/JEMBS%20MGT%20Final%20Report%202005-12-12.pdf>.

Afghan Transitional Administration, and by assisting in the registration of voters and the organization of the elections.

#### 2.1.4. *Iraq*

As has already been mentioned, the Security Council significantly extended the occupying power's competences in order to establish conditions in which the Iraqis would freely determine their own political future. Nevertheless, the creation of democratic institutions based on free and fair elections was not expressly contained in the relevant Security Council resolutions, or in the first CPA regulations.<sup>108</sup> One of the first indications for the holding of elections is contained in Resolution 1546, in which the Security Council confirmed the importance of holding direct democratic elections and welcomed the effort of the Interim Government to work towards democratic institutions.<sup>109</sup> On 28 June 2004, according to Security Council Resolution 1546, the Coalition occupation of Iraq ended, and the CPA, which had administered Iraq since the fall of the former regime, was dissolved. An appointed Iraqi Interim Government assumed authority to govern Iraq from June 2004 until a Transitional Government of Iraq was formed in May 2005 by the Transitional National Assembly directly elected for this purpose by the Iraqi people in January 2005.<sup>110</sup> The other primary responsibility of the Transitional Government of Iraq was the drafting of a permanent constitution for Iraq leading to the formation of a constitutionally elected government by 31 December 2005, marking the end of the transitional administration period.

The overall conduct of the elections to the National Assembly held on 30 January 2005 was in accordance with international standards, although the overall turnout was low, especially among Sunni Arabs.<sup>111</sup> Following the adoption of the new constitution in October 2005, which vested legislative authority in a Council of Representatives, national parliamentary elections were held on 15 December 2005. The overall turnout was much larger than for the January 2005 elections and no 'major' incidents were reported on election day, although there were several reports of violence.<sup>112</sup> An Independent Electoral Commission, charged with ensuring the fairness of the process, supervised the elections.<sup>113</sup>

The main criticisms with regard to the electoral process concerned the timetable and the involvement of local actors. Whereas we do agree with the prerequisite of having a stable environment before the holding of elections, the various interim or transitional institutions put in place in Iraq have caused great distrust among the local population. In addition, no local or provincial elections were held before

108. D'Aspremont, *supra* note 30, 896.

109. SC Resolution 1546, UN Doc. S/RES/1546 (8 Jun. 2004).

110. *Ibid.*

111. Report of the Secretary-General pursuant to paragraph 30 of Security Council Resolution 1546 (2004), UN Doc. S/2005/141 (7 Mar. 2005), para. 5.

112. Report of the Secretary-General pursuant to paragraph 30 of Security Council Resolution 1546 (2004), UN Doc. S/2006/137 (3 Mar. 2006), paras. 4 and 11.

113. Coalition Provisional Authority (CPA) Order No. 92, 'The Independent Electoral Commission of Iraq' (31 May 2004), available at [http://www.cpa-iraq.org/regulations/20040531\\_CPAORD\\_92\\_Independent\\_Electoral\\_commission\\_of\\_Iraq.pdf](http://www.cpa-iraq.org/regulations/20040531_CPAORD_92_Independent_Electoral_commission_of_Iraq.pdf).



the nationwide parliamentary elections.<sup>114</sup> Nevertheless, the basis of a democratic system, as well as the principle of holding elections on a regular basis, has been laid. The major issue in the Iraqi reconstruction process remains the security aspect, which, of course, greatly influences the capacity of the population to participate freely in the electoral process. The general perception of the fairness of the conducted elections nevertheless has to be considered with regard to the other two defined human rights, which are now examined.

## 2.2. Freedom of association

The practice pertaining to the (re)construction of institutions in post-conflict situations also demonstrates that the second element that we have identified—freedom of association – has been seen as a pillar of the new institutions on these occasions. This is not utterly surprising, since the freedom of association, as demonstrated earlier, constitutes an important condition for the holding of free and fair elections.

