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From Haiti to Somalia: The Assistance Model and the Paradox of State Reconstruction in International Law

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Abstract
This article is an attempt to draw attention to the nature of the assistance model of state reconstruction and its significance for the UN system. Traditional international legal doctrine identifies valid state consent with an effective domestic government. Moreover, effective control remains the means for applying the legal right of self-determination for the population of a state as a whole. Nonetheless, a frequently adopted paradigm for large-scale international involvement in the reconstruction of an ineffective state operates through the consent of an ineffective government. The assistance model is found in the recent past of Haiti (1994–1997; 2004–), Sierra Leone (1998–2005), Liberia (2003–), Afghanistan (2001–), in Iraq following the formal end of the belligerent occupation (2004–), and there are signs that it could soon be pursued in Somalia. To reveal how the assistance model of state reconstruction in fact relates to the political independence of the target state and its people, the key features of the assistance model and related legal issues are addressed. The main argument is that while the assistance model appears unremarkable, in fact it offers little protection for political independence and as a consequence puts at risk the core values of the UN system of self-determination of peoples and international peace.

Keywords
Sovereignty; self-determination; state reconstruction; political independence; non-intervention; consent; chapter VII; effective control; democracy

1. Introduction

It is not by accident that effective control of territory – the ability to preserve public order – has a prominent position in international law. As control of territory is indicative of a capacity to fulfil international obligations, it makes sense for the basic unit of a decentralised international legal system, the state, to be centred on effective control, and for the agent of the state to be identified by its ability to exert effective control. The correlation between the efficacy of international law and the existence of governments with effective control also helps to explain why it has been difficult to move beyond effective control as the means for applying

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the legal right of self-determination for the population of a state as a whole.[1] Logic might suggest, then, that states that manifest an absolute lack of effectiveness for a prolonged period of time should cease to exist as states. In the not so distant past, because signs of a significant decrease in the degree of control being exercised over a territory would trigger conquest and annexation by a stronger state, there was little opportunity for struggling states to progress to the status of ineffective state. It is only relatively recently, with the prohibition on the use of force and the emergence of the legal right to self-determination, that a legal framework for the continuation of even those states that display a lack of effectiveness over a prolonged period of time has emerged. Somalia is the classic example, but there are a number of other recent examples of states that have continued as states despite a complete lack of anything like an independently effective domestic government on the territory.

The continued existence of states without effective government affects the efficacy of international law,[2] leads to human suffering,[3] and has been identified as a source of international security threats.[4] Thus it is logical for the international community to want to assist with the restoration of effective control over the territory. If, however, the continuation of an ineffective state as a state is explained on the basis of a legal framework that operates to preserve the political independence of the state and its people, in the interests of self-determination of peoples and international peace, core values of the UN system, international efforts at the restoration of effectiveness encounter a significant paradox.[5] This is because political independence is clearly brought into question by large-scale international involvement aimed at restoring effectiveness through a military presence and reconstruction of the state and civil infrastructure. Thus the same law that explains the continuation of the ineffective state also counsels against the type of international involvement that could help to make the state effective.

Still, despite this paradox of state reconstruction in international law, the assistance model is a frequently adopted paradigm for large-scale international involvement in the reconstruction of a state without an effective government. Prominent examples of this paradigm, with contextual differences but a core of common features, are found in the recent past of Haiti (1994–1997; 2004–), Sierra Leone

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1) Brad Roth, *Governmental Illegitimacy in International Law* (1999) pp. 137–42; David Wippman, "Treaty-Based Intervention: Who Can Say No?", 62 *University of Chicago Law Review* (1995) p. 612 and references therein at note 26.

2) Georg Sorensen, "An Analysis of Contemporary Statehood: Consequences for Conflict and Cooperation", 23 *Review of International Studies* (1997), p. 258.

3) Gerard Kreijen, *State Failure, Sovereignty and Effectiveness* (2004) p. 87.

4) UN High-level Panel on Threats, Challenges, and Change, A More Secure World: Our Shared Responsibility, UN Doc. A/59/565 (2004), p. 25.

5) Art. 1 (2) UN Charter: "[The purposes of the UN are] [t]o develop friendly relation among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace."; see Nigel White, *The United Nations System: Toward International Justice*, (2002) pp. 47–72.

(1998–2005), Liberia (2003–), Afghanistan (2001–), and in Iraq following the formal end of the belligerent occupation (2004–). Furthermore, following the establishment and international recognition of a transitional government, there are signs that, after a number of false starts, Somalia might also soon receive the level of sustained international involvement that defines the assistance model.[6]

The assistance model involves an otherwise ineffective domestic government, to all intents and purposes, gaining legal capacity through international recognition. This permits it to provide valid consent for an international military presence and capacity building assistance from an array of international actors. Treated as a continuum, the international involvement makes the government effective and puts it in a position to administer state reconstruction. The fact of valid state consent, and the consequent preclusion of wrongfulness, might be taken as evidence that the assistance model has avoided the paradox of state reconstruction in international law. In fact, however, the validity of the consent presents another troubling paradox: international recognition creates the notional authority that permits an ineffective government to authorise the international involvement that makes the notional authority a reality. Can this really be consistent with the preservation of political independence? International acceptance and the lack of attention given to this aspect of the reconstruction process in the scholarly literature might lead one to believe that it, at least, does not neglect political independence in a manner that threatens core values of the UN system.

In an attempt to draw attention to the nature of the assistance model and its significance for the UN system, this article investigates how the model relates to the political independence of the target state and its people. The main argument to be pursued is that while the assistance model appears unremarkable, in fact it offers little protection for the political independence of the target state and as a consequence puts at risk the core values of the UN system of self-determination of peoples and international peace.

The article begins with an account of the legal framework for the continuation of statehood without an effective government and the identification and explanation of the paradox encountered by international involvement in the reconstruction of such states. With a focus on recent efforts in Haiti, it goes on to highlight the key features of the assistance model, to show how, despite the international involvement being from a variety of international actors, the model does not manage to evade the problem posed by the paradox: how to have large scale-international involvement while maintaining the political independence of the target state and its people. The dominant legal justification for the assistance model – state consent – is then analysed from the perspective of the preservation

6) In 1993, Somalia was set to be a significant example of the assistance model, but the international military presence failed to establish the degree of stability required for attention to turn to reconstruction, see, for a general discussion, Yemi Osinbajo, "Legality in a Collapsed State: the Somali Experience", 45 *ICLQ* (1996).

of political independence. Subsequently, in an attempt to better understand international acceptance and why there has not been more scholarly attention, further sections explore how key legal issues – the international recognition of the assisted government, state consent, chapter VII aspects, and the pursuit of democracy – explain the position of the assistance model in relation to political independence and the attendant values of the UN system.

2. The Continuation of Ineffective States

The first issue to be dealt with is why it is that a state does not become extinct when effective control of the territory is lost. How one understands the legal mechanisms that surround the creation and extinction of states can affect the perception of the nature and significance of the state reconstruction paradox. As a preliminary point, it is useful to note that, while the two are closely related, the main focus of this article is on the ineffective state paradigm rather than that of ineffective government. This is because it is the state and its people that possess the legal rights that are the source of the paradox of state reconstruction international law, not the government. The government, if one exists, serves only as the agent for these rights.[7]

'A state is not a fact in the sense that a chair is a fact; it is a fact in the sense in which it may be said a treaty is fact: that is, a legal status attaching to a certain state of affairs by virtue of certain rules'.[8] The 'certain rules' and, in particular, the role of international recognition are the source of an ongoing debate. There is, though, a general consensus around some core criteria. As effective control of territory indicates a potential for undertakings to be fulfilled,[9] it is logical that a government with effective control of a territory with a permanent population, which is not subject to the formal authority of another state or factually dependent, should form the key criteria for statehood in international law.[10] In relation to whether these factual criteria are sufficient to create a state, one end of the spectrum on the role of international recognition posits recognition as declaratory of the existence of the state; the factual criteria are seen as sufficient.[11] The other end makes international recognition constitutive of statehood; the factual criteria are not sufficient.[12] The issue is not helped by the fact that over time practice has changed.[13]

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7) See discussion on governmental status in international law *infra* Section V.
8) James Crawford, *The Creation of States in International Law* (2006) p. 5.
9) Colin Warbrick, "States and Recognition in International Law", in M. Evans (ed.), *International Law* (2006) p. 233; Crawford, *supra* note 8, p. 59.
10) Crawford, *supra* note 8, pp. 37–95.
11) See, e.g., James Brierly, *The Law of Nations* (6th ed., 1962) p. 139.
12) See, e.g., Hersh Lauterpacht, *Recognition in International Law* (1947) pp. 38–66.
13) Warbrick, *supra* note 9, p. 224.

