9 Economic self-determination in post-conflict reconstruction: The case study of Timor-Leste

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Introduction

The aim of the chapter is to explore the role of international law in economic reconstruction and, in particular, the right to economic self-determination as the right of the people to choose their economic system. In international legal scholarship the issue of economic reconstruction has been analysed more closely in respect of the measures that were applied in Iraq and the extent to which the transformation of a socially based economy to an open market was compatible with the laws of occupation.[1] Nevertheless, there remains certain ambivalence in identifying the rules related to economic transition and their interaction with the wider fabric of international law beyond the scope of occupation. After briefly considering the meaning of economic self-determination in international society during the period of decolonisation, the chapter explains how post-conflict reforms can have an impact on our understanding of the right and its parameters. Finally, it considers the case study of Timor-Leste and how the right of the Timorese people to economic self-determination was applicable in the reconstruction process.

Economic self-determination and post-conflict reconstruction

The legal right to economic self-determination became central to the process of decolonisation. It was considered a corollary to political independence and socio-economic development of the colonised states. [2] Indeed, the right emerged in the context of negotiations between developed and newly independent states in the United Nations General Assembly (UNGA) as the latter attempted to break

1 See G H Fox, 'The Occupation of Iraq', (2004) 36 *Georgetown Journal of International Law* 195; B Crocker, 'Restructuring Iraq's Economy' (2004) 27 *The Washington Quarterly* 73; A K Audi, 'Iraq's New Investment Laws and the Standard of Civilisation: A Case Study of the Limits of International Law' (2004) 93 *Georgetown Law Journal* 335.

2 See UN Charter Arts 1(2) and 55; International Covenants of Human Rights 1966 Art 1; A Cassese, *Self-determination of Peoples: A Legal Reappraisal* (CUP 1995) 42–43.

the economic arrangements that were forced upon them by colonialism.[3] Resolutions 1803 (1962)[4] and 3201 (1970) defined two important pillars of the right to economic self-determination: the free disposal of natural resources and the right of states to expropriate or nationalise foreign property.[5] The central issue at that time was whether economic self-determination entitled states to expropriate foreign property without the provision of full compensation.

On the one hand, customary international law at that time was summarized in the Hull formula, which required that expropriation was lawful if it was carried out for a public purpose, in accordance with the law and followed by prompt, adequate and effective compensation.[6] On the other hand, decolonised states interpreted economic self-determination as the entitlement to terminate the legal contracts with foreign investors, irrespective of their obligations under international law, and subject to the laws of the host state.[7]

It is generally accepted that the UNGA resolutions did not reform customary international law on matters of expropriation.[8] Evidence of this is found in the rules of international economic law, which regulate the standards of treatment of foreign investors through Bilateral Investment Treaties (BITs) and multilateral agreements. They require in their majority that the host state provides prompt, adequate and effective compensation in the event of expropriation illustrating that the Hull formula remains customary international law.[9] Instead, the GA resolutions can be regarded as crystallising the relationship between the right to economic self-determination and permanent sovereignty over natural resources, which is readily considered to apply beyond the context of decolonisation.[10]

3 R Dolzer, 'Permanent Sovereignty over Natural Resources and Economic Decolonisation' (1986) 7 *Human Rights Law Journal* 217.

4 UNGA, 'Permanent Sovereignty over Natural Resources' (1960) UN Doc A/RES/1803.

5 UNGA, 'Declaration on the Establishment of a New International Economic Order' (1974) A/RES/S-6/3201 para 4.

6 This was confirmed by the decisions of arbitration tribunals, national and international courts in the nineteenth and at the beginning of the twentieth centuries. See *Norwegian Ship-owners Claims (Norway v USA*), PtC of Arbitration 1922; *Factory at Chorzow (Germ v Pol)*, 1926 PtC of Arbitration (Ser A) No 7 (May 1925)*;* see R Dolzer, 'New Foundations of the Law of Expropriation of Alien Property' (1981) 71 *American Journal of International Law* 553 at 558; S M Schwebel, 'Investor-State Disputes and the Development of International Law' (2004) *American Society of International Law Proceedings* 27.