### 2.2.1. Kosovo

When defining the law applicable in Kosovo, the Transitional Administrator confirmed that in exercising their functions, all persons undertaking public duties or holding public office in Kosovo had to observe internationally recognized human rights standards, contained in the main international human rights instruments.<sup>115</sup> In addition, Chapter 2(b) of the 2001 Constitutional Framework for Provisional Self-Government, adopted by the then Special Representative of the Secretary-General, imposes on the PISG the duty ‘to promote and fully respect the rule of law, human rights and freedoms, democratic principles and reconciliation’.<sup>116</sup>

UNMIK Regulation 2000/16 on the registration and operation of political parties established the right to create political parties, and initiated a whole regime of registration, operation, and dissolution of political parties. With regard to non-governmental organizations (NGOs), a similar regulation was adopted, governing the founding, registration, activities, and dissolution of all legal persons organized as NGOs.<sup>117</sup> The regulation, co-drafted with national and international NGOs, fully recognizes the right of individuals to associate and work together for a common interest and public well-being. The regulation also certifies that it does not seek to limit the right of individuals to freedom of association, by providing simple procedures for associations to form a legal entity separate from the legal personality

114. See for a critique of the election timetable L. Diamond, ‘Building Democracy after Conflict: Lessons from Iraq’, (2005) 16 *Journal of Democracy* 9.

115. UNMIK Regulation 1999/24 on the law applicable in Kosovo, UN Doc. UNMIK/REG/1999/24 (12 Dec. 1999), para. 1.3.

116. UNMIK Regulation 2001/9 on the Constitutional Framework for Provisional Self-Government, UN Doc. UNMIK/REG/2001/9 (15 May 2001).

117. UNMIK Regulation 1999/22 on the registration and operation of non-governmental organizations in Kosovo, UN Doc. UNMIK/REG/1999/22 (15 Nov. 1999).

of its members. Within a few years the number of registered NGOs in Kosovo had risen to 2,800, some 300 representing Kosovo Serbs.<sup>118</sup>

The Ombudsperson Institution, created by UNMIK to receive complaints with regard to, *inter alia*, the observance of fundamental human rights and freedoms by the Kosovar official institutions,<sup>119</sup> also plays a vital role in safeguarding the freedom of association. Since its establishment, the Ombudsperson has dealt with various cases of alleged human rights violations by Kosovo official institutions. One of the first cases concerned the freedom of association. The Ombudsperson found that the 'arbitrary' removal by the Special Representative of the Secretary-General of three persons from the list of candidates of their respective political parties for the 2001 elections to the Kosovo Assembly violated *inter alia* the right to freedom of association guaranteed under Article 11 of the ECHR. The Ombudsperson recommended that the Special Representative of the Secretary-General reinstate them on the list of candidates for the elections of 17 November 2001 to the Kosovo Assembly.<sup>120</sup>

The implementation of the right to freedom of association has also been addressed in the Kosovar institutions, when on 23 February 2005, the Kosovo Assembly passed the 'Law on Freedom of Association in NGO'. Problems have occurred, since the draft law incorporated amendments which through mandatory registration could limit the right to free association; mandatory registration could be refused on certain grounds, therefore creating a risk of generating obstacles to the right to form associations.<sup>121</sup> The earlier UNMIK regulation merely offered the opportunity of registering to form a separate legal entity.<sup>122</sup> The proposed law is still under review by the Special Representative, awaiting promulgation.<sup>123</sup>

### 2.2.2. *East Timor*

UNTAET took an important first step in adopting Regulation 1999/1, which sets out the framework for the authority and powers of UNTAET.<sup>124</sup> The regulation affirms on the one hand that all legislative and executive authority, including the administration of the judiciary, is vested in UNTAET and, on the other, that in exercising their functions all those undertaking public duties or holding public office in East Timor shall observe internationally recognized human rights standards.

118. Report of the Secretary-General on the United Nations Interim Administration Mission on Kosovo, UN Doc. S/2005/88 (14 Feb. 2005), para. 10.

119. UNMIK Regulation 2000/38 on the establishment of the Ombudsperson Institution in Kosovo, UN Doc UNMIK/REG/2000/38 (30 June 2000).

120. Ombudsperson Institution in Kosovo Ex Officio Investigation No. 19/01, Report Regarding the Removal of Emrush Xhemajli, Gafurr Elshani and Sabit Gashi from the List of Candidates for the November 2001 Elections, available at [http://www.ombudspersonkosovo.org/doc/reps/elections\\_summary.htm](http://www.ombudspersonkosovo.org/doc/reps/elections_summary.htm).

121. See on this issue Council of Europe, Advisory Committee on the Framework Convention for the Protection of National Minorities, Opinion on the Implementation of the Framework Convention for the Protection of National Minorities in Kosovo, Doc. Nr. ACFC/OP/I(2005)004 (25 November 2005), para. 60, available at [http://www.coe.int/T/E/Human\\_Rights/Minorities/](http://www.coe.int/T/E/Human_Rights/Minorities/).