Presently, the declaratory theory is dominant. There is, however, a tendency for an entity to be accepted as a state despite a lack of effective control of the territory, such as occurred with the rapid period of decolonisation in the 1960s or with the break-up of Yugoslavia in the early 1990s. Some commentators therefore present the role of recognition in statehood as a composite of declaration and constitution, with a more constitutive role accorded to recognition when the material attributes are less obviously achieved.[14] In some situations, undoubtedly, the mass of international recognition secures the status of the entity as a state. Still, it is important to be aware that, even in such situations, recognition remains evidence of status rather than the source. For example, in relation to the new states emerging from the break-up of Yugoslavia, some pretence of adherence to the criterion of effectiveness was retained.[15] If it were otherwise, the implication would be that denial of recognition permits a non-recognising state to act as if the non-recognised state were not a state, with obvious implications for the stability of international relations.[16]

Though a temporary loss of effectiveness as a result of civil war is hardly new, the prolonged continuation of states lacking all effectiveness is a relatively new phenomenon. It was only with respect to a temporary loss of effectiveness that Marek identified a presumption of continuity that operated, in the interests of the preservation of international stability, to preserve the rights and obligations of the state in question.[17] Indeed, Marek imagined that more than a temporary period of anarchy would lead to the extinction of the state.[18] Now that there clearly is the prolonged continuation of ineffective states, there is a need to reconsider the basis of the presumption of continuity.[19] Particularly because, in light of the human suffering and threats to international security that are associated with a lack of effectiveness, one might reasonably expect the presumption to end when there is no foreseeable recovery from the lack of effectiveness.

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14) See, e.g., Nikolaos Tsagourias, "International Community, States and Political Cloning", in C. Warbrick and S. Tierney (eds.), *Towards an International Legal Community: The Sovereignty of States and the Sovereignty of International Law* (2006) pp. 222–225; Kreijen, *supra* note 3, p. 17.

15) See Colin Warbrick, "Recognition of States: Recent European Practice", in M. Evans (ed.), *Aspects of Statehood and Institutionalism in Contemporary Europe* (1997) p. 22 (note 58); see also Colin Warbrick, 'Recognition of States', 41 *ICLQ* (1992) p. 476.

16) Crawford, *supra* note 8, pp. 27–28; cf. Brad Roth, "The Entity That Dare Not Speak Its Name: Unrecognized Taiwan as a Right-Bearer in the International Legal Order", Wayne State University Law School Legal Studies Research Paper Series No. 07–27 (2007) available at SSRN: http://ssrn.com/abstract=1015120.

17) Krystyna Marek, *Identity and Continuity of States in Public International Law* (1968) p. 24 and p. 548.

18) Marek, *supra* note 17, p. 188; see also Brierly, *supra* note 11, p. 137.

19) Crawford does not specifically address the rationale for the presumption, instead the view that "extinction is not effected by more-or-less prolonged anarchy within the state" is supported by the lack of doubt that has been "expressed as to the continuity of states such as Somalia, the Democratic Republic of Congo and Solomon Islands, notwithstanding total or nearly total collapse of internal public order." Crawford, *supra* note 8, p. 701.

3. The Paradox of State Reconstruction

Little attention has been given to why the presumption of continuity persists in relation to a prolonged lack of effective control over a territory. Kreijen argues that the continued existence of ineffective states does not stem from a presumption of continuity but rather from international recognition, which it may or may not be possible to withdraw depending on the strength one accords the legal right to self-determination.[20] Like with the creation of states, however, recognition should not be seen as the source of the status. If it were, obligations owed to the ineffective state could be discarded through de-recognition. Rather, recognition should be seen as evidence of the presumption of continuity. The approach of this article to explanation of the presumption of continuity, and the resulting paradox for international actors interested in reconstructing the state in question can be revealed through charting developments in the legal doctrines of state sovereignty and self-determination of peoples.

3.1. *State Sovereignty*

Much contestation surrounds the concept of state sovereignty.[21] It is possible to identify at least three related uses for the term in international law. Sovereignty in a descriptive or empirical sense refers to the factual condition of independent effective control over a territory.[22] In this sense, sovereignty is pre-law or, in other words, the source of the law. Another is sovereignty in a legal sense, wherein sovereignty is constituted by international law; the law defines the rights, duties and competences attributable to states under international law.[23] Because neither position is outright convincing, international legal argument oscillates around the two positions.[24] The third use is reference to the positing, from what it means to be sovereign in an empirical sense, of general ideas about what sovereignty should stand for in relation to international law.[25] Traditionally, these are a freedom to act,[26] and a freedom from the acts of others.[27] Such ideas represent sover-

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20) Kreijen, *supra* note 3, pp. 361–362.

21) See, e.g., Louis Henkin, "International Law: Politics, Values and Functions – General Course on Public International Law", 216 *Recueil des Cours de l'Académie de Droit International de La Haye* (1989) pp. 24–5.

22) See discussion in Wouter Werner and Jaap de Wilde, "The Endurance of Sovereignty", 7 *European Journal of International Relations* (2001) pp. 285–290.

23) See, e.g., Hans Kelsen, "Sovereignty and International Law", 48 *Georgetown Law Journal* (1960).

24) Marti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2006) p. 301.

25) See Bardo Fassbender, "Sovereignty and Constitutionalism in International Law" in N. Walker, (ed.), *Sovereignty in Transition* (2003) pp. 116–120; D. Kennedy, "International Law and the Nineteenth Century: History of an Illusion", 65 *Nordic Journal of International Law* (1996) p. 396.

26) See *Case of the SS "Lotus", P.C.I.J. Series A. No 10, (1927)* p. 18: '[r]estrictions upon the independence of states cannot therefore be presumed'.

27) See *Island of Palmas case (Netherlands v. US) [1928] 2 R.I.A.A.* p. 838: "[s]overeignty in the relations

eignty as a general principle of international law.[28] One can trace the rights and duties that are attributed to a sovereign state to these ideas.[29] Moreover, because sovereignty as a general principle is of fundamental importance for international law from a systemic perspective, these ideas are to be looked to when there is a need for interpretation, application, or development of new law in relation to a particular practice.[30] For present purposes, it is important to be aware of the nature of sovereignty as a general principle. This is because a changing appreciation of the balance in importance between the ideas it traditionally stands for has been central to the development of the legal framework that encourages the existence of ineffective states.

Until the middle of the twentieth century, the right to wage war was considered an attribute of sovereignty.[31] A prohibition on intervention in the affairs of the state co-existed with the right to wage war, but its legal significance was clearly undermined by the legality of the use of force.[32] Accordingly, should a state show signs of weakness it was likely to be acquired by another state through conquest, which provided a valid title to territory.[33] As the balance in sovereignty as a general principle favoured a freedom to act over a freedom from the acts of others, ineffective states were not likely to persist for very long.

The atrocities that occurred during the two World Wars eventually led to the complete outlawing of the use force and a consequent prohibition on the annexation of territory following a use of force.[34] Furthermore, the general prohibition on interference, which had obviously suffered while the balance of opinion favoured the use of force as an attribute of sovereignty, was also strengthened.[35] Indeed, the persuasiveness of the political value of peace can be seen to have affected the balance in the sovereignty ideas to such an extent that the right to be free from the use of force by another state was soon found to be an attribute of state sovereignty.[36] However, while the removal of the possibility of legally

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between states signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other states, the functions of a state."

[28] This is a reference to its role as a directive for the development and application of international law, see, on the concept of general/basic principle, K. Zemanek, "Basic Principles of UN Charter Law", in R.J. Macdonald and D.M. Johnston (eds.), *Towards World Constitutionalism* (2005) pp. 401–403.

[29] See Wouter Werner, "State Sovereignty and International Legal Discourse", in I. Dekker and W.G. Werner (eds.), *Governance and International Legal Theory* (2004) pp. 147–151.

[30] On the concept of fundamental principle of international law see Rein Mullerson, *Ordering Anarchy – International Law in International Society* (2000) pp. 156–159.

[31] Francis Hinsley, *Sovereignty* (2nd ed.,1986) p. 230.

[32] Antonio Cassese, *International Law* (2001) pp. 98–99; see also Percy Winfield, 'The History of Intervention in International Law', 3 *BYIL* (1922–1923).

[33] See Ian Brownlie, *International Law and the Use of Force by States* (1991) pp. 14–51.

[34] See Hilaire McCoubrey and Nigel White, *International Law and Armed Conflict* (1992).

[35] See Cassese, *supra* note 32, pp. 98–99.

[36] See The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States, adopted in October 1970 by the UN General Assembly, GA res. 2625 (1970); see also Werner, *supra* note 29, p. 155.

sanctioned forcible annexation increases the likelihood that weak states will go on to become ineffective states. It is the emergence of the legal right of self-determination that provides the better explanation for the presumption of continuity in relation to the continued existence of a state despite a prolonged lack of effectiveness.

3.2. *Self-Determination*

The UN Charter introduced self-determination as a political postulate promoting self-government.[37] It first gained status as a legal right amidst the process of decolonisation during the 1960s, where it was associated with the right of a people to be free from 'alien subjugation, domination and exploitation'.[38] Its post-colonial relevance, confirmed by way of its inclusion in some of the most significant international documents of recent times,[39] has been the source of much debate.[40]

There is, however, a core of accepted legal meaning, which grants the population of the state as a whole the right to 'freely determine their political status and freely pursue their economic, social and cultural development'.[41] This overlaps with the sovereign attribute of the 'right to freely to choose and develop its political, social, economic and cultural systems'.[42] Consequently, the prohibitions on forcible annexation and intervention that protect the political independence of a state also protect the right of the people of a state as a whole to self-determination.[43] In light of this, in the normal run of things, there is arguably not yet much

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[37] Art. 1 (2) '[The purposes of the UN are] [t]o develop friendly relation among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.'; see A. Cassese, *Self-Determination of Peoples. A Legal Reappraisal* (1995) 37–43.

