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Postconflict Statebuilding: the Liberal Peace and the Transformative Alternative

©Patrick McAuslan

1. Introduction

I would emphasise at the outset of this paper that this is indeed very much ‘work in progress’ and is not an academic paper *stricto sensu*¹. It is an attempt to work out on paper some dissatisfactions that I have been developing about the directions that postconflict statebuilding is taking and in particular, the implications for postconflict land administration that current approaches are mandating as the ‘correct’ approach as evidenced by the plethora of official guides, handbooks, reports and soft international legal instruments that have been and are being produced by the international community for use in postconflict states. I should make clear at the outset that my concerns are not original; other commentators are voicing similar concerns in general though not so much on the direction postconflict land administration is going.

My concerns have been focused by work I have been doing for UN-Habitat in Afghanistan, Somaliland and Liberia, and the UN and UNDP on local government institutions for Mogadishu in Somalia. UN-Habitat’s Country Report on Liberia focusing on the urban sector went some of the way towards re-orientating my thinking on these

¹ In large part, it consists of edited reports written for various UN and other agencies with additional *ex post* commentaries. Nor can I claim that because it consists of reports to UN agencies, it will have *impact*. The reports may not even be read or if read acted upon. Parts 1 – 3 were written in Nairobi in April 2010 during a UNDP mission to participate in a workshop on local government in Mogadishu; Part 4 was written in the UK and in Nairobi; Part 5 was written in Monrovia, when I was on a UN-Habitat mission there, and in Dar es Salaam when I was on a World Bank funded mission reviewing Tanzania’s land registration system, both in November 2009; Part 6 is a revised, updated and expanded version of part of an unpublished paper given at a conference on Law and Development in Cornell University Law School in 2004 which together with the Conclusions were written in Hargeisa when I was on a UN-Habitat mission on land issues in Somaliland in April 2010. The part dealing with an urban transformation law draws on a report on suggested reforms to urban planning laws in Syria written in 2007. Not all footnotes are complete.

There’s not much to do in Hargeisa in the evenings or at the weekends. Hargeisa is a UN security rated level 3 post. This means that UN staff are confined to their hotels at the weekends and from 6.30 pm daily unless we have to go out to see persons on official UN business. In theory we can go out in a UN vehicle to a UN approved restaurant or other hotel for a meal but no such places exist in Hargeisa unlike Kabul and Monrovia where there are several UN approved (on security grounds) restaurants and hotels one could go to which were of quite a good culinary standard together with a reasonable selection of wines.

issues, but matters really came to a head on my reaction to a proposed local government law for Mogadishu. But we need to start at the beginning.

2. The Liberal Peace Agenda and its critics

The peacemaking and statebuilding industry is about two decades old². It got underway in the aftermath of the wars that accompanied the break-up of Yugoslavia in the 1990s; once the UN became involved in Cambodia and Timor Leste, it rapidly developed as a branch of international administration with its own agencies (OCHA in the UN and a separate division in the World Bank and in many bilateral agencies), approaches, principles via soft international law, commentaries and inevitably rivalries between countries involved in the provision of peacekeeping and statebuilding services, agencies within countries and tensions between providers and receivers of the various services on offer. I allude to some of these rivalries in my paper on Afghanistan in Amanda's edited volume³. Right now there are upwards of 20 UN-led peacemaking and statebuilding operations in existence, of which the largest number are in Africa.

The current orthodoxy has been called the "contemporary liberal peace thesis"⁴. I prefer to call it the liberal peace agenda (LPA). It derives its legitimacy and its legality from the 2001 report of the International Commission on Intervention and State Sovereignty (ICISS) which propounded the thesis that "where gross human rights abuses are occurring, it is the duty of the international community to intervene, over and above considerations of state sovereignty"⁵ (what is now known as the Responsibility to Protect or R2P). The General Assembly of the UN endorsed this report and stated that the international community should be prepared to intervene in such situations through the Security Council.

So far so good. But the issue which sparks most debate is the nature of intervention in the reconstruction of postconflict and/or failed states. Should it be externally driven or internally led and what should be the aims of the process; what outcomes are being

² Roland Paris and Timothy D. Risk (2009) (eds) *The Dilemmas of Statebuilding: Confronting the contradictions of postwar peace operations*, and Vincent Chetail (2009) (ed) *Post-Conflict Peacebuilding: A Lexicon* for very useful introductions to the subject.

³ P. McAuslan (2009) Land and Power in Afghanistan: in pursuit of Law and Justice? In A. Perry-Kessaris (ed) *Law in Pursuit of Development*

⁴ Paris in J. Milliken (2003) (ed) *State Failure, Collapse and Reconstruction*.

⁵ The Responsibility to Protect (2001). Report of the International Commission on Intervention and State Sovereignty; International Development Research Centre Ottawa.

sought? Many commentators have raised serious concerns about the implications of externally driven interventions. States can only be built on strong foundations of social capital and indigenous beliefs and approaches. Durable institutions can only be built through processes of decision-making characterised by informed discourse among the people of a society. Attempting to develop new institutions on the basis of international best practice inevitably excludes the mobilising of public consent. Internal actors are disempowered by the presence and capacity of external actors. Perhaps more important than all these very valid concerns is the ideology behind external intervention. The aim is to create a liberal economic order – the free market economy – bolstered by a veneer of democracy legitimised by periodic elections and political institutions which replicate on the surface those found in the West. So the LPA is at best a variant of the post-Washington consensus.

Those arguing for external intervention do not dispute the ultimate and ideological aims of intervention. Their concern is that if state reconstruction is left to internal actors, nothing will change from what caused the state breakdown in the past. Calls for internal leadership are stigmatised as ‘nostalgia for the state of days gone by’⁶. The new reconstructed state must be equipped to operate “in multilevel non-territorial decision-making networks that bring together governments, international agencies, non-governmental organisations and so on” (Moore). When international gobbledegook like that is spouted, then you know you ought to be on your guard.

If that is a rather extreme version of the case for externally driven reconstruction, others offer a more moderate approach. External leadership will allow the buffer for local actors to renew trust and confidence in themselves. Democracy and marketised economies do offer the best chances of guaranteeing long-term peace. However the new states or new governance arrangements must ensure the centrality of institutions that can regulate the transition to a marketised system. There must in effect be a partnership between local and international actors with oversight remaining in the hands of the international community until conditions are ripe for the return of the state to local actors.

To my mind this debate is a reprise of debates from by-gone days on the arguments for and against colonialism – mainly for, since the arguments against from recipients of

⁶ D. Moore (2000) Humanitarian agendas, state reconstruction and democratisation processes in war-torn societies; *New Issues in Refugee Research* Working Paper 24, www.jha.ac/articles/u024.htm

empire didn't get much of a hearing at the outset of empire – and the international mandate and trusteeship system established by the League of Nations in the 1920s and the UN system in the 1940s. Indeed some of the discussions on statebuilding do actually pose the issue of whether a formal system of international trusteeship should not be reinstated for some countries in postconflict situations.

It would be difficult to argue that the UN's role in Timor Leste was anything other than that of an international trusteeship. Iraq's sovereignty was held by the USA for a year or two after the invasion of 2003 and then formally returned to the government of Iraq. In Liberia, under specific agreements made between the postconflict government elected in 2005 and the international community, the elected government accepted as the price for continued international aid and assistance a system of co-governance over national finances under which international administrators have to co-sign most of the authorisations of expenditure by the Liberian government. This is regarded as a great success by the international community so it can be assumed that it will become part of 'best practice' in the future. Much of the debate about governance in Afghanistan is to my mind a coded one on how much 'independence' should the Karzai regime be allowed.

3. Land and the liberal peace agenda

What of land? There are probably more international guides to best practice on land than on any other aspect of statebuilding. After a slow start, international agencies have produced a plethora of such documents, noted in my presentation at a Birkbeck Law School staff seminar in January 2009. Then I was more or less convinced of the correctness of this approach and indeed was concerned in that seminar to try and advance it by arguing for the development an all-encompassing humanitarian land law.

But on this I am having second thoughts. Many of the reports and guidelines and the Pinheiro Principles themselves make strong recommendations for a clear legal framework being the necessary precondition for programmes of restitution of property and housing which is a cornerstone of the Principles⁷. But a criticism of these guides and their

⁷ Leckie in his UNHCR paper is explicit in setting out what needs to be done: "One particular legislative action that may be considered...would be the pursuit of a *Consolidated Housing Rights Law*...[which] could provide the legal basis for land reform..."

The ICTJ states: "Restitution programmes should set out clear rules balancing the rights of claimants against those of subsequent occupiers..."

recommendations to which I paid too little attention is that what is needed is “post-conflict land policy which focuses on the political dynamics of the conflict over land rather than the technical dimensions of land administration” and this has been sidestepped by the guides and the Principles which have focused on the technical aspects of postconflict land administration. In some respects indeed, it seems to me that in urging the restoration of the status quo ante, these principles and guides are in danger of recreating the very conditions that contributed to the collapse of the state.