7 M Bedjaoui, *Towards a New International Economic Order* (Holmes and Meier Publishers 1979); N Schrijver, *Permanent Sovereignty over Natural Resources* (CUP 1997).

8 See *TOPCO/CALASTIC* Award, IRAN-US CTR, 19 January 1977, published in English translation in 53 *International Law Reports,* para 62; P M Norton, 'A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation' (1991) 85 *American Journal of International Law* 474; U Kriebaum and A Reinisch, 'Property, Right to, International Protection', in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of PIL* (OUP 2010); <www.mpepil.com> accessed 25 March 2014.

9 OECD, 'Indirect expropriation' and the 'Right to Regulate' in International Investment Law, Working Papers on International Investment 2004/04 (2004) 2; <http://www.oecd.org/daf/inv/internationalinvestmentagreements/33776546.pdf> accessed 30 March 2014.

10 A Farmer, 'Towards a Meaningful Rebirth of Economic Self-determination: Human Rights Realisation in Resource-rich Countries' (2006) 39 *International Law and Politics* 417; Schrijver (n 7); see

Post-conflict reconstruction offers a different context from decolonisation. In the aftermath of the conflict, the absence of effective governing authorities hinders the exercise of the right of the people to determine their economic organisation due to the lack of representative authorities and mechanisms to express their wishes. International engagement is therefore necessary both to facilitate the transition to sustainable peace and to ensure that the domestic authorities comply with their international obligations related to the internal governance of the territory.

Consequently, the reform processes affect domestic governance and important economic choices are made, such as which industries are privatised, how the tax system is restructured, how property rights and commercial transactions are secured and which investment restrictions are lawful. It is not always clear, however, the degree to which international actors are permitted to influence the economic reforms without restricting the right of the local actors to economic self-determination. An examination of economic self-determination requires first, ascertaining how the right applies to post-conflict situations: Do the consistent international policies in favour of implementing market reforms affect our understanding of the right?[11] Is the post-conflict state constrained by international rules to implement certain economic measures? Does international law require the reconstruction of a particular economic system, which entails the outcome of an open market? Some further observations regarding the scope of the right in the international society and the international community in the following section can be helpful.

The traditional law on economic self-determination

The traditional law on the right to economic self-determination pertains to the nature of the international society. The international society is the aggregate of its sovereign member states, which are organised within their territorial boundaries and coexist side by side.[12] In their internal composition, states have distinct identities, which are shaped through their history and domestic affairs. Territorial separation and national distinctiveness therefore construct the pluralist nature of the international society based on thin socio-political affiliations amongst its member states. Nevertheless, common concerns on matters of security and stability can help to explain the need to regulate state relations and establish international institutions. The role of international law is then to 'shield the domestic cosmos from

A Carty, 'From the Right to Economic Self-determination to the Rights to Development: A Crisis in Legal Theory' (1984) *Third World Legal Studies* 73; J Oloka-Onyango, 'Heretical Reflections on the Right to Self- Determination: Prospects and Problems for a Democratic Global Future in the New Millennium' (1999) *American University International Law Review* 151.

11 See M Melandri, 'Self-determination and State-building in International Law: The Need for a New Research Approach' (2014) *Journal of Conflict Security Law* (first published online 29 May 2014); <http://jcsl.oxfordjournals.org/citmgr?gca=jconsl%3Bkru009v1> accessed 10 July 2014.

12 H Mosler, *The International Society as a Legal Community* (Sijthoff 1980) 2.

external interference and to encourage modes of conduct based on consent'.[13] Law provides the mechanisms whereby states can agree on equal rights and their reciprocal obligations by preserving the demarcation of the national sphere from the international. Its role can be demonstrated, for example, by the institution of sovereignty, as the exercise of ultimate and autonomous authority.[14] A cornerstone of the international society, sovereignty insulates states from external interference in their domestic affairs and preserves the diversity of their identities.