[38] UN Doc. S/RES/1514 (XV) (1960); see also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*, *Advisory Opinion, I.C.J Reports* p. 31.

[39] GA Res. 2625, *supra* note 36, treated the 'principle of equal rights and self-determination of peoples' as part of the rights and duties imposed by the Charter; the right is also found in common Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ECSCR) (both in force 1976); see J. F. Gareau, "Shouting at the Wall: Self-Determination and the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory", 18 *LJIL* (2005) p. 500.

[40] G. Simpson, "The Diffusion of Sovereignty: Self-Determination in the Post – Colonial Age", 32 *Stan. JIL* (1996) pp. 257–58.

[41] Quoting Common Article 1(2) of the Human Rights Covenants; GA Res. 2625, *supra* note 36: "[b]y virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every state has the duty to respect this right in accordance with the provisions of the Charter."

[42] GA Res. 2625, *supra* note 36.

[43] The right to political independence is used by this article as shorthand for the rights to decide on the change and development of the state and civil infrastructure that are accorded to the state and its people in the legal doctrines of state sovereignty and self-determination.

to distinguish the right of the state to decide on the change and development of the state infrastructure from the right of the people.

However, unlike the right of the state to political independence, which it acquires as part of the bundle of sovereign rights and duties through a display of effective control of the territory, the right of the people to political independence exists because of the fact that they are a people. Thus the right of all peoples to self-determination contributes an ethical justification for statehood and helps legitimise sovereignty.[44] Consequently, when effective control of a territory is lost for a prolonged period of time, the right of the people to political independence provides the better explanation for the presumption of continuity of the ineffective state. To extinguish the state simply because of a prolonged lack of effectiveness would be to violate the right of the people to self-determination.[45]

3.3. *The Paradox of State Reconstruction in International Law*

With regards the prospect of large-scale international involvement in the reconstruction of an ineffective state, the developments in the legal doctrines outlined above create a paradox. In the interests of international peace, legal protection is afforded the sovereign right of a state to political independence from forcible annexation or intervention. In the interests of the self-determination of all peoples, the people of a state are afforded an overlapping right to political independence. The people's right supports the prohibitions on annexation and intervention,[46] but as the right to self-determination arises without any need for effective control, it also provides a better explanation for why the state should continue despite a prolonged period of ineffectiveness. Accordingly, the same law that explains why the ineffective state continues as a state also explains the prohibition on international intervention. To some extent, then, the significance of this paradox for international actors interested in intervening rests on what type of activity is caught by the prohibition on intervention.

The principle of non-intervention tends to be presented as a corollary of state sovereignty that exists in its own right to protect those matters reserved by sovereignty.[47] Although the scope of the prohibition on intervention is not susceptible

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44) See Marti Koskenniemi, "National Self-Determination Today: Problems of Legal Theory and Practice", 43 *ICLQ* (1994) p. 245.

45) See, making a similar point, Ruth Gordon, "Some Legal Problems with Trusteeship", 28 *Cornell International Law Journal* (1995) p. 32; support for this approach is also found in the work of commentators have identified how the right of the people to self-determination is the best explanation for the continued deference to state sovereignty when it comes to matters of intervention, see, e.g., Christian Tomuschat, "International Law: Ensuring the Survival of Mankind on the Eve of a New Century", 281 *Recueil des Cours de l'Académie de Droit International de La Haye* (1999) p. 165; Rein Mullerson, *International Law, Rights and Politics: Developments in Eastern Europe and the CIS* (1994) pp. 90–91.

46) See Benedetto Conforti, 'The Principle of Non-intervention', in M. Bedjaoui (ed.), *International Law: Achievements and Prospects* (1991) p. 467.

47) *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States), Merits, Judgement, I.C.J Reports 1986* p. 108 para. 205.

to a precise standard,[48] and is ever decreasing, debate tends to be about whether intervention from a distance, such as political influence over an existing regime, is still caught.[49] The legality of humanitarian intervention to put an immediate stop to immense human suffering, not, it should be stressed, to reconstruct the state, has been the subject of considerable debate. The general verdict, supposing there is no target state consent or a UN Security Council chapter VII resolution, is that it remains wrongful,[50] but in extreme circumstances may be excusable.[51] As humanitarian intervention has a much stronger link with the alleviation of human suffering and represents a much lesser encroachment on the right to political independence than state reconstruction, but still remains wrongful. It is reasonable to submit that the type of large-scale international involvement necessary for the reconstruction of a state is also prohibited.

In sum, from the perspective of the core UN system values of self-determination of peoples and international peace, the central issue raised by the paradox is can large-scale international involvement in the reconstruction of an ineffective state be reconciled with the political independence of the state and its people? Reconciliation is important not only because to proceed in ignorance of it would contradict the reason why the state retains its status as a state, but also because the legal protection afforded political independence has been developed in the pursuit of self-determination of peoples and international peace. Accordingly, to interfere with political independence in the target state risks sparking conflict and impeding the people's continuing act of self-determination. It is to whether the assistance model provides an adequate answer that attention is now turned.

4. The Assistance Model of State Reconstruction

As a model for the short-term and hopefully long-term restoration of effective control on a territory, the assistance model is far less striking than some of the alternatives. A key distinction from belligerent occupation and international territorial administration is that a domestic government administers the reconstruction process.[52] In light of this, one might readily imagine that the assistance model

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48) Malcolm Shaw, *International Law* (2003) p. 191; Georges Abi-Saab, "Some Thoughts on the Principle of Non-intervention", in K. Wellens (ed.), *International Law: Theory and Practice* (1998) pp. 228–231.

49) See, e.g., Lori Damrosch, "Politics Across Borders: Non-intervention and Non-forcible Influence over Domestic Affairs", 83 *AJIL* (1989).

50) See, e.g., Simon Chesterman, *Just War or Just Peaces? Humanitarian Intervention and International Law* (2001) p. 86; Antonio Cassese, "*Ex iniuria ius oritur*: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?", 10 *EJIL* (1999) p. 25.

51) See, e.g., Chesterman, *supra* note 50, at 236; Cassese, *supra* note 50 at 25; Jane Stromseth, David Wippman and Rosa Brooks, *Can Might Make Rights? Building the Rule of Law After Military Interventions* (2006) p. 39.

52) On belligerent occupation see Eyal Benvenisti, *The International Law of Occupation* (1993); on the concept of international territorial administration see Ralph Wilde, "From Danzig to East Timor and Beyond: The Role of International Territorial Administration", 95 *AJIL* (2001) pp. 584–586.

does not encounter the paradox, that political independence is not put at risk. Hence it is necessary to consider how it is that queries about consistency with political independence are in fact raised.

The assistance model has been prominent in the recent past of Haiti, Sierra Leone, Liberia, Afghanistan, and in Iraq following the formal end of the belligerent occupation. There are contextual differences across this selection of examples. It is possible, though, to identify a set of common features in relation to the process for restoring effective control on the territory, which, when taken as a whole, prompt one to query how the model relates to the preservation of political independence. These are the initial lack of effective control on part of the assisted government, the means of restoring short and long-term effective control, and the legal justifications of state consent and/or chapter VII resolution. Haiti is chosen as the focus for the illustration of these features because the assistance model has been pursued on two occasions that together display the limited range of modalities in the common features that this article identifies as the assistance model. Furthermore, the Haiti circumstances are particularly apt for highlighting how the model struggles to resolve the paradox and the significance of this for the UN system. This is primarily because of the sharp contrast in the way the international actors chose to proceed in the identification of a government to assist on the two occasions, which encapsulates the overwhelming influence that the international actors are able to have in relation to all facets of the assistance model of state reconstruction.

4.1. *The Ineffective Government*

In 1994, Haiti had a government that was able to retain a degree of control over the state. Cedras' government had come to power by a military coup in 1991 and maintained control by a reign of terror. Thus there was widespread international support for the international intervention that led Cedras to step down and reinstalled the government of Aristide.[53] This was the start of the first assistance effort to restore governmental effectiveness in Haiti. Assistance to an existing but ineffective government was also the approach adopted in Sierra Leone.[54]

The success of the first effort in Haiti was seriously hindered by a lack of cooperation from the Aristide government and a series of political crises.[55] After some improvement, the security situation worsened and successive governments struggled for control of the state.[56] In February 2004, with Haiti in an anarchic condition, President Aristide, after being elected for a second time, stepped

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53) See Roth, *supra* note 1, at p. 377.

54) See Adekeye Adebajo and David Keen, "Sierra Leone", in M. Berdal and S. Economides (eds.), *United Nations Interventionism 1991–2004* (2007).

55) David Malone and Sebastian von Einsiedel, "Haiti", in M. Berdal and S. Economides (eds.), *United Nations Interventionism 1991–2004 (2007)* pp. 178–179.

56) See Report of the Secretary General on Haiti, UN Doc. S/2004/300 (16 April 2004).

down – noticeably encouraged by some of the same international actors that had returned him to power in 1994.[57]

President Alexandre, following the departure of Aristide, requested the second assistance effort in Haiti.[58] Alexandre was Aristide's successor, but following the prompt establishment of a transitional government the President's role became ceremonial. The Transitional Government was selected rather than elected. A three-member council, which consisted of a representative of Aristide's party, one from the main opposition party, and one international representative, selected seven eminent persons to identify a Prime Minister. The Council selected Gérard Latortue as Prime Minister from a short list of three candidates. Prime Minister Latortue subsequently selected his government in 2004, which agreed to work towards elections within two years.[59] Political authority was passed to an elected government in February 2006.