A paper by the Brooking Institution in June 2008 on *Addressing Property Claims of the Displaced: Challenges to a Consistent Approach* has the merit of highlighting three very different approaches to post-conflict property rights: the rights-based approach being developed by the UN system via international law and internationally developed institutions as in Bosnia and Kosovo; what might be called the national approach which tries to utilise existing national laws and institutions rather than trying to reinvent the wheel: the model offered here was Iraq; third, the approach that starts from the position that conflict will have had a profound effect on existing tenure systems so that it might be next to impossible to return to the pre-conflict position which is what in a sense the rights-based approach is geared to; one was inevitably going to be involved in rewriting rights: this is especially the position, it was argued, in African states with respect to customary tenure.

The IDMC, the offshoot of the NRC says in much the same language: “A clear and consistent legal framework is vital for restitution programmes to succeed...domestic legal analysis, repeal and reform should form a cornerstone of programmes designed to ensure the right to housing and property restitution.” The HPG of ODI’s conference noted the need to promote legislative reform. Finally, the *Pineiro Principles* are quite explicit on the need for clear national laws: “18.3 States should ensure the national legislation related to housing, land and property restitution are internally consistent...”

I think this analysis is very useful and certainly applicable to postconflict states in Africa. In several cases, the conflict, if not directly about land, certainly involved land and land lay behind what went on and goes on in the public eye. Jean-Philippe Platteau has made this point with respect to Rwanda. Land and the loss of it to foreign and Northern Sudanese investors lay behind the Nuba's joining the Sudanese civil war on the side of the SPLM. The restoration of land to its original owners was a key element of the Chimurenga in Zimbabwe and still is. There is a great deal of evidence that land was an issue in Liberia's and Sierra Leone's civil wars and if land issues are not addressed in Liberia, may well trigger renewed fighting. The breakdown of the state in Cote d'Ivoire revolved around land and the 'foreigners' who had obtained rights in indigenes' land. Land and who should have what rights to it was a major issue in the post-election outbreak of violence in Kenya in 2007 now the subject of proceedings before the ICC at The Hague. Nor should we forget that South Africa was in the early 1990s a postconflict state and that land was and remains a fundamental element of conflict within the state.

One thing the *Brookings* analysis leaves out however is the ideology behind the international community's increasing involvement in postconflict land administration. It seems to me that in placing a heavy emphasis on restitution of property, reform of land laws, and the resolution of conflicts over land, admirable though these matters are, taken singly, and placing them within a context of a rights-based approach, the international community is concerned to restore as quickly as possible a land management system that is a recognisable market-led one. People will regain clear rights to land, property and housing; a new and comprehensive land law will facilitate dealings with these property rights and an efficient and effective dispute settlement process will sort out any problems that may arise in this brave new postconflict world of a functioning land market: part of the LPA in other words.

Of late a more fundamental criticism of the liberal peace agenda is beginning to be voiced which has not yet been applied to the land elements of that agenda. My current work could I suppose be seen as an attempt to see how far and in what way this critical approach to the LPA could be applied to postconflict land administration. The key term here and one that is constantly surfacing now in discussions is 'transformation'. I can best illustrate this different approach or at least how I am interpreting it and using it by referring to the reports I have recently written on local government in Mogadishu, urban land management in Liberia and land issues in Somaliland.

4. Local government in Mogadishu⁸

First Mogadishu. I was involved in 2007 in drafting a discussion paper on possible future local government in Mogadishu. The paper took the form of a host of questions that I considered needed addressing by those who were going to put together a Mogadishu City Charter (MCC) together with pointers drawn from other local government systems in Anglophone Africa of the pros and cons of different possible solutions. A workshop took place in that paper in Kampala⁹ with some 15 Somalis involved either in the past or in the present with the provision of local services and government issues in Mogadishu. I revised the paper in the light of the discussions that took place there. This year I was invited to a workshop in Nairobi to discuss a draft MCC. It bore little relationship to any issues that had been raised and discussed in the workshop of 2007¹⁰. I had been doing some further reading about the current state of affairs in Somalia and that together with concerns about the LPA led me to write a critical note on the MCC to the UNDP Office on Somalia based in Nairobi. I reproduce it here more or less as drafted.

The MCC is quite well drafted and covers most of the matters that a traditional local government law based on an English model should cover. It is however very repetitive on functions, powers and duties; some of the clauses overlap and need tidying up. The big gap is a total lack of provisions on administrative law, integrity systems and codes of

⁸ The internationally recognised ‘official’ government in Somalia is the Transitional Federal Government (TFG) established in 2007. It controls very little of Somalia. It is not clear how much of Mogadishu it controls. Mogadishu is in theory divided into 16 districts; one estimate I have heard is the TFG is confined to just one district in Mogadishu. UN agencies seem to operate in more than that one district so they are clearly co-operating with CBOs, NGOs, and various other ‘unofficial’ groups which provide services to the residents of Mogadishu. At present no UN officials can visit or are based in Mogadishu.

⁹ The workshop took place in Kampala because there was no place in Somalia which the UN considered safe enough for a workshop to be held. It could not be held in Nairobi as the Somalia government has just issued new passports. The persons coming to the workshop only had old passports which the Government of Kenya refused to recognise. The Government of Uganda did recognise them however. Uganda had just agreed to spearhead the new AU peacekeeping force which was taking over from the Ethiopians who were retreating from their US supported invasion of Somalia. The Ugandan government thus had a vested interest in helping forward the process of reinstating a local government in Mogadishu. Earlier on in the consultancy I had visited Biadoa in Somalia where the TFG was based to interview officials about local government reform in Mogadishu. Interestingly, several key officials were most reluctant to become involved in the exercise. I then gave a presentation on my findings and very preliminary views at a workshop in Nairobi where many members of the TFG resided.

¹⁰ The odd thing is that the document just arrived out of the blue. There was no indication as to who or what body had had a hand in drafting it or what its sources were. In his book *The Law and the Constitution* Dicey makes the point early on that Englishmen did not wake up one morning and find the Constitution fully grown. But this is what seems to have happened with the Mogadishu City Charter.

conduct for councillors and officials. There are no provisions on hearings and appeals against decisions by the authority adverse to the citizen, no provisions on any form of public involvement by the citizenry in the governance of Mogadishu; no provisions on internal audit or monitoring of the exercise of power and behaviour by officials and councillors. These are grave gaps in the law as they give the impression that the aim of the law is to acquire and use power over citizens rather than use powers in the service of and with the participation of the citizen.

However the real issue is whether any such body should be established in Mogadishu. Basically the law provides for a rather old-fashioned approach to what local authorities should do and how they should do it. It is too top-heavy: it assumes the city council will do everything and regulate a lot of activities; will set and collect local taxes and will also set its own expenses and rates of allowances. Contacts with local communities and the delegation of functions to local communities and their organisations are absent. The citizen's role is to do as he or she is told.

This is in my view very much the wrong kind of local authority to establish in Somalia right now. There is a very great deal of evidence that in the absence of any kind of effective central or local government in Somalia and in Mogadishu, a very great number of organisations have come into being providing a range of services and public goods to the citizenry. These may be business people, community based organisations, traditional and religious organisations and bodies such as SAACID, the women's group responsible for garbage collection, disarmament, demobilization and reintegration using a cross-clan community dialogue model. As one commentator has put it, economic progress and improved public goods in critical areas have flourished in the absence of a monopolistic and corrupt state. This commentator compares Somalia on 18 key indicators on a 'before' and 'after' the collapse of central government in 1991 basis and with 3 neighbouring states – Kenya, Djibouti and Ethiopia – and finds that Somalia after is much better than Somalia before and outscores the neighbouring states on 13 of the 18 indicators¹¹.

More pertinent is the evidence that on the whole Somalia has been pretty peaceful since 1994 and that trade, particularly cross-border cattle trade with Kenya, has flourished. Foreign investors are coming in. The Somali shilling has been remarkably stable over the

¹¹ Peter T. Leeson (nd but it is probably 2007) *Better Off Stateless: Somalia Before and After Government Collapse*, Department of Economics, West Virginia University.

last 19 years. When there has been violence, it has been more or less, no doubt inadvertently, led or stimulated by the international community – the internationally supported invasion of Somalia by Ethiopia, raids on Somalia to ‘root out’ al-Qaeda – and successive attempts to establish central governments with too little recognition that the Somali experience of central government had been a very unhappy one; that central government was seen almost universally as a predator, and something that, if one was not going to be able to capture it, one should oppose it vigorously and if necessary violently. One commentator has put it thus: “The critical point of the analysis of Somalia is that, in the absence of a central state, the result has not been widespread chaos. Instead, endogenous rules and mechanisms that allow individuals to “get things done” have developed and created widespread co-operation. This is even more evident when compared to the widespread conflict that resulted when foreign governments attempted to create a central state”.