122. UNMIK Regulation 1999/22, *supra* note 117, Section 4.

123. See UNMIK, Provisional Institutions of Self-Government, Assembly of Kosovo, Evidence of the Processed and Adopted Laws, available at [http://www.assembly-kosova.org/common/docs/ligjet/matrix\\_en.pdf](http://www.assembly-kosova.org/common/docs/ligjet/matrix_en.pdf).

124. UNTAET Regulation 1999/1 on the Authority of the Transitional Administration in East Timor, UN Doc. UNTAET/REG/1999/1 (27 Nov. 1999).

UNTAET reaffirmed the importance of the freedom of association and expression in the drafting of the regulation on the election of the Constituent Assembly: 'persons in East Timor have the right to freedom of association, the right to peaceful assembly, the right to freedom of expression, the right to vote and to be elected and to take part in the conduct of public affairs, directly or through freely chosen representatives'.<sup>125</sup> The difficulties in fully realizing freedom of association can be illustrated by the discussion that arose concerning the provisions relating to the registration of political parties contained in this regulation. Some local actors had asked that parties that had opposed East Timor's independence be excluded. UNTAET refused to agree to this demand, which was mainly inspired by consideration of inherent ethnic and post-conflict reactions, and finally introduced a general right to form political parties,<sup>126</sup> leading to the registration of 16 political parties to participate in the elections to the Constituent Assembly.<sup>127</sup>

In the meantime the right to freedom of association, in conjunction with the protection of human rights as one of the state's main objectives, has been enshrined in the constitution, which was adopted in March 2002 by the Constituent Assembly elected in 2001. The constitution guarantees that everyone has the right to freedom of association, with the important proviso that such association is not intended to promote violence and is in accordance with the law.<sup>128</sup> The constitution also includes the prohibition to establish armed, military, or paramilitary associations, including organizations of a racist or xenophobic nature or those promoting terrorism. A specific provision has been introduced concerning the right of every citizen to participate in the political life and public affairs of the country, and to establish and participate in political parties. The provision also included the freedom to form and to join trade unions.<sup>129</sup>

### 2.2.3. *Afghanistan*

Afghanistan had acceded to the ICCPR on 24 January 1983.<sup>130</sup> Article 35 of the newly adopted Afghan constitution provides that the citizens of Afghanistan shall have the right to form associations and to form political parties in accordance with provisions of the law.<sup>131</sup> However, the constitution also provides that these associations or parties cannot be 'contrary to the provision of the sacred religion of Islam, and the provisions and values of this Constitution', and that they cannot 'be affiliated to foreign political parties or sources'.<sup>132</sup> The formation and operation of a party on the basis of ethnicity, language, religion, or region is equally prohibited.<sup>133</sup> While some

125. UNTAET Regulation 2001/2 on the Election of a Constituent Assembly to Prepare a Constitution for an Independent and Democratic East Timor, UN Doc. UNTAET/REG/2001/2 (16 Mar. 2001), Section 20.3.

126. See on this issue Morrow and White, *supra* note 90, 15.

127. Progress Report of the Secretary-General on the United Nations Transitional Administration in East Timor, UN Doc. S/2001/719 (24 July 2001), para. 2.

128. See Constitution of the Democratic Republic of Timor-Leste, *supra* note 93, Section 43.

129. *Ibid.*, Section 52.

130. See OHCHR, Status of Ratifications and Reservations of the International Covenant on Civil and Political Rights, available at <http://www.ohchr.org/english/countries/ratification/4.htm>.

131. Constitution of Afghanistan, *supra* note 103.

132. *Ibid.*

133. *Ibid.*, Article 35 (§ 2).

restrictions on the right to form associations, such as mandatory registration and the exclusion of military or paramilitary activities, are obvious and even necessary to guarantee the efficient exercise of the right to freely form associations, some of the restrictions contained in the Afghan constitution are in our view a direct threat to the right itself and go far beyond the internationally accepted restriction contained, for example, in the ICCPR.<sup>134</sup> A general question on the legality of any denominational invocation should indeed be addressed by international law. Problems have already risen with regard to the Afghan Christian apostate Abdul Rahman, who had to flee to Italy since he was facing prosecution for the alleged crime of apostasy, in clear violation of the Afghan constitution and the international human rights instruments contained therein.<sup>135</sup>