Transitional governments have also administered the reconstruction process in Afghanistan, Iraq, and Liberia, as these states emerge from conflict. In Afghanistan and Iraq, eminent persons, identified as such by international actors, selected the respective transitional governments.[60] In Liberia, the warring factions parties to an internationally backed peace agreement nominated the transitional government.[61]

4.2. *The Restoration of Effectiveness*

Efforts at reconstruction require stability and order. The first aim in the assistance model has been to establish and maintain security throughout the state. In Haiti in 1994, there was a 20,000 strong multinational force followed by a series of UN peacekeeping missions; the remnants of the UN military presence left in November 1997.[62] In Haiti from 2004, there was a multinational force followed by significant UN peacekeeping, which remains today.[63] As well as providing security through their own continued presence, these military forces are also mandated to

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57) Malone and von Einsiedel, *supra* note 55, p. 184.

58) UN Doc. S/RES/1529 (2004) para 2.

59) For an account of events see 2004 Interim Cooperation Framework for Haiti available at <http://haiticci.undg.org/>.

60) On Afghanistan see Ebrahim Afsah and Alexandra Guhr, "Afghanistan: Building a State to Keep the Peace", 9 *Max Planck Yearbook of United Nations Law* (2005); on Iraq see Rüdiger Wolfrum, "Iraq – from Belligerent Occupation to Iraqi Exercise of Sovereignty: Foreign Power Versus International Community Interference", 9 *Max Planck Yearbook of United Nations Law* (2005).

61) Peace Agreement between the Government of Liberia, the Liberians United for Reconciliation and Democracy, the Movement of Democracy in Liberia and the Political Parties, 18 August 2003, UN Document S/2003/850.

62) See Malone and von Einsiedel, *supra* note 55, p. 177, and at p. 181 noting that almost all the US soldiers had left by January 2000.

63) See J. Leininger, 'Democracy and UN Peace-Keeping – Conflict Resolution through State Building and Democracy Promotion in Haiti', (2006) 10 *Max Planck Yearbook of United Nations Law* p. 521.

assist the respective governments develop the capacity to ensure security on departure of the international forces.

The other emphasis of the assistance model is helping the government to develop the capacity to govern effectively in a sustainable manner. This has been through assistance that collectively facilitates the change and development of the state and civil infrastructure. There has been assistance right across the political, economic, legal, and civil sector spheres of the state. It has been financial support in the form of grants for specific projects, and loans, as well as the provision of technical assistance, resource, and physical construction work. It has come from an array of different international actors. Some prominent examples in relation to Haiti in 1994, include US support for legal reform to a model based on the US legal system,[64] as well as a significant amount of conditioned funding for economic reform.[65]

A mass of international actors worked with the Transitional Government to draft the 2004 Interim Cooperation Framework for Haiti.[66] This mapped out how Haiti would be changed and developed over the next two years throughout all sectors and was the basis for a donor conference to gain funding and assistance to see it through.[67] Subsequently, the US, for example, is involved across a number of different spheres, including economic growth and job creation, health and human services, infrastructure budget support, and security and legal reform.[68]

This twin approach of a large military presence to provide stability and capacity building assistance that facilitates the reconstruction of the state is repeated across the other examples. Particularly noticeable are the conferences of friends at which the reconstruction targets of the state are mapped out and international assistance promised on this basis.[69]

4.3. *The Legal Basis for the International Involvement*

Security related involvement has been authorised under various chapter VII resolutions. In Haiti in 1994, Security Council Resolution 940 authorised a military presence to enforce and maintain stability in Haiti.[70] The UN peacekeepers were

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64) Which after being pursued for a short time was rejected, see L. Hagman (Rapporteur), Lessons Learned: Peacebuilding in Haiti, International Peace Academy, Seminar Report 23–24 January 2002 (New York) p. 5.

65) Which gradually dwindled amidst a lack of cooperation from the government, Hagman (IPA), *supra* note 64, at 8–9.

66) Led by the Inter-American Development Bank, the European Commission, the World Bank, and the United Nations System, see Interim Cooperation Framework for Haiti, *supra* note 59, p. 7.

67) A number of countries and institutions pledged a total of $1.085 billion, see World Bank, News Release 2005/27/LAC available at <http://econ.worldbank.org/>.

68) US Bureau of Public Affairs, The United States and Haiti: Helping Haitians Build a Better Life, Press Release, August 5 2004, available at <http://www.state.gov/r/pa/ei/rls/34980.htm>.

69) See, e.g., The Afghanistan Compact arising out of the London Conference on Afghanistan January 31–February 1st 2006 (on file with author).

70) UN Doc. S/RES/940 (1994), para 4. and para 8.

further mandated under chapter VII to assist the restored government of Aristide with certain security-related matters, focused on the recruitment and training of the police force.[71]

In Haiti in 2004, Resolution 1529 authorised the Multinational Interim Force to establish stability and assist with the development of the security sector.[72] Resolution 1542 mandated the UN peacekeeping mission under chapter VII with assisting the Transitional Government in a variety of ways with security, political process, and protection and promotion of human rights.[73]

As well as the chapter VII justification for the security involvement, there has also been a consent justification for this involvement. In Haiti in 1994, Resolution 940 takes note of letters from Aristide requesting assistance[74] and repeatedly refers to the Governors Island Agreement as the framework for international involvement; the Governors Island Agreement was reached between Cedras (who was in effective control of Haiti) and Aristide to allow for the return of the latter.[75] In Haiti in 2004, Resolution 1529 acknowledged the request for international assistance from President Alexandre.

The wider international involvement has been called for in broad terms in the various chapter VII resolutions that authorise the international military presence, such as Resolution 940, which reiterated the need for 'the international community to assist and support the economic, social and institutional development of Haiti'.[76] This wider involvement has not, though, been provided with a chapter VII basis. Instead, the legal basis for the involvement is founded on state consent. This, of course, involves working with the domestic government, and the government of Aristide and the Transitional Government in 2004 were both criticised for not being sufficiently compliant with the wishes of those assisting them.[77]

Again the approach of authorising the military presence under chapter VII and calling for wider consensual involvement in the same resolution is repeated in the other examples of the assistance model noted above.[78]

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71) UN Doc. S/RES/940 (1994), para 9.

72) UN Doc. S/RES/1529 (2004) para 2.

73) UN Doc. S/RES/1542 (2004) paras 7 and 8.

74) "Taking note of the letter dated 29 July 1994 from the legitimately elected President of Haiti (S/1994/905, annex) and the letter dated 30 July 1994 from the Permanent Representative of Haiti to the United Nations (S/1994/910)."

75) UN Doc. S/RES/940 (1994) notes how the government of Cedras repeatedly failed to comply with its provisions.

76) See, e.g., in relation to Haiti 2004, S/RES/1542 (2004), para. 13 which emphasized the need for all other international actors to continue to contribute to the social and economic development of Haiti.

77) On Aristide, see Eleventh Report of the Multinational Force in Haiti, S/1995/149, 21 February 1995; on the Transitional Government see International Crisis Group (ICG) memorandum sent to the Members of the United Nations Security Council Mission in Haiti 'Update on Haiti' April 8 2005 (on file with author).

78) See, e.g., UN Doc. S/RES/1436 (2002) para. 7: "*[e]mphasizes* that the development of the administrative capacities of the Government of Sierra Leone, particularly an effective and sustainable police force, army, penal system and independent judiciary, is essential to long-term peace and development, and

4.4. *Encountering the Paradox*

As a domestic government administers the process, the assistance model of state reconstruction is less striking than belligerent occupation or international territorial administration.[79] Its projection as unremarkable in relation to the target state and its people's political independence is further improved by the fact that, with the exception of the military presence, the assistance is from a variety of different international actors and on an individual basis is relatively low-level interference. However, when one views the international involvement as a continuum, the potential impact on the political independence of the state and its people is much more apparent.

Seen as a continuum, the assistance model is intended to make an ineffective government effective. In Haiti in 1994, Aristide enjoyed overwhelming international support for his continuation in government despite effective control of the state being lost. In Haiti in 2004, Aristide again lost effective control. Yet, rather than assist with the restoration of effective control, some of the same international actors that had previously helped secure international support encouraged Aristide to step aside. This time international opinion favoured a government selected by a prime minister, who himself been selected by seven eminent persons that had been identified by two prominent Haitian politicians and a representative of the international community. The obvious subjectivity of the international actors, with regards the choice of government to place in effective control of the state, is made all the more significant because the government is put in a position where it has the authority and the capacity to introduce significant reforms in state and civil infrastructure. In Haiti in 1994, for example, Aristide disbanded the armed forces;[80] in Haiti from 2004, there has been significant economic restructuring, as well as the restoration of the armed forces.[81]

In relation to the impact of the assistance model on political independence, the history of events in Haiti provides good reason to wonder about the credentials of an otherwise ineffective domestic government to be treated as the agent for the rights of the target state and its people. Moreover, there is reason to be concerned about the ability of an otherwise ineffective government to resist the designs of the international actors, either explicit or implicit, as to how the state should be

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therefore urges the Government of Sierra Leone, with the assistance of donors and of UNAMSIL, in accordance with its mandate, to accelerate the consolidation of civil authority and public services throughout the country, and to strengthen the operational effectiveness of the security sector."