In these circumstances, an old fashioned local authority is the very last institution that should be set up. It has no resonance with the lived experience of Somalis. It will be seen as an institution that must be captured or opposed so that its resources can be used for the benefit of one group and against other groups. It is both highly significant and highly depressing that one of the few major changes made to the MCC during the workshop held on it in Mogadishu in December 2009 was to introduce an expanded list of the expenses that councillors would be entitled to claim. An MCC not part of the institutional arrangements that already exist or have developed over the last 15 or so years that provide some forms of governance and service provision to the residents of Mogadishu. Institutions are more than a set of rules, they are the result of a bargain between rulers and constituents. One needs to restore or support and affirm societal mechanisms, structures and communities rather than try to impose alien structures.

Many commentators have made the point, not just in relation to Somalia, that what is needed in many postconflict societies and states is not the restoration of the state but the transformation of the state, not by tinkering with outside changes to institutions but by local ownership, participation, inclusion and consensus-building. The externally imposed liberal model of peacekeeping and statebuilding prevalent in relation to Somalia is increasingly being questioned. The matter has been put very well by Doe:

Current approaches to state building, primarily dominated by the liberal peace thesis, tend to gloss over indigenous or organic mechanisms

rooted in the sociological, historical, political and environmental realities of postconflict contexts...Such universalised and ‘best practice’ approaches not only restore superficial states, they also extend the colonial project of undermining organic processes of state formation and state building. Indigenization stands as a complement to the liberal peace approach. Central to indigenization is the recognition of the role of emerging agencies and structures as part of the basis for recovery...¹²

If we take this approach, what should a Mogadishu City Charter look like? The law should provide that the city council should do very little except negotiate with substate and nonstate actors to undertake various tasks. The MCC should work through local intermediaries which are doing the job already and not set up local statutory rivals to them. More effort should be made to involve indigenous authorities especially in keeping the peace. There should be much more decentralisation to localities and more recognition of cultural pluralism in Mogadishu. There should be greater reliance on the business community and civil society to provide services.

Rather than try to act as a Western-style local authority, (which it will not for the foreseeable future have the funds to emulate) it should make it its business to engage in dialogue with the communities in Mogadishu, to craft new relationships between it and them. Perhaps it should initially be no more than a forum for dialogue about how to bring about peace and security in Mogadishu and who should take what actions to achieve this and then move on to discuss who could supply what services to whom. Social interaction and exchange requires co-ordination between individuals. This is facilitated by trust-enhancing institutions. Governments are assumed to be able to do that but Somalia shows that that need not be the case. The private sector has been innovative on this. The MCC should not try to take over this role. If it is to follow the mantra now common in humanitarian aid circles of ‘do no harm’ then it should *do* very little.

The situation in Somalia now is very different to that in Somaliland which has been developing a city charter for Hargeisa¹³. Once fighting in Somaliland came to an end in

¹² Samuel Gbaydee Doe (2009), (a development and reconciliation officer with UNDP in Sri Lanka but from his name almost certainly from West Africa), *Indigenizing Postconflict State Reconstruction in Africa: A Conceptual Framework*: 2 *Africa Peace and Conflict Journal* 1 – 16; synopsis, 1

¹³ Based on a draft I prepared in 2003. There was a City wide workshop on the draft in December 2003 and since that date work has continued on the draft refining it in the light of the experiences in local government in Hargeisa. A draft City Charter is now (April 2010) before Parliament in Hargeisa. It has

1996, a central government was set up *by the Somalilanders* with the full agreement of all clans and groups. This central government has provided a reasonable modicum of peace and stability since then and on that basis, the government has moved slowly and carefully to develop a statutory system of local government for Hargeisa. This is based in part on a locally developed local government law already in existence, a draft law modelled on the types of local government existing in Anglophone East Africa (and familiar to some of the local councillors in Hargeisa who have lived in Anglophone countries and worked in local government there) but also, and probably more importantly, on the developing existing practices of local government actually being operated in Hargeisa and other local authorities in Somaliland.

The model being suggested here for local government in Mogadishu in fact follows the Somaliland approach: agreement amongst traditional authorities to establish a government combining indigenous and imported institutions (but imported which were familiar to the political leaders); local government developed on the basis of practices again both indigenous and imported and only when these are seen to work quite well, moving to a statutory framework. To try and introduce – impose as it will be seen – a new law on local government in Mogadishu in current circumstances would be unwise.

It is not surprising that this note was not distributed to delegates at the workshop on the draft MCC¹⁴. I argued for a modified version of it at the workshop stressing the existing role of NGOs, and CBOs in providing some services and urging a much less prominent role for any Mogadishu City Council and the need for principles of administrative justice to be embedded in the draft. I suggested that the concept of the Right to the City (see below) should be the guiding principle for drafting an MCC and for local government in Mogadishu. I think the Deputy Mayor of Mogadishu took the point as did representatives of CBOs at the workshop but other and more senior Somali officials seemed to want to

been drafted in Somali and not yet translated into English so I do not know what relationship it bears to the draft of 2003.

¹⁴ The only comment I received from any official was one from a quite senior official in UN-Habitat (which considers that it and not UNDP should be the agency working with the TFG on local government in Somalia) that it was always amazing how little attention officials paid to academic writings on the issues they were working on. However, the summary of the workshop prepared by UNDP does give some prominence to my views as presented to the workshop. – impact! I had also drawn attention to a book just published in Nairobi: *Public Law in East Africa* which is a useful introduction to administrative law in the three East African countries of Kenya, Tanzania and Uganda with some comparative material drawn from the UK and the Caribbean. I had the book with me. The legal adviser to the Mayor of Mogadishu asked me for details of the book so he could obtain it – a sign that the message about administrative justice might make some headway.

hark back to the old local government laws of Somalia¹⁵. The upshot was an agreement to establish a ‘Technical Team’ to revise the draft MCC to which I am to provide advice.¹⁶ The aim is to have an agreed draft of an MCC to present to the TFG by December 2010.

This workshop was then followed up by an informal discussion in UN-Habitat between some of the Somali participants from the workshop and some senior Habitat officials on the issue of land management in Mogadishu. The debate centred round how the necessary information on the land situation in Mogadishu could be gathered together in Mogadishu and relayed to UN-Habitat so the agency could offer constructive comments on what might be done. The usual methods of collecting data were explained. This was a perfectly rational response to a request for assistance. It was, however, also a response which completely failed to take account of the realities of land problems in Mogadishu.

One of the key land issues in Mogadishu (I was aware of this but it was put to me quite forcefully in a break in the local government workshop by a delegate from a Mogadishu-based NGO) is the strong feeling by the Hawiye clan who are located in and around Mogadishu that ‘their’ land should not be taken by non-Hawiye Somalis who want to come and live and work in Mogadishu as employees and beneficiaries of Mogadishu as the capital of Somalia. For the Hawiye, Mogadishu as the capital is a dis-benefit and in their eyes, they have been offered nothing to compensate them for the loss of control over their land and loss of the land itself. For the TFG, land in Mogadishu as the capital of Somalia must be freely available to any Somali who wants to live and work there. This issue was not raised at the discussions but while it continues to be officially ignored, tension over land in Mogadishu will continue to bubble beneath the surface and an MCC blundering about will only make matters worse.

¹⁵ One enormous gap in the discussions at the workshop was finance: how was an MCC to be funded. Since records began to be kept for Somalia in 1905, the country’s internal financial resources have never kept pace with public expenditure that has always been subsidised either by the Italian colonial and later trusteeship authorities until 1960 and then by copious amounts of foreign aid until 1991. Somalis do not like paying taxes, understandably so since they get nothing in return and there is in any event little to tax.. See Mohamoud, *op. cit.*, chap. 5.

¹⁶ There was no clear indication at the workshop of what a technical team would do. It was however agreed that the Team should visit Djibouti where another group of Somalis – the Independent Federal Constitutional Committee (IFCC) is based to undertake the work of drawing up a revised federal constitution of Somalia. Since the workshop, it has been agreed with the IFCC that the technical team should become a sub-committee of the IFCC. The UNDP was all for sending me to Djibouti but I pointed out that if, as should certainly be the case, drafting and discussions on the draft are conducted in Somali, my role would be rather limited. No problem was the answer: an interpreter will be provided.

It is not as if there are no possible solutions There are two possibilities. One is the Fijian approach: non-native Fijians have restricted rights to occupy and use Fijian land and such land is managed by a Fijian Native Lands Trust Board on behalf of native Fijians. It is not a very admirable system as it introduces an element of ‘apartheid’ into land ownership and use in Fiji. But it might be a way to reassure the Hawiye that even if they cannot continue in exclusive occupation or control of all ‘their’ land, they can at least obtain some specific financial benefit from the loss of ‘their’ land. So land would not be compulsorily acquired from Hawiye land ‘owners’ but leased with the rents being paid into, e.g. a Hawiye Development Trust Fund administered by the Hawiye for the benefit of all Hawiye.