Freedom of association still remains fragile in Afghanistan, especially in respect of political parties and religion-related issues. In June 2005, the Ministry of Justice had registered 72 political parties, although the registration process for the Wolesi Jirga elections has been difficult, parties having been barred from registration on ideological grounds.<sup>136</sup> Another worrying factor was that only 12 per cent of the candidates for the Wolesi Jirga elections had recorded affiliation to a political party because candidates feared that affiliation to a party could have a negative influence due to the role played by these parties in the Afghan civil war during the nineties.<sup>137</sup>

#### 2.2.4. *Iraq*

The ICCPR was ratified by Iraq on 25 January 1971.<sup>138</sup> The freedom to establish political organizations and parties is equally guaranteed by Article 39 of the constitution, without any limitation.<sup>139</sup> Article 39 of the constitution equally prohibits forcing any person to join any party, society, or political entity, or forcing him to continue his membership of it. Although these rights have been enshrined in the constitution, effective implementation seems rather difficult. With regard to trade unions, for example, the Iraqi government failed to respond to a request made by the International Labour Organization (ILO) to amend its Decree No. 16 of 28 January 2004, which imposed a trade union monopoly by recognizing the Iraqi Federation of Workers' Trade Unions as the only legitimate and legal trade union in Iraq. The ILO rightly considered that such a monopoly imposed by law is contrary to democracy and to freedom of association.<sup>140</sup>

134. See Art. 23 ICCPR.

135. M. K. R. Afshar, 'The Case of an Afghan Apostate – The Rights to a Fair Trial between Islamic Law and Human Rights in the Afghan Constitution', (2006) 10 *Max Planck Yearbook of United Nations Law* 591.

136. AIHRC-UNAMA, 'Joint Verification of Political Rights, Wolesi Jirga and Provincial Council Elections, First Report' (19 April–3 June 2005), available at [http://www.aihrc.org.af/jvr\\_on\\_election.pdf](http://www.aihrc.org.af/jvr_on_election.pdf), at 4.

137. *Ibid.*, at 4.

138. See OHCHR, Status of Ratifications and Reservations of the International Covenant on Civil and Political Rights, available at <http://www.ohchr.org/english/countries/ratification/4.htm>.

139. Constitution of Iraq, unofficial translation, available at <http://www.unhcr.org/cgi-bin/texis/vtx/rsd/rsddocview.pdf?tbl=RSDLEGAL&id=454f50804>.

140. Statement by Mr Ulf Edström (Sweden) on behalf of the Workers Group on the 338th Report of the Committee on Freedom of Association (CFA) (16 Nov. 2005), available at <http://www.ilo.org/public/english/dialogue/actrav/new/wg/cfa338.htm>.

With regard to the freedom to establish NGOs, similar concerns have arisen. A draft law on civil society organizations had been proposed by the ministry in charge of civil society affairs, whereby the executive would have been authorized to interfere in the internal management of NGOs, thus violating international regulations on the issue.<sup>141</sup> At the insistence of UNAMI, the minister finally agreed to the redrafting of the proposed law.<sup>142</sup>

Freedom of association in respect of political parties and NGOs seems to be difficult to establish, notwithstanding clear and precise legal instruments. The advisory role of the United Nations in Afghanistan and Iraq has, in some cases, been helpful in drawing the attention of officials to manifest violations of the freedom of association. The long-term effects of the emphasis on freedom of association are, however, not evident. As we shall see, similar concerns have arisen with regard to the freedom of expression, which in its application is closely connected with the freedom of association.

### 2.3. Freedom of expression

Freedom of expression – the third component of democracy that we have identified – has also played an important role in the practice related to the (re)construction of institutions in post-conflict situations, as is explained in this section.

#### 2.3.1. Kosovo

The 2001 ‘Constitutional Framework for Provisional Self-Government’<sup>143</sup> contains the basic human rights and fundamental freedoms. With regard to the implementation of the right to freedom of expression, the climate in Kosovo was at the very least worrying at the time of the establishment of UNMIK. Intolerance had emerged within the Kosovo Albanian community, and the rights of Kosovo Albanians generally to freedom of association and expression were challenged. As the UCK controlled most of the re-established and self-appointed municipal administrations, opposition to them led to reports of intimidation and harassment.<sup>144</sup>

The main problem in Kosovo is the difficulty in maintaining peaceful coexistence and tolerance among all ethnic groups and creating an environment in which freedom of opinion and expression can be fully exercised. In that regard, the fact that defamation is still a part of criminal law seems to play a vital role in the initiation of libel suits, especially against journalists, and resulted in approximately 300 libel suits between 2000 and 2004.<sup>145</sup> The Kosovo Ombudsperson reminded the Special Representative of the negative effects of these provisions of the criminal

141. UNAMI, Human Rights Report 1 September–31 October 2006, available at <http://www.uniraq.org/documents/HR%20Report%20Sep%20Oct%202006%20EN.pdf>, at 23.