In the context of socio-political diversification, the right to economic self-determination does not presuppose the implementation of a specific model of economic reconstruction that would influence the economic structures of the state. The right only requires that the people are consulted in a voluntary manner, but this can occur in different systems of political and economic organisation. Self-determination, therefore, is in line with the legal principles of non-intervention and sovereign equality, demonstrating that international law is neutral toward the form that states are governed internally.[15]

Thus, any measures imposed by international administrators to implement a market-oriented economy would not be compatible with the exercise of the right. Whatever their choice is, whether a socialist or capitalist system, mixed, centrally planned, or laissez-faire, it is an international legal requirement that the people determine it without external interference.[16] The role of the international actors in such circumstances is perceived as facilitating the post-conflict operations through the provision of resources, but these actors are prevented from determining a particular outcome of the reconstruction process. This approach can be seen in line with the concept of local ownership that was endorsed by the UN in 2001, as a best practice postulate of sustainable development and peace. In the report 'No Exit without Strategy' the Secretary-General observed:

> [peace and development] can only be achieved by the local population itself; the role of the United Nations is merely to facilitate the process that seeks to dismantle the structures of violence and create the conditions conducive to durable peace and sustainable development.[17]

13 N Tsagourias, 'International Community, Recognition of States, and Political Cloning' in C Warbrick and S Tierney (eds), *Towards an 'International Legal Community'?* (British Institute of International and Comparative Law 2006) 210, 215; see *Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14, para 269.

14 See N Walker, 'The EU and the WTO: Constitutionalism in a New Key' in G De Burca and J Scott (eds), *The EU and the WTO: Legal and Constitutional Aspects* (Hart 2001) 21, 40.

15 See J Vidmar, *Democratic Statehood in International Law: The Emergence of New States in Post-Cold War Practice* (Hart 2013).

16 *Nicaragua* (n 13) 259–263; see *Western Sahara (Advisory Opinion)* [1975] ICJ Rep 12 para 94: 'No rule of international law, in view of the Court, requires the structure of a State to follow any particular pattern, as is evident from the diversity of the forms of State found in the world today.'

17 UNSC, 'No Exit without Strategy: Security Council Decision-making and the Closure or Transition of United Nations Peacekeeping Operations' (2001) UN Doc S/2001/394 para 12.

Economic self-determination in international society remains therefore, 'agnostic'[18] to the type of economic system that is reformed in the post-conflict period and insulates it from extensive external involvement. At best, it requires international actors to ascertain how the people of the territory wish to organise their economy and guarantee their participation in decision-making processes.

Economic self-determination reconsidered

A revised understanding of economic self-determination is examined in this section. The right is considered here more closely to the internationally led practice of post-conflict reconstruction and to the extent that the latter can have an impact on its interpretation. This approach suggests a different model of economic reconstruction from one that tolerates any type of economic organisation. As Paris put it, the post-conflict operations are instances of the globalisation of a particular practice of domestic governance that determines how the state should behave.[19] Thus, it is a model in relation to which, international law and the right to economic self-determination have a broader impact on what the reforms of the economic system should look like.

Under the reconstruction process, the post-conflict territory is not the sovereign Westphalian state that determines its internal affairs autonomously.[20] Having failed to maintain peace and security, the state and its internal structures are placed at the centre of international engagement to restore their governability. The tools and the end result of the reform processes therefore become entangled with the identity and objectives of the international actors, who undertake this role because the domestic agents and infrastructure are largely absent or weak. In this respect, the right to self-determination no longer represents a rigid demarcation between the adoption of internal decisions and the influence of external actors over them.[21] The state rather experiences and reforms its political and economic identity in relation to its approximation with other states and international actors with which it wishes to be associated in the international sphere. It adopts a specific identity and values, which are common to the international political and legal order embedding the post-conflict practices.[22] The

18 N Bhuta, 'New Modes and Orders: The Difficulties of a Jus Post Bellum of Constitutional Transition' (2010) NYUIL and Justice Working Paper No 2010/1; <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1574329> accessed 10 June 2014.