The second way would be more complicated but be aimed to achieve the same end. In many systems of local government, where central government contributes to local finances via grants, the grants are given for specific purposes. In the case of the Hawiye in Mogadishu, it should not be impossible to arrive at some kind of weighted cost/benefit conclusions about the impact of the capital on the Hawiye. On the one hand, increased jobs, better services, facilities and infrastructure – health, education, roads etc.—more income flowing to Hawiye-owned and controlled businesses; on the other hand, loss of land, loss of control over land, loss of traditional ways of living, losing out on many services and facilities in competition with better educated and more wealthy Somalis coming to Mogadishu from elsewhere. If the costs exceed the benefits, then the Hawiye should be compensated for their losses from specific grants made by the TFG to either the Hawiye direct or to the MCC. These suggestions may not be acceptable to either the Hawiye or the TFG but not addressing the problem will more of less ensure failure for any attempt to create a local government system for Mogadishu.

5. Land and urban governance in Monrovia

I turn now to Liberia¹⁷. My mission to Liberia took place in November 2009 to participate in the Orientation Programme for Land Commissioners of the newly

¹⁷ S. Ellis (2008) *The Mask of Anarchy: The Destruction of Liberia and the Religious Dimension to an African Civil War*. 2nd ed. The book is a sombre picture of Liberia but well worth reading. It only goes up to the election of Charles Taylor as President of Liberia in the late 1990s so does not cover the last decade – more civil war, Taylor’s deposition, an internationally brokered peace agreement and the election of Ellen Sirleaf-Johnson as President – apart from a brief introduction to the 2nd edition. But the underlying social construct called Liberia will not have changed in the last 10 years.

established Land Commission. My contribution at the orientation programme was an introduction to comparative African and other country experiences on dealing with informal urban settlements. I also wrote a report on the urban land and governance situation in Monrovia, the capital, and how it might be addressed using ideas from my presentation at the orientation programme. It was in this report that I developed ideas that may be seen as transformational and in doing so made use of ideas and approaches already in existence but not perhaps put forward in a postconflict land and housing context before. What follows is a very much shortened and edited version of my report.

5.1. The Urban Problematique in Monrovia

There is no lack of basic evidence about the urban situation in Monrovia.

- the legal framework of urban local governance is out of date, geared very much to a centralised approach to local governance – deconcentration at best as opposed to devolution – and even at the centre is split between several different Ministries which operates to prevent any kind of coordinated approach to local problems;
- urban planning laws are out of date;
- the majority of the urban population live in unplanned, informal and ‘illegal’ settlements, either on public land or privately owned land, are extremely poor and live in extremely poor quality accommodation; they have no security of tenure;
- much of the urban infrastructure has been destroyed in the course of the civil wars;
- Liberia is still in a post-conflict situation with all the special land issues to which such a situation gives rise; in particular continued and unresolved conflicts over land – who has the better right to occupy what land;
- there is an urgent need to address these problems (and wider ones on land tenure generally) to prevent violent conflict breaking out again;

Two key policy approaches which informed a Habitat Country Report on Liberia may be quoted here as they are arguably relevant to Liberia and Monrovia in particular:

- *A profound re-conceptualisation of the role of the urban sector is the most likely solution...this re-conceptualisation could have an immense impact on institutional and governance structures and the systems that regulate them...Interventions should include a redefinition and refocusing of mandates, structures and functions...of local government...Good*

governance encourages the participation of local populations in the decision-making process that affects their welfare and well-being...

- *Land problems are emerging as a matter of urgency... The urbanisation process has been unregulated, haphazard and chaotic resulting in the increase in demand for land, shelter and delivery of basic services... Consequently, land administration and management issues are now impacting on the peace. As a result, there is an urgent and institutional challenge to strengthen security of tenure issues.*

These policy prescriptions inform what follows.

5.2. The Right to the City: towards a transformed urban future for Liberia

A “profound re-conceptualisation of the role of the urban sector” can best be brought about by adopting policies and laws based on The Right to the City: a right for all in the city to be there; to have or acquire secure tenure to their homes (particularly the absence of arbitrary evictions); to participate in the processes of urban governance and in particular in the planning and financial management of their local areas; to have uniform standards of administrative justice applied to them by officials; and to have uniform access to dispute settlement fora and processes to assist them to resolve their land and other disputes peaceably and justly.

The Right to the City is a conceptualisation of the messages of the Habitat Agenda and the Global Plan of Action as later developed and elaborated in the Global Campaigns on Urban Governance and on Secure Tenure for the Urban Poor. In national policy and legal terms, it can most clearly be seen in Brazil’s City Statute of 2001; Turkey’s Law on Informal Settlements (which dates from 1966), and its 2007 Urban Transformation Law and in the South African Development Facilitation Act 1996 (since repealed and replaced by provincial urban planning laws). Briefly, commentators have summarised the 2001 Brazilian and 2007 Turkish laws as follows:

The City Statute has four main dimensions, namely a conceptual one, providing elements for the interpretation of the constitutional principle of the social function of urban property and of the city; the regulation of new legal, urbanistic and financial instruments for the construction and financing of a different urban order by the municipalities; the indication

of processes for the democratic management of cities; and the identification of legal instruments for the comprehensive regularization of informal settlements in private and public urban areas...¹⁸

The intended Law empowers the municipalities in the designation of several types of special planning areas for the purposes of implementing projects concerning protection, regeneration, intensive development, and public and/or private investments...They are entitled to determine the location and size of areas for such operations, prepare plans and projects.

The municipality or the majority of the property owners in an area could form partnerships for the redevelopment and/or joint management of the area. Besides physical operations of clearance, development, protection, such projects are envisaged to cover policies of finance, management, ownership and means of socio-economic development. Protecting the rights of the original owners, the municipalities in these areas could carry out lease agreements, servitudes, comprehensive project development...¹⁹

Key elements of South Africa's Development Facilitation Act 1996 which set out General Principles of Land Development which applied throughout the country; and enshrined a new approach to planning law provided, *inter alia*, that:

- Policy, administrative practice and law should...facilitate the development of formal and informal, existing and new settlements...;
- Policy, administrative practice and law should promote efficient and integrated land development;
- Members of communities affected by land development should actively participate in the process of land development...;
- Laws, procedures and administrative practice relating to land development should –
 - be clear and generally available to those likely to be affected thereby;

¹⁸ E. Fernandes (2007) Constructing the 'Right to the City' in Brazil, 16 *Social and Legal Studies*, 201 – 221, 212. See too C.S. Carvahlo and A. Rossbach (2010) *The City Statute of Brazil: A Commentary*, Sao Paulo, Cities Alliance and Brazil Ministry of Cities.

¹⁹ A. Ulu, (2007) Regeneration of Urban Areas in Cities of Turkey: Case Study: Izmit, Conference on Sustainable Urban Areas, Rotterdam, June 25 – 28.

- be calculated to promote trust and acceptance on the part of those likely to be affected thereby;
- land development should result in security of tenure, provide for the widest possible range of tenure alternatives, including individual and communal tenure, and in cases where land development takes the form of upgrading an existing settlement, not deprive beneficial occupiers²⁰ of homes or land or, where it is necessary for land or homes occupied by them to be utilised for other purposes, their interests in such land or homes should be reasonably accommodated in some other manner...;

Applying these principles to Liberia would involve a total recasting of laws on local government and urban planning, a review and probable fundamental revision of the law relating to compulsory acquisition of land, alterations to the law on prescription (acquisition of land rights based on open, peaceable and continuous occupation of land for a specified period), and a moratorium on evictions of ‘squatters’²¹.

But that is not all. More important, perhaps than changes in the law, adoption and enactment of these principles would involve a total transformation of the administrative and land tenure cultures of Liberia: in one fell swoop, every citizen would be entitled to own his or her own home; to be involved in the governance of their local area above and beyond voting every now and again for their representatives; and to be treated fairly and with respect by all officials. That is what is involved in a re-conceptualisation of urban governance and land management..

5.3. Urban local governance

The Right to the City goes beyond land issues. It is first and foremost a statement of the requirement of a participative approach to governance within urban areas. It involves not

²⁰ “*beneficial occupier*” means in relation to the occupation of land in a land development area where land development takes the form of upgrading an existing settlement, any person who has been in peaceful and undisturbed occupation of such land for a continuous period of not less than five years.” Section 1 DFA

²¹ A rigid application of a restitution approach to urban land problems in Monrovia would see thousands of squatters removed from land privately owned by some of the large landowners in Monrovia. Liberia has a land policy and land practices not dissimilar to apartheid South Africa: Americano-Liberians have rights to own land denied to rural ‘natives’ on the basis of laws dating from the 19th century (the latest of these laws is a 1956 law which permits ‘civilised natives’ to own land) including acquiring freehold ownership of land in rural areas occupied by ‘natives’ on the basis of Presidential grants.

just devolution from the centre to a local authority; in large urban areas such as Monrovia, it involves the creation and empowerment of local area councils, so bringing governance to the people. An example may be given: the one tier City Council of Dar es Salaam – a city of some 3 million inhabitants – was reorganised in the 1990s into a three tier system: the City Council; 3 municipal councils and 70 ward councils. The principal operational level is the municipal council but ward councils do have some important powers and bring local government down to a more human level. The legal framework of urban local government in Tanzania is a fairly standard Anglophone model dating from the early 1980s and would need its own revamping were that country to adopt a Right to the City approach to urban governance but the 3 tier structure is a step in the right direction of bringing governance to the people.