79) In this respect, it is interesting to note that the prospect of international transitional administration in the sovereign state of Afghanistan was never seriously considered, see The Situation in Afghanistan and its Implications for International Peace and Security: Report of the Secretary-General, 18 Mar. 2002, para. 98, UN Doc. A/56/875-S/2002/278; see also J. Kreilkamp, "U.N Post conflict Reconstruction", 35 *NYU Journal of International Law and Politics* (2003) p. 662.

80) See Malone and von Einsiedel, *supra* note 55, p. 185.

81) World Bank, Haiti: Recent Progress in Economic Governance Reforms, October 2006 available at <http://go.worldbank.org/PF8ERYHLA0>.

reconstructed. In light of such concerns and the importance of the preservation of political independence for the UN system, there is reason to expect that international law would not permit the assistance model. It is to how legal justification is possible and how this positions the model in relation to political independence that attention is now turned.

5. Legality and the Paradox of State Reconstruction

A range of legal justifications can preclude wrongfulness in international law.[82] By chapter VII of the United Nations Charter, the UN Security Council was given the power to create superior legal obligations and authorise activity that would otherwise be wrongful without contemporary consent in the pursuit of international peace and security.[83] Its activity under this heading does not appear to be legally obliged to respect the political independence of a state or its people.[84] However, more significant for present purposes, there is little ground for suggesting a chapter VII resolution makes otherwise inconsistent activity consistent with political independence.[85] It is clear, then, that the fact of a chapter VII resolution does not resolve the paradox of state reconstruction in international law.

In the assistance model even the military presence and some security related activity that is mandated under a chapter VII resolution also enjoys a consensual basis. Consent is thus the dominant legal justification for the assistance model as a whole. This point is supported by the fact that the consent of the domestic government has been emphasised in the relevant Security Council resolutions.[86]

Inherent in state sovereignty is a freedom to contract away parts of that same sovereignty –[87] within reason, of course, if the state wants to remain a state.[88] Accordingly, state consent can serve as a legal justification for otherwise wrongful activity in international law.[89] In the case of intervention it has been suggested

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82) See Ademola Abass, "Consent Precluding State Responsibility: A Critical Analysis", 53 *ICLQ* (2004) p. 211.

83) Art. 2 (7) UN Charter makes enforcement measures under chapter VII the exception to the prohibition on UN involvement with matters within the domestic jurisdiction of any state.

84) On the ongoing debate about legal restrictions on the chapter VII powers of the Security Council compare Michael Matheson, 'United Nations Governance of Post-Conflict Societies', 95 *AJIL* (2001) p. 85; with Dapo Akande, 'The International Court of Justice and the Security Council: Is there Room for Judicial Control of Decisions of the Political Organs of the United Nations?', (1997) 46 *ICLQ* pp. 317–25.

85) This view is supported by the strong presumption against an international organisation being created as an agent of its member states; see, on this presumption, D. Sarooshi, *International Organisations and their Exercise of Sovereign Powers* (2005) p. 43.

86) See, e.g., UN Doc. S/RES/940 (1994).

87) *Case of the SS "Wimbledon", PCIJ Rep Series A No 10*, p. 25.

88) Brad Roth, "The Illegality of Pro-Democratic Invasion Pacts", in G. Fox and B. Roth (eds.), *Democratic Governance in International Law* (2000) p. 330.

89) Art. 20, 2001 ILC Articles on State Responsibility; see J. Crawford, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries (2001) p. 164.

that consent suspends the normal operation of the rules,[90] or that the lack of consent is central to the definition of wrongful intervention.[91] The latter approach rests on the idea that the agent's consent represents an exercise of the rights of the state and the people, the implication here is that the consent makes what would otherwise be a wrongful intervention an internal affair of the state. If one follows this approach, the search by international actors for a valid source of consent to their involvement in the reconstruction of an ineffective state can be read as an attempt to reconcile their efforts with the political independence of the target state and its people. Hence it is necessary to enquire into whether the preclusion of wrongfulness through state consent can in fact be seen as synonymous with the preservation of political independence.

The validity of consent is dependent on the rules in international law for the expression of the will of the state.[92] States are abstract legal institutions; an agent is needed for the exercise of legal personality. For the most part, international law identifies the government as the sole agent of the state.[93] Traditional international legal doctrine identifies a government on the basis of effective control of the state.[94] This provides an objective basis for international actors to identify the government, moreover, effective control suggests some meaningful attachment to the state, and it entails the potential for obligations to be fulfilled.[95]

'People' is nearly as much of an abstraction as the state.[96] In respect of the right of the people as the population of the state as a whole to self-determination, effective control is also the traditional basis for identification of the agent of the people. This is because the ability to exert effective control suggests acquiescence of the people and, however unsatisfactory, is as far as international consensus has stretched.[97]

The relative nature of the effective control test, 'effective enough', means that provided a government has a modicum of independent effective control of the state, it is possible to argue that it retains the credentials to be treated as the agent of the state and its people.[98] However, when all independent effective control is

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90) Robert Ago, Eighth Report on State Responsibility, UN Doc. A/CN.4/318 (1979) and Add. 1–4 Yearbook of the International Law Commission (1979) at 31–32.

91) David Wippman, "Military Intervention, Regional Organization, and Host State Consent", 7 *Duke J. Comp. & Int'l L.* (1996) p. 210.

92) Crawford, *supra* note 89, p. 164.

93) Crawford, *supra* note 8, pp. 33–4 "[o]ne of the prerequisites for statehood is the existence of an effective government; and the – for most purposes the only – organ by which the State acts in international relations is its central government."

94) *Tinoco Arbitration (Great Britain and Costa Rica) (1923) 1 R.I.A.A.* 375; see James Crawford, "Democracy in International Law", 64 BYIL (2003) p. 119.

95) See discussion in Roth, *supra* note 1.

96) Roth, *supra* note 1, p. 430.

97) Roth, *supra* note 1, p. 419.

98) For criticism of effective control test as not free from subjectivity in its application see Maria Aristodemou, 'Choice and Evasion in Judicial Recognition of Governments: Lessons from Somalia', (1994) 5 *EJIL*.

absent such arguments are no longer sustainable. Accordingly, one might reasonably expect that an ineffective government should not have the capacity to provide valid consent in the context of the assistance model. How, then, does an ineffective government gain the legal capacity to provide valid consent to international involvement that puts it in effective control of the state?

Different factors that can affect the validity of consent include coercion, either of the representatives of the state or the state itself, as well as the competence of those purporting to act on behalf of the state.[99] The basic rules on competence are found in Article 7 of the Vienna Convention on the Law of Treaties, 1969. Essentially, Article 7 lists the relevant positions in government that are presumptively able to provide consent.[100] There is no suggestion of a lack of governmental effectiveness making a difference to the validity of the consent, possession of status as the government in the sense of international law appears sufficient.[101]

To possess governmental status in the sense of international law, the general rule is that recognition is declaratory, and that status, as was decided in the *Tinoco Claims Arbitration*,[102] is based on effective control of the territory.[103] However, as with statehood, international recognition serves as evidence of status. Importantly, those states that no longer adopt the policy of recognising governments do occasionally still use it to support the position of favoured governments.[104] And, by indicating the position of other states in relation to a particular government, the occurrence of diplomatic relations serves a similar role to recognition.[105] International recognition has therefore proved capable of helping to preserve or establish the status of governments struggling for effective control.[106]

Certainly, international recognition is the overwhelming factor that explains why the governments identified in relation to the assistance model in Haiti, as well as in the other examples cited, have enjoyed the legal capacity to serve as a

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[99] See Abass, *supra* note 82, p. 214.

[100] 1969 Vienna Convention on the Law of Treaties, Art. 7 (2a) 'Heads of State, Heads of Government and Ministers of Foreign Affairs'.

[101] *See Genocide case (Bosnia and Herzogovina v Yugoslavia), Preliminary Objections, Judgement, I.C.J Reports 1996* pp. 621–2; at times 'legitimate government' has been used to indicate a government that meets the criteria for governmental status in international law, but this is easily confused with the use of the term 'legitimate' to suggest political or moral approval, accordingly this article avoids the term 'legitimate' in relation to governmental status; support for this approach is found in Stefan Talmon, "Who is a Legitimate Government in Exile? Towards Normative Criteria for Governmental Legitimacy in International Law", in G.S. Goodwin-Gill and S. Talmon (eds.), *The Reality of International Law: Essays in Honour of Ian Brownlie* (1999) p. 537.

[102] *Tinoco Arbitration, supra* note 94.

[103] M.J. Peterson, *Recognition of Governments: Legal Doctrine and State Practice, 1815–1995* (1997) p. 37 and p. 49.

[104] See Peterson, *supra* note 103, at p. 182; Warbrick, *supra* note 9, p. 256.

[105] See Crawford, *supra* note 8, at p. 152; in this respect the UK were keen to present its dealings with the Taliban, when the latter exercised a degree of effective control in Afghanistan, as not inter – governmental, see UKMIL 72 *BYIL* (2001) p. 578.