142. UNAMI, Human Rights Report 1 March–30 April 2006, available at <http://www.uniraq.org/documents/HR%20Report%20Mar%20Apr%202006%20EN.PDF>, at 24.

143. UNMIK Regulation 2001/9 on the Constitutional Framework for Provisional Self-Government, UN Doc. UNMIK/REG/2001/9 (15 May 2001).

144. OSCE Mission in Kosovo, Human Rights in Kosovo: As Seen, As Told – Vol. II (Oct. 1999), available at [http://www.osce.org/kosovo/item\\_11\\_17756.html](http://www.osce.org/kosovo/item_11_17756.html).

145. Human Rights Committee, Concluding Observations of the Human Rights Committee: Serbia and Montenegro, UN Doc. CCRP/CO/81/SEMO (12 Aug. 2004), at 22.

code, and urged him to remove the offences of criminal insult and libel.<sup>146</sup> As already mentioned, the Kosovo Ombudsperson's role is fundamental to disputes regarding alleged human rights violations, as the Ombudsperson can initiate investigations to ensure respect for human rights standards. Much criticism has been heard about UNMIK's work regarding this aspect, but UNMIK's presence does seem indispensable for work on these issues to be continued.<sup>147</sup> We should not forget that creating a free media environment in a region that suffered from years of oppression under the previous regime and, to a lesser extent, from the destruction of war, is not an easy task.

### 2.3.2. *East Timor*

In East Timor freedom of expression had been widely restricted in the past, not only during the Indonesian occupation, but also under the former Portuguese administration of the territory. The right to freedom of expression was explicitly confirmed by UNTAET Regulation 1999/1 and later incorporated into the state's constitution, with explicit reference to the basic human rights treaties.<sup>148</sup>

UNTAET had few problems regarding freedom of expression during the administration of the territory, but some problems have risen since independence, especially with regard to harsh defamation laws, which are at present a significant assault on freedom of expression. Whereas defamation laws are an accepted restriction to the freedom of expression, reparation should be a matter of civil law rather than criminal law.<sup>149</sup> While Timor Leste's Press Law contains a basic regime for guaranteeing the right to freedom of expression for journalists, in full accordance with the international standards and treaties, the Penal Code includes a harsh regime for defamation, which can be applied concurrently with the Press Law. In February 2005 the parliament adopted new articles of the Penal Code, providing for imprisonment for up to two years for defamation if committed through the media, and three years for defamation against individuals performing public, religious, or political duties,<sup>150</sup> whereas international case law established that public officials should tolerate a higher degree of criticism.<sup>151</sup> In addition, the draft articles do not provide a maximum for fines. The president eventually declined to sign the decree criminalizing

146. Ombudsperson Institution in Kosovo Press Release, 'The Ombudsperson Asks the SRS to Decriminalize Defamation Cases to Safeguard Freedom of Expression' (7 March 2005), available at <http://www.ombudspersonkosovo.org>.

147. ECOSOC Commission on Human Rights, Report submitted by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression – Addendum 4 – Mission to the State Union of Serbia and Montenegro, UN Doc. E/CN.4/2005/64/Add.4 (8 February 2005).

148. Constitution of the Democratic Republic of Timor-Leste, *supra* note 93, Sections 40 and 41.

149. See for example the Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression: 'Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws' (11 December 2002), available at <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/2D8D8FAD6977D4A5C1256C8C00493AF7?opendocument>.

150. For an overview of the issue see USAID's Timor Leste Media Assessment (February 2006), available at [http://pdf.usaid.gov/pdf\\_docs/PNADF898.pdf](http://pdf.usaid.gov/pdf_docs/PNADF898.pdf).