In the case of Monrovia, the only urban local authority large enough to warrant the creation of a multi-tiered structure, a two tier system might be sufficient, provided the second and lower tier authorities were of a size that would be accessible for the citizen and effective in the delivery of services: ideally between 6 and 8 lower tier authorities should be created. If this would likely strain capacity, then the City Council should adopt a programme of establishing area offices with their own budgets and delegate functions to such offices. In time these area offices could become the lower tier councils.

The Right to the City is a broad and general policy statement. It offers a new way forward for urban governance and urban land management. In the context of Liberia, these two areas of concern are inseparable. What must now be concentrated on is the detailed content of the rights which involves a discussion of the possible contents of the laws which would be needed to give practical effect to the rights. There are, it is suggested, two basic laws – one providing for a new approach to urban local government, the other, providing for a new approach to urban land management.

If the Right to the City were to form the basis of any new law to provide for a re-conceptualised approach to local government in Monrovia, then at the forefront of the law would be a statement of the rights and responsibilities of the residents of the city towards each other and the wider community of the city and of the local authority towards its residents. The following is a possible formulation of such rights and responsibilities:

Rights of the citizen:

- to participate both individually and collectively via associations of their own making in urban governance through processes of participatory budgeting, participatory planning, local referendums, popular initiatives and public private partnerships;
- to obtain information from the public authorities necessary to be able to exercise the above rights;
- to live in a safe, secure and healthy environment;
- to obtain equitable and affordable access to basic urban services and facilities of land with secure tenure, potable water, waste disposal and electricity;
- to receive all services respectfully, impartially, efficiently, and timeously;
- to be treated in accordance with principles of administrative justice;
- not to be evicted arbitrarily from where he or she is living;
- to have access to processes of conflict resolution and dispute settlement with respect to disputes over rights to property, land and housing;
- to object to any decision or action of the council or an officer of the council on grounds of illegality, abuse of power, corrupt practices or disproportionality and to have that decision or action reviewed and, if necessary, set aside by an impartial body.

Obligations of the citizen

- to pay local taxes levied in accordance with the law;
- to comply with all lawful requirements of the council, its councillors and officers;
- to live at peace with his and her neighbours;
- to take all reasonable steps to diffuse tensions and settle disputes arising locally; and
- to co-operate with others in maintaining a safe, secure and healthy environment within the immediate neighbourhood.

Primary duty of local authorities within Monrovia

(1) The city council shall have as its primary duty the provisions of a forum for the discussion by organisations and bodies representing all elements of civil society of the ways and means of governance, and the provision of services to the citizenry, in Monrovia; the taking of such actions and the performing of such functions including contracting out to and facilitating other persons to take such actions and perform such functions as will achieve any one or more of the following objectives within the area of the city for the benefit of all or any part of the residents of the city –

- (a) the promotion and improvement of peace, security and stability;
- (b) the promotion and operation of open and participative government;

- (c) the promotion and improvement of economic, social and environmental well-being, habitations and living conditions;
 - (d) the regularisation and improvement of informal settlements;
 - (e) the facilitation of the settlement of disputes over property, land and housing issues.
- (2) The taking of any such actions and the performance of any such functions as are referred to in subsection (1) shall comply with the principles of administrative justice.
- (3) Where any actions or functions are being provided by any institution of civil society or through the operation of bodies functioning in the private sector, then the city council shall liaise with such institutions and bodies and assist them to carry out those functions so as the better to meet the principles set out in subsection (1).

It is important to make the point that these rights and obligations will not stand alone as an add-on to existing local government laws: they will drive the rewriting of those laws so as to give effect to them. To give just one illustration, setting the local authority budget will cease to be the preserve of officers and councillors alone with ultimate reference upwards to central government. Participatory budgeting involves local communities via their organisations working with officers of local authorities, setting goals, determining spending priorities, allocating, spending and accounting for funds. It reverses the normal budgetary process which is a top-down one. It will involve central government no less than local authorities ‘letting go’ This would need to be provided for by law.

5.4. Urban land management

When it comes to dealing with the land question in post-conflict states, the two principal institutions that need to be rebuilt and supported are local governments and dispute settlement bodies. Central government and its offshoots, e.g. the Land Commission, can and should make policy, enact the necessary laws to give effect to policies, access finance and technical expertise from the international community (and from the diaspora) but the day-to-day business of dealing with people and their land problems – restitution, resettlement, the rapid growth of informal settlements, disputes over land etc – fall to local authorities and local judicial institutions. These front-line institutions need to be

revived, rebuilt and reorientated as quickly as possible to tackle the urban land problems in Liberia²².

When undertaking a mission for UN-Habitat in Afghanistan in 2005 reviewing both urban governance and urban land issues with suggestions for reforms, I wrote a short note entitled *Urban Land Problems: Present Problems: Future Directions*. Revisiting that note I am struck by the aptness of many of its general points for the situation in Liberia. I make no apology therefore for quoting it here: (words in [] are added to or substituted for those in the original):

Cities are the engines of economic growth and the potential seed-bed of disaffection. Both positive and negative aspects of cities and their development involve getting land policies and land management right. The role and duty of governments is to create the conditions for the efficient and equitable provision of

- access of all citizens to land;
- secure tenure for those on the land
- transparent and user-friendly processes for land transactions
- urban land use plans to ensure optimal use of land and capital
- [fair processes and procedures for land acquisition and compensation]
- accessible and cost-effective systems of dispute settlement

.....

What needs to be done

Law is a necessary but by no means a sufficient input into better urban land policies. To the extent that good laws can help and bad laws can hinder the realisation of more equitable and efficient pro-poor and pro-market land policies and practices, the following sets out the range of legal reforms that are needed and the reasons for same:

- the needs of the thousands of mainly poor residents of cities and towns living in planned and unplanned settlements and having very insecure rights to the land they are living on must be recognised and addressed in a positive way – acceptance and assistance rather than denial and demolition must be the way forward. This will involve developing and legislating for
 - determining who has what rights to what land

²² Very oddly, one might think, there has been little thinking or writing at an official or even unofficial level on local government in a postconflict state. One of the few ‘official’ documents is the UNDP/Oslo Governance Centre (2007) *Report of a Workshop on Local Government in Post-Conflict Situations: Challenges for Improving Local Decision Making and Service Delivery Capacities*. This report did not seem to be known to the UNDP officials working on the MCC and local government generally in Somalia and Somaliland. Of the first 76 articles in the new *Journal of Conflict and Peacebuilding*, founded in 2004, only 2 are on local government.

- graduated systems of secure rights to occupy housing for urban residents
- arrangements for the transfer, with or without payment, of title to [public] land to urban residents granted secure title to their homes
- community systems of recording of interests in a locally kept register
- urban planning likewise must start from the reality of cities and towns as they are now rather than from an ideal blueprint...and begin a process of working with communities to improve and upgrade their environments out of which can grow a bottom-up approach to the development of new city-wide urban development plans. This will involve developing and or legislating for
 - programmes to re-arrange land boundaries and plot sizes and shapes to facilitate providing [and upgrading] infrastructure and community facilities
 - small-scale removal and relocation of some housing with compensation
 - a new urban planning law based on the principles of participation, integrated development planning, facilitation of planned development of land, limited and focused 'development control' (requirement of permission to develop)
- land markets must be facilitated but as with any properly managed land management system, they must also be regulated in the interests of efficiency, effectiveness and equity: transparency and due process must be the keys here. This will involve developing and or legislating for
 - the separation of the governmental functions of allocating land from that of regulating the operations of the market for land;
 - setting out transparent systems for public sector land allocation, compliance with terms and conditions of government leases [and grants] and for revocation of leases, [grants] and other governmental land rights
 - a regulatory impact analysis of the existing procedures and processes for land transactions with a view to their revision and reduction...
 - accessible and cost-effective systems of dispute settlement.

How can all these requirements be provided for? There must be a prioritisation of what must be done. The whole area of land markets and their regulation necessarily involves a thorough review of existing law – statutes and case law – and practices and reform is a more long-term exercise which is not essential to meet the immediate needs of post-conflict urban land management.

This leaves urban tenure reform and urban planning and land development reform. The most pressing problem is unquestionably that of informal settlements, the socio-economic conditions therein and political implications of not addressing these conditions. These can best be provided by an urban transformation law. The remainder of this report explains and elaborates on the ideas behind and the possible contents of such a law.