[106] See, e.g., *Genocide case, supra* note 101, at p. 622.

source of valid consent. With Aristide, in respect of Haiti in 1994, there was massive international support for the continued recognition of status.[107] With regards the 2004 Haiti Transitional Government, support was not so unanimous. The Caribbean Community (CARICOM) refused to recognise the Transitional Government[108] but, crucially, key Security Council resolutions backed it and thus secured its status.[109]

International recognition, however, is a matter of discretion for the recognising state. Consequently, where a government's status in an international legal sense rests largely on the fact of international recognition, it is hardly conceptually consistent to view this government as the agent of the rights of the state and its people. One might accept that such a government out of practical necessity can represent the state and its people in relation to matters that do not have a significant effect on the political independence of the state and its people; such as the signing of a postal treaty. Yet, one should still question whether status that is dependent on international recognition should be sufficient for a government to be competent to provide valid consent to a process which puts it in effective control of the state and makes the notional authority real.[110]

There has been, in the past, some debate about whether a still internationally recognised but increasingly ineffective government in the context of a civil war could offer valid consent to international military intervention to assist it.[111] This was underpinned by a concern for the protection of the right of the state and its people to political independence, the agent of the right being uncertain in a time of civil war when effective control was in doubt.[112] Despite the strong conceptual logic of the purported rule, its strength has always suffered. This is primarily because of the ease by which those accused of violating it can claim there had already been external assistance for the other side that can justify further involvement on the basis of collective self-defence.[113] Today, whether the rule exists in relation to civil war,[114] or military assistance to an ineffective government

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107) See, e.g., the Organization of American States (OAS) "[t]o recognize the representatives of the Government of President Jean-Bertrand Aristide as the only legitimate representatives of the Government of Haiti" MRE/RES. 1/91 Corr. 1, OEA/Ser.F/V.1 (Oct. 3, 1991), para. 3; endorsements from a wide variety of states at the Security Council meeting of 3 Oct 1991 UN Doc. S/PV. 3011.

108) Malone and von Einsiedel, *supra* note 55, at p. 185.

109) See, e.g., UN Doc. S/RES/1542 (2004) para. 7; on the significance of the recognition from key international organizations for governmental status see Peterson, *supra* note 103, at p. 42.

110) This reasoning finds support in comments from Wippman, *supra* note 1, pp. 666–667; see also Louise Doswald-Beck, "The Legal Validity of Military Intervention by Invitation of the Government", (1985) 56 *BYIL* p. 200.

111) See, e.g., Domingo Acevedo "The Haitian Crisis and the OAS Response: A Test of Effectiveness in Protecting Democracy", in L. Damrosch (ed.), *Enforcing Restraint – Collective Intervention in Internal Conflicts* (1993) p. 139; Antonio Tanca, *Foreign Armed Intervention in Internal Conflict* (1993).

112) Doswald – Beck, *supra* note 110, at pp. 200–211.

113) Wippman, *supra* note 91, at p. 220.

114) Christopher Le Mon, "Unilateral Intervention by Invitation in Civil Wars: The Effective Control Test Tested", 35 *NYU Journal of International Law and Politics* (2003) p. 741.

in general,[115] is highly doubtful. This is particularly so in light of the recent example of the international recognition of the formed-in-exile government of Somalia and the toleration of Ethiopia's military intervention, at the request of that government, against contestants who controlled far more of the population and territory.[116]

As the military intervention rule represents an extreme circumstance and is hardly established, it seems the consent of an ineffective government can, dependent on international recognition, preclude the wrongfulness of the international involvement that constitutes the assistance model. However, as the state consent-international recognition mechanism operates without a particular concern for the credentials of the government to be treated as the agent of the rights of the state and its people, or for the ability of the government to resist the designs of the international actors as to how the state is reconstructed, the legality it provides offers little in the way of reconciliation with political independence.

6. The Portrayal of the Assistance Model as Unremarkable

The legal justifications for the assistance model operate without a particular concern for the credentials of the government as an agent for the rights of the state and its people. Thus the law permits a government with little attachment to the state or its people to be put in effective control of the state. Furthermore, in relation to the preservation of political independence, one imagines that such a government would have difficulty resisting the designs of the international actors in relation to the reconstruction of the state and civil infrastructure. Still, the scholarly literature on state reconstruction through assistance is dominated by policy recommendations on how to improve the success of the international efforts.[117] Moreover, where the subject of legality is broached, commentators tend not to look beyond the identification of a valid legal basis for international involvement.[118] Does this mean that the assistance model is of little significance in relation to the core UN system values of self-determination of peoples and international peace, which are put at risk by a neglect of political independence?

In order to establish whether the assistance model of state reconstruction is in fact a practice to be concerned about, it is necessary to address some of the legal issues that revolve around the assistance model and help project the risk to political independence and the attendant values as unremarkable for the UN system.

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115) Institut de Droit International, 10th commission: Present Problems of the Use of Force in International Law D. Sub-group on Intervention by Invitation, Rapporteur Gerhard Hafner (2007) p. 263.

116) See *infra* Section VIII.

117) See e.g., Stromseth, Wippman and Brooks, *supra* note 51.

118) See, e.g., B. Oswald, "Model Codes for Criminal Justice and Peace Operations: Some Legal Issues", 9 JCSL (2004) p. 253; Stromseth, Wippman and Brooks, *supra* note 51, at p. 51.

6.1. *International Recognition*

The lynchpin for the legality of the assistance model is sufficient international recognition of the ineffective government. While international recognition remains evidence of status rather than the source, without international recognition there would be little else to base the status of the respective governments on. How, though, does international recognition help the assistance model?

In the first place, the international legal significance that flows from international recognition, making a government the agent of the rights of the state and its people, could easily lead one to assume that recognition must be based on objective legal criteria; criteria that would guard against the international actors simply choosing any government they preferred.

Secondly, even if one appreciates that there are no objective legal criteria to structure international recognition policy, an overwhelming international consensus that a particular ineffective government is worthy of recognition tends to suggest that the government is in fact worthy of its status as agent for the rights of the state and its people.

The circumstances of the assistance model in Haiti indicate key reasons for being doubtful about the way international recognition portrays the assistance model as unremarkable in relation to political independence. As noted above, with Aristide, in respect of Haiti in 1994, there was massive international support for the continued recognition of status. With regards the 2004 Haiti Transitional Government, support was not so unanimous. The approach of CARCICOM, in contrast to other international actors in Haiti in 2004, shows the scope for disagreement amongst international actors about which government is worthy. Further, it indicates that, for governmental status when effectiveness is missing, it is the international majority, or the opinion of the stronger states, that makes the degree of recognition sufficient.[119] It is thus not clear how many international actors must be in agreement before the recognition is sufficient to confer legal capacity on a government. Not only, then, is the matter of governmental status taken out of the hands of the people, but it is done so in a manner that defers to hegemonic tendencies in international affairs. This hardly makes one confident that there will be absolute agreement at the international level on the worthiness of the assisted government, which could at least help reduce the threat to international peace, although clearly not the value of self-determination. Indeed, the fact that Charles Gyude Bryant, former Chairman of the National Transitional Government of Liberia, stands charged with economic sabotage for misappropriating $1.3 million during his tenure is a further illustration of the inherent risk that the international involvement will put a self-interested government in control of the state in question.[120]

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[119] In this respect see Peterson, *supra* note 103, at p. 42.

[120] See Sixteenth progress report of the Secretary-General on the United Nations Mission in Liberia, S/2008/183, 19 March 2008, p. 2, para. 6.

6.2. *State Consent*

All the international involvement in the assistance model, regardless of whether it is mandated under chapter VII, has a consensual basis.

The consensual basis removes any question of the law of occupation applying. The law of occupation applies, when a state comes into uninvited effective control of the territory of a third state, to regulate the administration of the occupied territory.[121] Its rationale, which includes the preservation of the occupied states' sovereignty and the humanitarian well-being of the people,[122] explains a strict emphasis on conservation of the state and civil infrastructure.[123] That this law does not apply in the assistance model can help project the international involvement as benevolent and of little threat to political independence because, one might reason, if there were a threat to political independence, surely the law of occupation would apply?

Similarly, by precluding the wrongfulness of the international involvement one might readily assume that the assistance model must be consistent with the rights of the state and the people – if not, surely it would be wrongful? In this respect, international recognition and valid consent are closely related. The fact that they are separate – that recognition does not necessarily entail valid consent – means that the validity of consent reinforces how the international recognition helps the assistance model in relation to the worthiness of the credentials of the government to be assisted.

The consensual basis is most significant because it portrays the government as in charge of the change and development of the state and civil infrastructure. Thus, notwithstanding doubts about the attachment of the government to the state and the people, it suggests consistency with political independence. However, in a context where the legal status is the result of the recognition by international actors, rather than on the basis of objective legal criteria, and all effectiveness both present and in the near future appears dependent on international actors, it is far from guaranteed that the government could resist the desires of the international actors, explicit or implicit, as to how the state and civil infrastructure is developed. One might query, for example, how much leverage the Haiti Transitional Government had when developing the Interim Co-operation Framework

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[121] The vast majority of the law of occupation is found in the 1907 Regulations Annexed to the Hague Convention No.IV Respecting the Laws and Customs of War on Land [Hague Law] in particular Arts. 42–56, and the 1949 Geneva Convention No. IV Relative to the Protection of Civilian Persons in Time of War [Geneva Law/GCIV] in particular Arts. 27–34 and 47–78; the rules on application are found in Art. 42 (Hague Law) and Common Art. 2 (Geneva Law); also see *Prosecutor v. Naletilic, judgment of 31 March 2003 (ICTY Trial Chamber)* para. 217.