151. See for example *Lingens v. Austria*, Decision of 8 July 1986, [1986] ECHR (Ser. A).

defamation and referred it back to the parliament.<sup>152</sup> Although this incident has not caused any real problems except major unease and concern, it does show that freedom of expression, particularly in relation to the media, is often targeted and needs to be fully implemented according to international human rights standards. Defamation laws in particular, which as such are not an insurmountable problem, can be the source of attacks on freedom of expression in countries where there is no established tradition of democracy and where courts, and politicians, may react excessively to media criticism.

### 2.3.3. *Afghanistan*

Kabul province remains the most open in terms of freedom of expression, due to active and diverse media reporting.<sup>153</sup> The main problem in Afghanistan is the lack of independent media, in conjunction with reprisals against journalists for criticizing officials.<sup>154</sup> A private magazine, for example, had its office shut down after it published a satirical piece on the governor.<sup>155</sup> In the election process, critical remarks against official institutions or local commanders have caused interference by local officials in media content and the censoring of statements made by candidates which have been deemed 'sensitive'. In addition, several cases of violence against candidates opposing local officials have been reported.<sup>156</sup> These examples are not the only worrying factors, however. Even more disturbing is the fact that during the campaign period for the presidential election, the Supreme Court issued a statement asking for the disqualification of a presidential candidate because of anti-shariah statements.<sup>157</sup> Although the Afghan constitution has explicitly incorporated the freedom of expression,<sup>158</sup> the Supreme Court does not seem effectively to interpret and apply this right. This is again an example of the already mentioned fact that effective freedom of expression takes more than an inscription of these rights in the constitution and an adherence to international human rights treaties. Overall, the UN mission in Afghanistan has made major efforts to promote the freedom of expression, especially during the elections. The verification exercise by the Afghan Independent Human Rights Commission and UNAMA, to which we referred, is to ensure that the commitments with regard to the basic human rights are in fact implemented throughout the country. This is an important aspect of democratic governance, since fundamental freedoms are only effective when they are applied

152. End-of-mandate report of the Secretary-General on the United Nations Office in Timor-Leste, UN Doc. S/2006/251 (20 Apr. 2006).

153. *Ibid.*, at 3.

154. For an overview see AIHRC-UNAMA Joint Verification of Political Rights, First Report (15 June–7 July 2004), available at [http://www.unama-afg.org/docs/\\_nonUN%20Docs/\\_Electoral%20Docs/Political-Rights/\\_NPVR/First%20National%20Political%20Verification%20Report%20-English.doc](http://www.unama-afg.org/docs/_nonUN%20Docs/_Electoral%20Docs/Political-Rights/_NPVR/First%20National%20Political%20Verification%20Report%20-English.doc), at 4–5.

155. AIHRC-UNAMA Joint Verification of Political Rights, Wolesi Jirga and Provincial Council Elections First Report (19 April–3 June 2005), available at [http://www.aihrc.org.af/jvr\\_on\\_election.pdf](http://www.aihrc.org.af/jvr_on_election.pdf), at 4.

156. AIHRC-UNAMA Joint Verification of Political Rights, Wolesi Jirga and Provincial Council Elections, Second Report (4 June–16 August 2005), available at [http://www.aihrc.org.af/jvr\\_on\\_election2.pdf](http://www.aihrc.org.af/jvr_on_election2.pdf), para. 38.

157. United States Commission on International Religious Freedom Press Release, 'Afghanistan: Freedom and Electoral Democracy Stifled by Supreme Court Chief Justice' (13 September 2004), available at [http://www.uscirf.gov/mediaroom/press/2004/september/09132004\\_afghanistan.html](http://www.uscirf.gov/mediaroom/press/2004/september/09132004_afghanistan.html).

158. Constitution of Afghanistan, *supra* note 103, Art. 34.

country-wide. However, the tangible effect of the Commission and UNAMA's work is less obvious. Although the presence of the Commission as such is supposed to be one of the major goals of the exercise,<sup>159</sup> its presence did not prevent violations during the presidential and Loya Jirga elections. The Commission has mainly a verification mandate and the results of its verifications are published. However, to be effective, not only should the Commission be charged with verifications, but clear violations of fundamental freedoms should be followed by legal investigations and eventually lead to judicial procedures.