5.5. Towards an Urban Transformation Act

5.5.1 Basic legal and other deficiencies of informal settlements

The first step is to summarise the principal deficiencies of informal settlements which a law on transformation, regularisation and regeneration might be expected to deal with. The concern here is with deficiencies on which action on and about land and buildings could be designed to bring about improvements. Principal deficiencies are –

- lack of a formal title to land which limits the possibility of obtaining loans to improve accommodation or to get started in or improve a commercial enterprise and might also limit the amount of compensation payable on expropriation;
- continuing post-conflict disputes between different groups of or individual returnees and current occupiers who may be IDPs on who is the ‘rightful’ occupier of land;
- continuing disputes between private landowners and ‘squatters’ whom the former want off their land;
- buildings built without planning and or building control permission;
- irregularly shaped plots of land which limit the kind of building that can be built on them and the services that can be supplied to them;
- buildings often built very close to each other which again limits services which can be supplied to residents;
- hazardous land – slopes, river beds, marshy land, contaminated land, land too close to roads – is used for the building of houses etc;
- where public land is used for settlements, the ever present possibility of eviction without compensation since it is difficult to obtain a title of ownership by long use over public land;
- exploitation of residents by large-scale landowners renting out property outside the scope of any laws providing for some balancing of rights and obligations between landlords and tenants;
- lack of full public services;
- lack of investment in the settlements (other than from the residents) which could improve the economic and commercial prospects of the settlements ;
- the difficulties that may be faced by residents in sorting out property, land and housing disputes where formal courts may not accept or apply the ‘informal’ laws that exist within settlements; and informal dispute settlement bodies have no mechanism to ensure that their decisions are complied with.

It is not suggested that all informal settlements in Liberia suffer from all these deficiencies; or that all these deficiencies are present all the time in informal settlements. But the above list does give a broad overview of problems affecting many informal settlements that need to be addressed in any law which aims to be comprehensive.

5.5.2 Towards a transformational approach to informal settlements

The terms which are increasingly being used in other countries faced either with similar problems of informal settlements or with their own set of problems of run-down inner city areas are 'regeneration' or 'transformation': both aiming to suggest that the aim of policy (and any accompanying law with the same name) is to rejuvenate, revitalise and renovate the designated area. This is significant for both terms are accepting that the area and its inhabitants will remain in being but need public support to improve their situation and circumstances. Two Turkish authors have explained transformation as follows:

Transformation can be defined as 'a comprehensive and integrated vision and action which leads to the resolution of urban problems and which seeks to bring about a lasting improvement in the economic, physical, social and environmental condition of an area that has been subject to change'. [italics added] Urban transformation interventions may vary according to the problems of localities. Some may aim to revitalise a declining activity, or a social function; to encourage social integration in the areas suffering from social exclusion; and/or to return the environmental and ecological deprivation back to a balanced level, while others may aim to regularize squatter areas and illegal urban developments, and to redevelop urban areas where standards of quality of life are highly low compared to other parts of the city. Therefore, urban transformation interventions need to have a deep and multifaceted understanding of the processes and sources of urban problems...(Egercioğlu and Özdemir, 2007)

This broad definition by these authors is apposite. Turkey has prepared an Urban Transformation Law to provide legal backing for a more holistic approach to dealing with *gecekondu*s. (informal settlements).

The intention behind such laws is clear: regeneration or transformation goes well beyond just tinkering with land use on a piecemeal basis and seeks to facilitate wholesale change and improvement in the areas subject to regeneration or transformation. Furthermore,

such laws make clear that a local authority or a statutory body is empowered to take an active role in bringing about improvements either on its own or in partnership with “other persons”: these could be persons from the areas or from outside. So public/private partnerships are a crucial dimension to regeneration and transformation.

The Turkish law focuses its initial attention on land issues: that is the entry into regeneration and transformation. Ulu makes that clear in his description of the Urban Transformation Law. Land provides the point of entry but once in, public agencies may take on a variety of other functions. This then is the most striking and important difference between a traditional approach to informal settlements and a transformational approach: the traditional approach begins and ends with land: a transformational approach uses land as a way in to transform the social and economic conditions of the people living in informal settlements.

Since the submission of my report to the UN-Habitat Office in Liberia in December 2009, there has been no reaction. The officials in the Habitat office liked it and made clear their hope that I would be available to return to assist with acceptance and implementation of the report. One can only speculate as to why so far there seems to have been no positive reaction on the Liberian side. There can be no doubt that a transformational approach to the current urban situation in Liberia would threaten large landowners and even after the traumas of the civil wars of 1990 – 2005, Americano-Liberians who make up most of the large landowning class still retain a lot of political and most of the economic power in the country. Given the very clear recognition that land issues played a part in the civil wars it might seem astonishing that the ‘reformist’ government of President Ellen Sirleaf-Johnson which took office in 2005 has done nothing to rectify the ‘apartheid’ style land policies and laws which she inherited. But the donor community, aka the USA, in other respects more or less running the government, has not brought any pressure on the government to reform the land laws and the present laws do certainly facilitate the continued granting of large land concessions to foreign investors. In other words a transformational approach to land relations runs up against the LPA whereas current Liberian land policies are foursquare within the LPA.²³

²³ Two other possible reasons for inaction are, first, that the senior UN-Habitat official proceeded on maternity leave shortly after she arrived and her successor is still getting into the job, neither having had any involvement with Liberia before their appointments. Second, the Land Commission, appointed by the President in October 2009 to get to grips with the land issue, seems pretty moribund. (private communication). That second reason would however chime in with a deliberate policy of inaction on land matters.

6. Somaliland²⁴

A key message from Doe's paper²⁵ is that there is a need "for a return to the dialogue of indigenizing postconflict state rebuilding, especially in Africa"

"indigeneity" as used here refers to institutions, mechanisms and practices predating colonialism and the Westphalian state that draws its roots from the sociological, historical, demographic, environmental and geographical context in which they exist...Beatrice Pouligny²⁶ has argued that all "societies have at their disposal social modes of regulation and resources able to serve as a basis for reconstruction and recovery.

Indigenization is not the same as endogenization in that it does not preclude the role of outsiders. The key here is that indigenization, the materials and structures are organic, with outsiders acting as a type of catalyst...

It may also be pointed out that in my report I had quoted the relevant section in the 1996 Constitution of Uganda which had conferred ownership rights on all those persons occupying land under customary tenure who up to that point were in law tenants at will of the state – the single most transformative action – postconflict or otherwise – any government in Africa has taken with respect to persons occupying land under customary tenure. This action was a direct result of promises President Museveni made to peasants when he was fighting the Obote 2 regime in the early 1980s in the bush. Suggesting that all peasants in Liberia should at the stroke of a pen receive freehold ownership of their land was not calculated to garner much support in Liberian governing circles.

An equally if not more challenging transformational approach to land issues in Liberia was put forward by Liz Alden Wily (2007) in *So owns the Forest in Liberia? An investigation into forest ownership and customary land rights in Liberia*, SDI Liberia and FERN which developed clear recommendations towards solving potential conflicts over natural resources and suggested that Liberia could set a precedent by returning ownership of land to communities which would lead to improved forest governance, control of illegal logging and remedial action against historical injustices. That too has not been acted upon. Forests are very big business in Liberia both for foreign investors and for the Americano-Liberian elite. Community forestry is a pretty common phenomenon in many African countries.

²⁴ M. Bradbury (2008) *Becoming Somaliland* for a good overview and analysis of the birth of the new state; B. Poore (2009) Somaliland: Shackled to a Failed State, *Stanford Journal of International Law*, 117 – 150, a thorough analysis of the case for international recognition; J. Caplin (2009) Failing the State: Recognizing Somaliland, 30 *Harvard International Review*, 9 – 10, a useful overview of the case for recognition; S Kaplan (2008) The Remarkable Story of Somaliland, 19 *Journal of Democracy*, 143 – 157; an enthusiastic encomium for Somaliland and its forms of governance. I agree with much of Kaplan's analysis but did not come across the article until preparing this paper in April 2010.

²⁵ op. cit., footnote 11

²⁶ B. Pouligny (nd given in Doe's reference) Building peace after mass crimes, in Newman and Schnabel *Recovering from Civil Conflict*, 202 – 21.

Indigenization argues that the focus of state building must be comprehensive – engaging the political, sociological and technological dimensions of rebuilding authority, institutions and community. It also proposes that the overall aim of state reconstruction should be state transformation, rather than state restoration, with all emerging institutions drawing their roots from the post-collapse context.

In such cases, transformation basically refers to a qualitative change in the structures, ideologies and networks of relationships...

Patrick O'Halloran²⁷ asserts that the current internationally led state reconstruction practice, confined to rational thinking, assumes that states can be restored by modifying their institutions and increasing material incentives for them...[but]...state building is also about society building. It therefore cannot be divorced from constructing the ideas on which a society must craft a state system...²⁸

These are very ambitious requirements and taken at their face value are probably impossible to realise. But one political entity – Somaliland – has good claims to be seen as having made a real effort to adopt an indigenising transformational approach to statebuilding and is worth discussing.

During 2003, I was in Somaliland on a UN-Habitat project working with the Mayor and councillors of Hargeisa to develop a new local government law for the city.²⁹ Somaliland

²⁷ P. O'Halloran (1998) The role of identity in post-conflict multiethnic state-building: The case of Bosnia-Herzegovina and the Dayton Accord, www.cda-cdai.ca/cdai/uploads/cdai/2009/04/ohalloran98.pdf

²⁸ Ibid., 8, 11, 14, 15.