[122] See Adam Roberts, "Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967", 84 *AJIL* (1990) p. 46.

[123] See Eyal Benvenisti, "The Security Council and the Law on Occupation: Resolution 1483 on Iraq in Historical Perspective", 1 *Israeli Defense Forces Law Review* (2003) pp. 20–21 and 23–27.

in partnership with the international actors that would finance and enable the reconstruction it envisaged to be implemented.

That at least some of the international actors are a little uneasy about the relevant government's status as an agent of the rights of the state and its people can be implied from the fact of the double legal justification for military intervention.[124] If the government is competent to consent to international involvement that puts it in control of the state then surely this should apply across the board, so why supplement consent with a chapter VII basis?

7. The Importance of Chapter VII for the Assistance Model

The UN Security Council's competence to create superior legal obligations and authorise activity that would otherwise be wrongful without contemporary consent, in the pursuit of international peace and security, is of huge significance for international law.[125] Not only does the Security Council have the ability to provide legal justification for activity that would otherwise be wrongful, but also, because of its position at the apex of the UN collective security system, it is able to confer certain activity with a degree of legitimacy that cannot be found from elsewhere.[126] This last point is sustained whether the activity is explicitly authorised in a chapter VII resolution or merely endorsed.

In the assistance model, only the security aspects are chapter VII authorised. This addresses any lingering doubts about whether such intervention on the basis of consent alone would be legally justified. But it also might be taken as a signal that all assistance to the government that benefits from the military intervention is legitimate – a point made explicit in the relevant resolutions which call for wider assistance to the otherwise ineffective government to help it sustain effectiveness once the international military presence leaves.[127] Thus concerns about the effect of the assistance model on the political independence of the target state and its people are assuaged because it is in pursuit of international peace and security and the most authoritative voice on the matter, the Security Council, has deemed it as such. However, there are reasons why it is not prudent for the Security Council to be blasé about the preservation of political independence.

One possible reason for relying solely on consent for the wider assistance is that this helps to present the actual process of reconstruction as an internal matter of the target state. If the Security Council authorised the wider assistance, this would take the choice of whether to accept the assistance out of the hands of the

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124) See, making a similar point, Wippman, *supra* note 1, at p. 672 note 225.

125) Art. 2 (7) UN Charter, makes enforcement measures under chapter VII the exception to the prohibition on UN involvement with matters within the domestic jurisdiction of any state.

126) Enrico Milano, *Unlawful Territorial Situations in International Law* (2006) p. 274.

127) See, e.g., in relation to Haiti from 2004, S/RES/1542 (2004), para. 13.

domestic government, it would be internationally obligated to accept the assistance. Thus it would be harder to square the international involvement with the idea that it is all desired by the government, and, accordingly, with preservation of political independence. Should the Security Council be concerned with political independence if it is acting in the interests of international peace and security?

The Security Council has a significant ability to legitimise and thereby make acceptable international activity that might otherwise be questionable in relation to core values of the UN system. However, if this ability is misused to confer legitimacy where it is not deserved, then the strength of its power in this respect will weaken.[128] The Security Council should therefore use its authority in a responsible manner. In this respect, for the sake of its own legitimacy, even if not legality, there are certain international legal principles of such fundamental importance that the Security Council even under chapter VII should seek to abide by.[129]

The apparent desire of the Security Council to render the assistance model consistent with political independence, by limiting its chapter VII authorisation to the military aspects and overlapping this with state consent, can be seen as evidence of the argument about adherence to fundamental legal principles. Yet, as noted, the consensual basis of the assistance hardly improves the situation in relation to the preservation of political independence. What this means is that both legal justifications benefit from the chapter VII-state consent composite. The Security Council benefits because the dominance of state consent as a legal justification for the assistance model as a whole presents the operation as more consistent with political independence. State consent benefits from endorsement in a chapter VII resolution because of the inherent reassurance that, regardless of the credentials of the government, it is in the interests of international peace and security that this government receives international support to enable it to remain in control of the target state.

Does this projection render the neglect of political independence unremarkable in reality? One might be more inclined to accept the neglect of political independence as insignificant if it were just the right of the state to political independence at stake. This is because, as noted above, the rights of the state are obtained through a display of effectiveness. Thus the ethical argument for protecting the rights of the state is solely in the interests of peace, and, as the actions of the Security Council are based on the pursuit of international peace the Security Council aspect may more readily persuade that any consequential neglect of political independence is not of significance.

However, the assistance model also puts at stake the right of the people to political independence found in the legal right of self-determination, which arises regardless of effective control. The ethical strength of the people's right to political

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[128] Milano, *supra* note 126.

[129] Nigel White, 'The Will and Authority of the Security Council after Iraq', 17 *LJIL* (2004) p. 672.

independence rests on the political value of self-determination, which stresses the importance of all peoples having the possibility of self-government. Its weight as a core value of the UN system is testified to by the fact of the continuation of the ineffective state as state for a prolonged period of time. Moreover, a disregard for the value of self-determination could itself lead to disruption of international peace. Accordingly, legitimating the assistance model only on the basis of its pursuit of international peace and security is not sufficient to render its neglect of political independence unremarkable for the UN system.

8. The Role of Democracy in the Assistance Model

This article operates on the basis that the protection of political independence is important for the values of self-determination of peoples and international peace. Moreover, when the continuing status of the state is underpinned by protection of the people's right to political independence, to violate this right in the pursuit of state reconstruction would be to contradict the reason for the state remaining a state. Putting an ineffective government in control of the state brings political independence into doubt because of a lack of concern in the recognition-consent mechanism for the credentials of the government; and the influence that the international actors can have over an ineffective government in respect of how the state is reconstructed. A chapter VII aspect can assuage concerns in relation to the threat to peace, but does nothing to improve the assistance model in relation to the value of self-determination. In this latter respect, the pursuit of democracy appears significant.

As a political principle, President Wilson, a key proponent, saw self-determination as entailing democracy.[130] In an ideologically pluralistic international society of states, self-determination as a legal right has traditionally stood for the right of a political community to political independence. An effective government has been as far as consensus has reached on means for identifying the agent of the right. Since the early 1990s there has, though, been much debate about the position of democracy in international law. Some have concentrated on the emerging consensus on democracy as human right, focusing in particular on the meaning of Article 25 of the International Covenant on Civil and Political Rights.[131] Others, by linking it to the legal doctrine of self-determination and the associated idea of popular sovereignty,[132] have identified implications in the

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130) Michaela Pomerance, "The United States and Self-Determination: Perspectives on the Wilsonian Conception", 70 *AJIL* (1976) p. 20.

131) See, e.g., Stephen Wheatley, *Democracy, Minorities and International Law* (2005) pp. 135–150.

132) Popular sovereignty reflects the idea that the authority of a government is derived from the will of the people, it has been used throughout time as an hortatory device by governments seeking to legitimise their rule, see Brad Roth, "Popular Sovereignty: The Elusive Norm", 91 *Proceedings of the American Society of International Law* (1997).

emerging consensus on democracy as a human right for matters of general international law such as governmental status.[133]

Hence in a situation where there is no effective domestic government, but there is felt a need to identify a domestic government to support, a democratic process is the obvious response for efforts that seek to accommodate the value of self-determination. Accordingly, in the examples of the assistance model cited, the governments assisted either possessed democratic credentials or promised to pursue democracy in the very near future. This, building on top of the other factors that this article has highlighted (international recognition, state consent, chapter VII aspects), helps project a reorientation in relation to the value of self-determination: political independence is obscured and the international involvement cast as necessary for the realisation of democracy and the genuine rule by the people which this concept is supposed to entail. How, though, does this projection of the assistance model translate in reality?

In 2004, following Aristide's stepping aside and the setting up of a transitional government, this transitional government signed a political agreement known as the 'Political Transition Consensus' with the seven eminent persons that had selected the prime minister of the transitional government (Council of Wise Men), certain organisations of civil society, and the principal political parties, with the exception of Aristide's former party the Fanmi Lavalas party which declined to participate. By this agreement, the government promised to pursue the organisation of elections.[134] Notwithstanding the Transitional Government's lack of democratic credentials, the decision to pursue elections appears as an act of self-determination – an exercise of the right to decide. There is nothing in the key resolutions or political agreements to suggest that the Transitional Government was legally obligated by international law because of a lack of effective control to pursue democracy as part of the right to self-determination. This reluctance to remove choice of governmental form and insist on democracy as a legal obligation because of a lack of independent effective control is seen across the other examples of the assistance model. In Iraq, for example, the Security Council specified only that the Iraqi government must be 'representative', with no explicit suggestion that a representative government was required by the legal right of self-determination.[135] Moreover, in the Security Council debates surrounding the adoption of the resolution, only Germany offered an indication that representative meant democratic.[136]

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[133] See e.g., See, e.g., T. Franck, "The Emerging Right to Democratic Governance", 86 *AJIL* (1992) p. 52; Gregory Fox, "The Right to Political Participation in International Law", 17 *Yale Journal of International Law* (1995) p. 539; cf. cf. See, R.A. Miller, "Self-Determination in International Law and the Demise of Democracy", 41 *Columbia Journal of Transnational Law* (2003).

[134] See Interim Co-operation Framework, *supra* note 59, at p 2.