#### 2.3.4. *Iraq*

Iraq had, and still has, many restrictive laws with regard to freedom of expression, most of them dating back to the Ba'athist regime. Once more, harsh defamation laws contained in the Iraqi Penal Code are a major concern for the media. Soon after its installation the CPA suspended some of the restrictions on the right to freedom of expression and the right of peaceful assembly imposed by the 1969 Iraqi Penal Code, considering that the 'prohibition on freedom of assembly contained in the Iraqi Penal Code is inconsistent with Iraq's human rights obligations'.<sup>160</sup> The CPA adopted regulations to implement the freedom of expression, its Order No. 59 introducing a prohibition on discharging, transferring, threatening, intimidating, or discriminating against a government employee or government contractor for reporting a violation of any law, rule, or regulation, or abuse of authority.<sup>161</sup> Some criticism has also been heard regarding some of the CPA's regulations restricting the freedom of assembly and publications that are considered provocative.<sup>162</sup> Although far-reaching restrictions on fundamental freedoms have been adopted, some measures restricting, for example, the freedom of assembly can be in conformity with international obligations, especially if the very worrying security situation in Iraq is taken into account. In addition, Article 19(3) of the ICCPR, for example, considers that freedom of expression may be subject to certain restrictions for the protection of national security or of the public. In any event, it is admitted that freedom of expression does not cover situations of incitement to crimes or hate. In the end, the present situation in Iraq is still disturbing, but at least the legal foundation has been laid for smoothing progress towards democratic governance.

In the end, the wording inserted into the constitution and the laws are only affirmations of fundamental freedoms, but the implementation and effective exercise of these rights in public life is another point. Freedom of association and expression remains fragile, especially when considered in respect of political parties and NGOs.

159. Joint press conference by Jean Arnault, Special Representative of the Secretary-General for Afghanistan and Dr Seema Samar, Chairperson of the Afghan Independent Human Rights Commission (23 June 2004), available at <http://www.un.org/apps/news/infocusnews.asp?NewsID=760&SID=1>.

160. Coalition Provisional Authority (CPA) Order No. 19, 'Freedom of Assembly' (10 July 2003), available at [http://www.cpa-iraq.org/regulations/20030710\\_CPAORD\\_19\\_Freedom\\_of\\_Assembly\\_.pdf](http://www.cpa-iraq.org/regulations/20030710_CPAORD_19_Freedom_of_Assembly_.pdf), section 1(1).

161. Coalition Provisional Authority (CPA) Order No. 59 'Protection and Fair Incentives for Government Whistleblowers' (1 June 2004), available at [http://www.cpa-iraq.org/regulations/20040601\\_CPAORD59\\_Protection\\_and\\_Fair\\_Incentives\\_for\\_Government\\_Whistleblowers.pdf](http://www.cpa-iraq.org/regulations/20040601_CPAORD59_Protection_and_Fair_Incentives_for_Government_Whistleblowers.pdf).

162. See, e.g., Article 19, 'Iraqi Laws Threaten Democracy', press release, 5 February 2004, available at <http://www.article19.org>.



When considering the cases discussed here, the United Nations as a transitional administration seems to have had more impact in introducing the right of people freely to associate with others, while in Afghanistan and Iraq, due its limited mandate, the United Nations has only been able to serve as an 'adviser'. Implementation of and respect for freedom of association and expression often appear to be problematic and are closely linked to local customs and ethnic factors, deeply embedded in cultural traditions, while tangible and long-term achievements are very limited.

### 3. CONCLUDING REMARKS

This article has submitted that democracy rests on three constitutive elements deeply rooted in human rights doctrine: free and fair elections, freedom of association, and freedom of expression. In particular, it has posited that free and fair elections are procedural guarantees for expressing the will of the voters, whereas freedom of association as well as freedom of expression provide the necessary competitive framework for the holding of free and fair elections. It has then been argued that the practice pertaining to the (re)construction of institutions in post-conflict situations supports such a three-tiered conception of democracy. The development of a democratic environment, including, among others, the holding of elections, has been the paramount priority in the four reconstruction cases examined here (Kosovo, East Timor, Afghanistan, and Iraq). The mere organization of elections has nonetheless not been deemed sufficient and, in practice, much effort and energy have been devoted to the development of an environment where freedom of expression and association are respected. The practices analysed in this article have further demonstrated that the awareness of the need to provide assistance in achieving freedom of association has usually come at a very late stage. This has much to do with the fact that freedom of association and freedom of expression can hardly be introduced and enforced in the transitional period. Ultimately, this article has shown that the difficulties besetting post-conflict situations have not, however, prevented the United Nations from being generally successful in its aspiration to set up democratic institutions.