²⁹ The EU, to its great credit, then provided the bulk of the aid to the geographical area of Somalia and disbursed it through other agencies such as UN-Habitat. Neither the EU nor the UN recognise Somaliland but their officials increasingly deal with reality on the ground. So does the British Government. On my first mission in July 2003, the first person I met in Hargeisa was an official from the British High Commission in Kenya, whom I happened to know, who was in Hargeisa with two senior officials from the Immigration Service in the UK to negotiate with officials in the (non-existent) government of Somaliland on a programme for the involuntary repatriation of Somalilander refugees and others from the UK to Somaliland. This sounds pretty drastic but it must be conceded that there was at the time a heavy two-way traffic between the UK and Somaliland (Daallo Airlines, a Somaliland airline based in Djibouti and using at least from Dubai, Ilyushin-18 planes, then flew from London Gatwick to Hargeisa via Djibouti) with refugees going out to Somaliland for their holidays and on business. DFID does now provide some aid and assistance to Somaliland; police and security and the library of the University of Hargeisa. The biggest practical difficulty in not recognising Somaliland is over IDPs and refugees. For the UN all displaced Somalis are IDPs; for the Government of Somaliland, persons coming from Somalia are refugees and not entitled to the same rights as IDPs.

is not Somalia. A brief introduction to the country and its developmental trajectory to the present is in order.³⁰

Somaliland became a British protectorate in 1887. It was never particularly well regarded by the British nor did it benefit from much development assistance during its dependency. Law and order – the first concern of a colonial power – were not fully established until the early 1920s³¹.

Somaliland was granted its independence by Britain on 26 June 1960. Five days later, it voluntarily and, at the time enthusiastically, voted to merge its independence with the newly created Somali Republic which came into being on 1 July 1960³². After a promising beginning, the Republic of Somalia succumbed to a military coup in 1969 and one of the most ruthless and vicious dictators to emerge in Africa took control of Somalia – Siad Barre. Despite (or perhaps because of) his record of tyranny, of demonstrating that he was a ‘strong ruler’, he received large amounts of aid from the USA, happy that in the late 1970s, he fell out with his former paymaster, the USSR, over his war with Ethiopia. Eventually, the Somalis rose up against Barre and taking the lead in this in the late 1980s were the Somalis from the North-West, the old Somaliland, who had become increasingly disenchanted with the discrimination practiced against them by Southern Somali dominated governments.

The reaction of Barre towards the Northern Somalis was immediate and horrendous. He set out to slaughter as many of them as possible and destroy their towns. Hargeisa, the largest town in the North-West was bombed by Barre’s air force based in Hargeisa and shelled by his army. Enormous destruction and loss of life took place. Over 50,000

³⁰ The information for this very potted history is taken from Ioan Lewis’s magisterial *A Modern History of the Somali; Nation and State in the Horn of Africa*, 4th ed, London and Hargeisa, 2002. However it must be noted that many Somali scholars dispute Lewis’s emphasis on the importance of clans in the public life of Somalia. See too the more recent and very perceptive (in my view) Abdullah A. Mohamoud (2006) *State Collapse and Post-Conflict Development in Africa: The Case of Somalia (1960 – 2001)* West Lafayette, Purdue University Press.

³¹ Jardine, D. (1923) *The Mad Mullah of Somaliland*, London. In those days, any one who opposed colonial rule was regarded as mad; nowadays, they are regarded and treated as terrorists. Mohamoud sums up the colonial position thus: “...the task of the colonial state administration was to ensure the subordinate induction of the livestock economy into global trade...In this respect the British colonial administration undertook two chief functions essential to the material benefits of the colonial government. One was to keep peaceful the coastal towns through which the livestock was shipped to external markets; and the second was to prevent any disturbances that might jeopardise the safety of the caravan routes which link the hinterland to the coastal enclaves.” Op. cit., 60.

³² Cotran, E. (1963) Legal Problems Arising out of the Formation of the Somali Republic, *International and Comparative Law Quarterly*, Vol. 12, pp. 1010 – 1026.

people lost their lives; countless others were injured and lost their homes and all their possessions. Eventually the people triumphed; Barre and his forces were expelled from the North-West and at the beginning of 1991, Barre was chased away from Somalia.

The people of the North-West had had enough. In May, 1991, at a conference of the Somaliland Communities at Burao, they reaffirmed their independence with effect from 18th May.³³ From that time onwards, Somaliland has regarded itself as an independent state and the citizens of that state have set about the process of rebuilding their state and nation. Without any recognition from any other state in the world community, and relying overwhelmingly on their own resources, and on remittances from the diaspora of Somalilanders which now amount of some \$450 million a year, they are doing a remarkable job.

It has not been easy. For the first few years, warlords both within Somaliland and from outside were a constant threat. But the government persevered. Gunmen have been disarmed. Now only the police in Hargeisa carry weapons. Peace and security have been restored more or less throughout the land. Only a border dispute with Puntland³⁴ – another unrecognized breakaway state in the North-East of Somalia – threatens the peace³⁵. As one statistic of the astonishing transformation which has been brought about, 14 years ago at the height of the civil war and general lawlessness, Hargeisa shrank to around 10,000 inhabitants³⁶. Today it has a population of over half a million and while there is much poverty, there is little crime in the city.

A constitution has been adopted which provides for a President, a two chamber Parliament the second chamber being an appointed house of traditional elders, a Bill of Rights and an independent judiciary. The first President was Mohamed Egal, the leader of Somaliland at independence in 1960. When he died in 2002, it was widely assumed both within and outwith Somaliland that conflict would break out over the succession. It

³³ The referendum that confirmed this declaration produced a larger majority for independence than that held in East Timor. It was declared by international observers (including some unofficial ones from the USA) to be free and fair. See generally, I. Jhazbhay, *Somaliland: Africa's best kept secret; A challenge to the international community?* (2003) 12 *African Security Review*, 79.

³⁴ Puntland regards itself as a constituent state within a Federal Somalia. However it has few dealings with the TFG.

³⁵ Of late however there have been some kidnappings and killings within Somaliland almost certainly orchestrated by al-Shaabab, an Islamic group fighting the TFG in Somalia. Many of the leaders of al-Shaabab come from Somaliland.

³⁶ I was shown photographs of Hargeisa as it was in 1991. Barely a single house had a roof on it. All have now been rebuilt.

did not. By the evening of the day of Egal's death, Somaliland had a new President; the Vice-President was elevated to the post. Presidential elections were held the following year and when the result was disputed by the opposition who had lost by a mere 80 votes in a nation-wide poll, the matter was resolved peaceably by the elders. Local governments have been re-established, local elections held, services are beginning to be provided to the people and local taxes collected. Disputes are for the most part being settled peaceably although there is still grave problems of conflict between pastoralists and those who have grabbed communal pastoral land and enclosed it, claiming private ownership.

Colonial Somaliland was part of the common law system. Appeals from the Somaliland High Court went to the Court of Appeal for East Africa which also exercised appellate jurisdiction in Kenya, Tanganyika (as it was until 1964), Uganda and Zanzibar. When Somaliland joined up with Somalia, a major exercise in 'legal integration' commenced managed by an Italian team³⁷. It would not be entirely unfair to say that the integration consisted in large part of the application of Italianate codes to Somaliland. The Penal Code for instance was drafted by an Italian lawyer in the early 1960s and was applied throughout independent Somalia: it was and is (in theory it still applies) a magnificent intellectual feat of no practical utility. Some of the old colonial statute law continued to apply in Somaliland but during the Barre era was slowly replaced by laws which owed little to specifically Italian influence.

There was a conscious and deliberate campaign by Barre to wipe out and destroy the legal heritage of Somaliland. All the old British colonial collections of Somaliland statute laws were destroyed, the law reports in the High Court were looted and vanished. There are now no collections of any laws of any kind in Hargeisa³⁸. Nor are there any persons with specific drafting skills. But this has not prevented Somaliland from basing their development on law.

³⁷ Contini, P. (1969) *The Somali Republic: an Experiment in Legal Integration*, London.

³⁸ My informants were the Minister of Justice and the Dean of the Faculty of Law at the new University of Hargeisa. I was not able to visit any libraries or other places where some old laws might still exist. One of the officials in the City Council with whom I was working produced the Town Planning Ordinance of 1947 (Cap. 83 of The Laws of the Somaliland Protectorate, 1950 edition) which I was told was still, in theory, in force. It was this official who had a prized copy of the English language version of the Penal Code. I went round the law library in the University in December 2009. It had virtually no law books of any kind whatsoever. Other towns in Somaliland do have old records. I was told by the former chief executive of Burao District Council that it has land records going back to the 18th century when the Ottoman Empire was the dominant power on the coast.