[135] UN Doc. S/RES/1483 (2003) para. 4 'an internationally recognized, representative government is established by the people of Iraq and assumes the responsibilities of the Authority'.

[136] SC 4761stmtg, 22 May 2003.

Keeping democracy as, formally at least, a freely chosen political concept is significant for the facilitation of the reconstruction process. If it were agreed that a transitional government was legally obligated to pursue democracy because of its lack of independent effective control in the interests of the right to self-determination of the people, the implication would be that such a government was not competent to administer the reconstruction process. For example, one might be more inclined to question whether Haiti's Transitional Government was competent to pursue the significant economic restructuring that it undertook with the assistance of the World Bank.[137] Allowing the otherwise ineffective government to freely choose to pursue democracy in the manner it prefers, helps to confirm its status as the agent of the rights of the state and its people.

In terms of bringing the assistance model in line with the value of self-determination, the avoidance of a legal concept of democracy as part of the right to self-determination has consequences in relation to how the pursuit of democracy actually stands. In one consequence, international actors lose a strong ground for questioning how the government that they assist governs. A government to be seen as consistent with the people's right to self-determination should be more than just elected at free and fair elections. The actual conduct of governance should meet certain standards,[138] such as those identified by the Human Right's Committee in its General Comment on Article 25 ICCPR.[139] As things stand, a neglect of these standards by an assisted government does not affect its competence to act as the agent of the state and its people. It is therefore too easy for a government to gain a victory in an election then govern in pursuit of its own interests rather than the people. Thus if the government blatantly rejects the required standards, interested international actors, including those that enable the government to retain control of the territory, are left to call for compliance

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137) See *supra* note 81.

138) For argument that international recognition policy should be driven not just by how a government is constituted but also whether it behaves democratically see Jean d'Aspremont, 'Legitimacy of Governments in the Age of Democracy' 38 *NYU Journal of International Law and Politics* (2006).

139) The Comment explains that it is implicit in Article 25 that the freely chosen representatives do in fact exercise governmental power and are accountable, and that citizens can take part in the conduct of public affairs through public debate and dialogue with representatives, which is supported by ensuring freedom of expression, assembly and association. Moreover, the rights of freedom of expression, assembly and association are identified as essential conditions for the effective exercise of the right to vote, and suggestions are made as to what these rights, which are enshrined elsewhere in the ICCPR, require in the context of Article 25. The principle of non-discrimination with regards the citizens right to vote is stressed. Conditions on eligibility to vote or stand for office on factors such as descent or political affiliation are rejected. It stresses the importance of voters being free to form opinions and oppose the government without undue influence or coercion of any kind. The issue of multiparty elections is not tackled directly, but when one reads that 'elections must be held at intervals… which ensure that the authority of government continues to be based on the free expression of the will of the electors' with the statement that 'political parties play a… significant role in the election process', the implication appears one of incompatibility with one party states; General Comment No. 25, 12 July 1996, UN Doc. CCPR/C/21/Rev.1/Add.7.

with human rights obligations which do not affect governmental status. The difficulties encountered with Aristide from 1994 onwards are testament to the significance of this point.

Moreover, the absence of this suggested legal regulation for the conduct of governance puts all faith in the elections producing a government that reflects the will of the people, so that how it governs can be imputed to be what the people want. However, when the ability of the government to govern is going to be largely dependent on the international actors, one wonders if the people are going to vote for the candidate they want or whom they think the international actors want. In other words, the projection of autonomous choice is brought into question.

Furthermore, keeping the matter of governmental form a political one maintains the discretion of international actors to assist the government that they feel is worthy rather than one that satisfies legal criteria. The support that has already been given to the internationally recognised, set-up in exile in Nairobi, transitional government of Somalia is testament to this point. The government is treated and considers itself as the total agent of the rights and obligations of the state and its people in international law.[140] While it continues to promise to be pursuing elections, international support for the Transitional Government looks like it will continue and potentially increase.[141] Yet, when it was set-up in exile the government had absolutely no control over the territory. Further, the only election was of the President by the parliament, which was appointed by the participants in attendance at the 2004 Inter-Governmental Authority on Development (IGAD) political conference.

The pursuit of democracy, because of its promise of genuine rule by the people and emerging ideas about it as a human right and as an aspect of the right to self-determination, helps to project the cited examples of the assistance model as in line with the value of self-determination. In this respect, however, the preference to keep democracy as a freely chosen political concept vitiates its actual utility. The main point is that without pursuit of democracy the threat to self-determination and, consequently, international peace would appear more severe. As things stand, however, the pursuit of democracy, because there is little effort to indicate, or regulate, the standards of governance that are required in order for there to be

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140) See The Transitional Federal Charter of the Somalia Republic 2004, Article 1.1.

141) See, e.g., answer of the UK Secretary of State for Foreign and Commonwealth Affairs, Hansard Written Answers, 16 Jan 2007, Col. 986w: "[w]e fully support Somalia's Transitional Federal government and Institutions in their efforts to find a lasting and inclusive political settlement, and to become an effective governing authority. The Transitional Federal Charter sets out a roadmap for a constitutional process and eventual transition to a democratically elected government. This is the framework within which the Transitional government should pursue a political process in Mogadishu. We are working with the Transitional government and Institutions, and our international partners, to help stabilise Somalia through the early deployment of a regional security force, restore governance through an inclusive political process, and rebuild Somalia through increased international assistance."

some truth in democracy's promise of genuine rule by the people, in fact hardly removes the concerns that the neglect of political independence raises for the UN system.

9. Conclusion

International law does not develop in linearly progressive manner. Instead, it is created on a needs basis. The fact that states continue as states despite a lack of effective control for a prolonged period is because of the significance accorded the self-determination of peoples in international affairs. Specifically, the importance of the people's right to self-determination supports a legal framework that prohibits annexation, intervention, and underpins the presumption of continuity. As things stand, these states can be reconstructed in a legally justified manner, through the assistance model. This, though, does not adequately address the preservation of political independence in relation to the core values of the UN system of self-determination of peoples and international peace.

In the context of a state suffering from a prolonged lack of effective control, there is an inherent need for flexibility in relation to who is given a voice and the approach to institutional reform that can be adopted. At present this flexibility appears largely unregulated by international law. This might be tolerable were it possible for international actors to always pick the right government to work with, in terms of who the people want. Further, were it possible to rule out that there is any self-interest motivating the involvement of the international actors, which might mean they would take advantage of the overwhelming influence that they have over the reconstruction process. However, as events in Haiti are testament to, it is very difficult to identify a government the people want when there is no effective control of the territory. Moreover, it is impossible, given that international involvement is motivated by a desire to see effective control restored in the interests of international security, to rule out self-interest.

A series of different factors have been identified as portraying the assistance model as unremarkable, particularly the nature of the international involvement, the consensual basis, international recognition of the government, the chapter VII aspects, and the pursuit of democracy. When one looks more closely, however, it becomes apparent that these tend more to obscure rather than address the preservation of political independence and the risk to attendant values of self-determination of peoples and international peace. Essentially, when it comes to dealing with ineffective states, the fact that the international legal system is creaking at the seams has been papered over. Consequently, the apparent 'need' for new more appropriate law to be developed is reduced.

The international community clearly benefits from the stability of effective states, and in this sense can be seen as conducive of the paradox of state reconstruction. At the same time, the fact that there has not been a response more

consistent with the values that underpin contemporary international law appears indicative of an international community that is only just starting to be seen as more than a rhetorical device.[142]

In sum, this article, by revealing the true nature of the assistance model in relation to political independence and the attendant UN system values, should be seen as support for a reconstruction component to be included any in proposals for a *jus post bellum* – a set of rules and principles to guide and hold accountable all those involved in post-conflict situations.[143] Indeed, while those interested in this idea have hitherto focused on situations of international territorial administration and belligerent occupation, this article has shown that there is just as much need for some legal bounds to be set for political discretion in all reconstruction situations where there is not an independently effective domestic government. Moreover, the present situation in Somalia, with the Transitional Government not yet receiving the massive international military presence needed to put it in effective control of the state,[144] represents a prime time for thinking about what type of legal regulation is required. Should the necessary level of military assistance be forthcoming in Somalia, such legal regulation could potentially be a key factor in securing the legitimacy of any wider reconstruction process in the eyes of the Somali people. It could also help to assuage concerns of those international actors that might, otherwise, not be inclined to tolerate assistance to a government that has little evidence to support its case for being treated as the agent of the state or its people.

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142) See, though, Russell Buchan, "A Clash of Normativities: International Society and International Community", 10 *International Community Law Review* (2008); Tsagourias, *supra* note 14.

143) See Carsten Stahn, *'Jus ad bellum', 'jus in bello'… 'jus post bellum'*? – Rethinking the Conception of the Law of Armed Force", 17 *EJIL* (2006) p. 943; Brian Orend, "*Jus Post Bellum*: The Perspective of a Just-War Theorist", 20 *LJIL* (2007) p. 571; Kristen Boon, "Legislative Reform in Post-conflict Zones: Jus Post Bellum and the Contemporary Occupant's Law-Making Powers", 50 *McGill LJ* (2005) p. 285.

144) See J. Gettleman, "Somalia Town Falls to Insurgent Raid", *International Herald Tribune*, 1 April 2008 available at <http://www.iht.com/articles/2008/03/31/africa/31somalia.php>.