What is clearly happening is that Somaliland is slowly and inevitably some false starts – the laws on local government I was asked to comment on had had built into them several flash points of conflict between central and local government, between mayor and councillors and between councillors and officers which was partly a product of the universal ambivalence which central governments have over decentralising power to local governments and partly just a badly drafted law³⁹ – creating a new autochthonous constitutional and legal system, geared to meeting its own needs and principles, and based on its own traditions. Kaplan puts it thus:

Somaliland has achieved these successes by constructing a set of governing bodies rooted in traditional Somali concepts of governance by consultation and consent. In contrast to most postcolonial states in Africa and the Middle East, Somaliland has had a chance to administer itself using customary norms, values, and relationships. In fact, its integration of traditional ways of governance within a modern state apparatus has helped it to achieve greater cohesion and legitimacy and— not coincidentally—create greater room for competitive elections and public criticism than exists in most similarly endowed territories⁴⁰.

The absence of international legal assistance is, in my view helping in the development of a truly national legal system, tailored to national needs. Nowhere is this more the case than with dispute settlement. Disputes in rural areas are handed almost exclusively by traditional authorities applying customary principles and/or ADR⁴¹. Courts exist in urban areas but do not have a very good reputation. Yet it must be emphasized that this is a society with a high level of commerce both national and international; with a banking and money transfer system capable of handling many millions of dollars of transactions having international elements and ramifications. Clearly the system works and must be based to a large degree on trust and honour, the foundation of any system of law.

³⁹ My mission involved drafting a City of Hargeisa Law. I used models from several other Anglophone African countries. My draft was discussed at a workshop in December, 2003. The workshop included senior officials from the Ministry of Interior – the Ministry with responsibility for local government. There was unanimity that I had written into the draft too much power for the Minister to intervene in the affairs of the city council.

⁴⁰ *Op. cit.*, footnote 23, 144.

⁴¹ Academy for Peace and Development (2007) *No more 'Grass grown by the Spear'*, Hargeisa.

Could it not be suggested that unlike the formal legal systems of so many states in Africa, the evolution of a legal system which derives its fundamentals and direction from the culture and locally driven needs and decisions of the society in which the law is to apply is a more likely guarantee of ‘law and order’ i.e. acceptance of the need to observe and comply with the law, and so of development than the ambitious programmes of legal system reform now being mounted by the World Bank and many donors. The Somaliland system is an indigenous transformational one; World Bank imported systems are not.

The people I met and worked with – councillors, officials, lawyers – were concerned to create and work under a law which they could understand and which would have resonance with the residents of the country: they had experienced the reverse and did not want a repeat. The same concern is very apparent in my missions in 2009 – 10 on developing a land policy and reforms to land laws. My task is not to write the policy or the laws – that is emphatically not wanted – but to work with the government and the community to develop a participative inclusive process leading to the creation of a policy and accompanying laws. Far from there being a ‘failed state’ a ‘black hole’ in the Horn of Africa, there are people in Somaliland committed to building a state governed by law, willing to work with external assistance but not in any way dependent on it and determined to pursue their own way in a largely hostile world.

Commentators have said that Somaliland is a ‘challenge’ to the international community; it is in many respects a threat for if it can succeed on its own and with minimal aid and this example begins to be followed by other countries in the South, where is the leverage over development and rule-of-law reform which the international community attempts to exert over so many countries. Where is the LPA with its veneer of democracy but its underlying message of markets open to all without restrictions. No wonder there is resistance to the recognition of a state which complies with every traditional formal requirement for recognition of a state in international law – a defined territory (the old British Somaliland Protectorate); a government with the monopoly of force within the state; and the support of the people.

Of late there are some disturbing signs that internally Somaliland is showing signs of a rather traditional African presidential or electoral ailment – difficulties with accepting transparent election preparations. Elections which were due some years ago have been postponed so many times that the incumbent has almost served two terms – the second one unelected. In part this has been caused by chaotic voter registration – the

Government was misguided enough to allow itself to be persuaded that a foreign electronic voter registration system should be used that didn't work and too easily became a vehicle for voter registration fraud but in part it is plain reluctance to meet the voters. Donors are now desperate to encourage elections to take place as soon as possible fearing a collapse of the state and a reversion to the fighting that characterised its early years.

Externally, too there are what I would regard as disquieting signs that the World Bank is becoming interested in Somaliland. It is likely to subject the country to one of its diagnostic analysis of the legal, regulatory and procedural constraints facing investors in the country, a prelude to a report strongly recommending the dismantling of a range of legal and regulatory arrangements created to assist the operation of the Somaliland economy and opening it up to largely unregulated foreign investment. It is perfectly natural that Somaliland would wish to become an official part of the international community but it is open to question whether if the price was to be, in effect subject to a variant of the LPA, it would be a price which would benefit the average Somalilander.

Conclusions

Paris and Sisk offer a succinct summary of the evolution of both the actions of peacebuilding and statebuilding and scholarship on same:

The missions launched between 1989 and 1997 may be viewed as a first generation of peacebuilding operations following the Cold War...Scholarship on peacebuildings during this initial period was also nascent. Most of the literature provided detailed descriptions of particular operations and countries, offering relatively little systematic cross-case analysis, or theorizing about the strategies or nature of the peacebuilding enterprise...

By the end of the 1990s and early 2000s, however, the practice and study of peacebuilding underwent parallel transformations...Three new operations were deployed in 1999 – in Kosovo, Timor Leste and Sierra Leone...The mandates of these missions...were more expansive than their predecessors, reflecting a recognition that such operations needed to focus less on exit deadlines and more on achieving the conditions for basic stability in these societies, including the functioning systems of public administration...

In parallel with the changing practices of peacebuilding, a second generation scholarship was coming to fruition in the late 1990s and early 2000s, including more theoretical treatments and systematic cross-case comparisons...

There are moments in every scholarly field when different writers independently arrive at similar conclusions at approximately the same time. This happened in 2004 with the publication of three books and two articles offering parallel critiques of peacebuilding theory and practice. In different ways, Francis Fukuyama, Simon Chesterman...argued that the operational concepts and implementation of peacebuilding had under-emphasised the creation or strengthening of governmental institutions as a foundation of successful transitions for war to peace...

In the wake of these and other publications, statebuilding became a growing topic of interest within the peacebuilding scholarship and in documents produced by and for major intergovernmental and national development agencies...

Today [2009] the future of peacebuilding and statebuilding is uncertain...and it is unclear what direction this experiment will take, or indeed whether it will proceed at all...Few observers seem willing to endorse the status quo but there is little agreement beyond that...⁴²

The critique from the direction of transformation goes beyond the kind of internal critiques that have usually surfaced but as Doe's article makes clear, it can draw on an increasingly impressive array of supporters. It is undeniable however that as the cases discussed in this paper show, making progress with transformational practice will be much more difficult. One matter which Doe (and others) underestimate is the reluctance of the existing ruling classes and elites in African states and the international community to embrace a transformational approach.

The LPA restores the existing ruling elites to positions of authority – at the price of the sacrifice of a few mavericks like Charles Taylor of Liberia to the ICC or a special tribunal to try persons for 'war crimes'. It is expressly designed not to rock the boat whereas a transformational approach does the reverse: Somaliland is no longer part of Somalia and will never become part of Somalia again even though the international

⁴² R. Paris and T. D. Sisk, (2009) *The Dilemmas of Statebuilding*, 6, 7, 8, 11, 12

community persists in pretending that that is not the case. No other postconflict government in Africa has emulated the dramatic steps taken by Museveni to confer full property rights on peasant farmers and it must be doubted whether the Museveni of 2010 would take such steps as the Museveni of 1996 did. To the extent that the provisions of the Constitution and the Land Act 1998 might stand in the way of the newly created oil extraction industry, they will likely be ignored or revised. The international community has made no effort to hold the Sudanese government to its commitments under the CPA to restore customary tenure in the two transitional states of Blue Nile and Southern Kordofan and halt large scale land grants to foreign investors. Indeed, there was a conscious policy on the part of USAID after supporting an initial project to begin the process of implementing the special Protocol to the CPA with respect to those two states to end that project and commence another one with the unspoken aim of not rocking the boat on land issues in those states. Huge amounts of aid are being provided to Rwanda to create a statutory system of land tenure and ‘abolish’ customary tenure despite well documented (but carefully ignored) misgivings about the likely imbalance of land rights between the Hutu majority and the Tutsi minority that that policy will bring about. Non-action in Liberia on the land issue has already been noted.

Unlike Paris and Sisk then, I do not see any dramatic new approaches being developed in the peacebuilding and statebuilding industry (or for that matter in the post-disaster statebuilding industry – there is no more chance of President Aristide being allowed back into Haiti by the USA to lead a reconstruction effort designed to benefit all Haitians than there is of ex-President Bush (and ex-Prime Minister Blair) standing trial for war crimes at the Hague). This prompts an irreverent reflection: should a British academic, even one manqué like myself, be writing along these lines at all when the chances of having an impact on the real world is virtually nil? Well, stranger things have happened: one can point to some half-successes in going against the orthodoxies of development even if most of time, one is, wittingly or unwittingly, advancing it. So its worth discussing the limits and deficiencies of the LPA even if its alternative – full-blown transformation – is unlikely to be adopted in the foreseeable future. Nor, as the example of Somaliland shows, is there any guarantee that if a transformative approach is adopted, it will last: the temptations to succumb to internal political pressures and external economic pressures may be too great to resist. On that gloomy note I shall conclude.