19 R Paris, 'International Peacebuilding and the 'Mission Civilisatrice'' (2002) 28 *Review of International Studies* 637 at 638.

20 D Chandler, 'The Uncritical Critique of 'Liberal Peace'' (2010) *Review of International Studies* 137 at 149.

21 See A Skordas, 'Self-determination of Peoples and Transnational Regimes: A Foundational Principle of Global Governance' in Nicholas Tsagourias (ed), *Transnational Constitutionalism* (CUP 2007) 207.

22 See J W Meyer, J Boli, G M Thomas, F O Ramirez, 'World Society and the Nation-State' (1997) 1 *American Journal of Sociology* 144; G S Drori, Y S Jang and J W Meyer, 'Sources of Rationalised Governance: National Longitudinal Analyses, 1985–2002' (2006) 51 *Administrative Science Quarterly*

politico-legal space can be identified in this context as the international community, which constitutes states, international organisations and non-governmental organisations. [23]

As defined by Tsagourias, the international community is 'characterised by shared norms and understandings, common sensibilities and a shared feeling of collective entity'.[24] It is a sub-entity of the international society and its members associate with each other because of their common values.[25] In contrast to the international society where members are autonomous and insulated from external interference, members of the community open their domestic politico-legal orders to interaction with international norms and rules. They construct and develop their identity not only as a result of their local circumstances but also with reference to the environment in which they are embedded. Thus, the degree of integration of a state into the international community is demonstrated by the extent not only to which it applies the latter's value system in its external relations but also in its domestic legal system and governance.[26] The actors of the community build up a common conscience, in that they interpret phenomena and collective problems in common ways and strive to realise their values in their internal domains and in their external behaviour.[27]

For instance, the link between the domestic and the international can be observed in models of best policy practices that emerge to provide solutions to challenges, such as human right violations, socioeconomic development and post-conflict reconstruction. These models are 'universalised',[28] capable of being applied to various degrees in different circumstances, and reflect the 'common sense' of the actors involved and of the international community more broadly. They result from the social expectations of the international and domestic actors, be it the attainment of socioeconomic development through open markets in the economy, democracy in politics, justice in law and peace in the international order. Therefore, common outcomes in the economic infrastructure of states can be traced in the widespread state practice to establish market-oriented economies since the end of 1980s and after the 1990s. Even though the models are not legally binding upon the state, they shape its behaviour so that the latter becomes a member

205; see D Buhari-Gulmez, 'Stanford School on Sociological Institutionalism: A Global Cultural Approach' (2010) 4 *International Political Sociology* 253.

23 Tsagourias (n 13) 210–215; see D Kennedy, 'Disciplines of International Law and Policy' (1999) 12 *Journal of International Law* 9 at 83; D Kritsiotis, 'Imagining the International Community' (2002) 13 *European Journal of International Law* 961.

24 Tsagourias ibid 212.

25 For the relationship between the international society and community see N Tsagourias, 'The Will of the International Community as a Normative Source of International' in I E Dekker and W G Werner (ed), *Governance and International Legal Theory* (Martinus Nijhoff 2004) 97; B Buzan and A Golzalez-Pelaez, ''International Community' after Iraq' (2005) *International Affairs* 31.

26 Tsagourias (n 13) 213.

27 Ibid.

28 Meyer (n 21) 173.

of the international community. Such an approach is taken by the World Bank, which has warned that in changing course, states must:

> 'calculate not just the benefits and costs of the policy reversal, but also the broader costs of reneging on an international commitment for which their partners will hold them accountable. The threat of international censure makes countries less likely to reverse course.'[29]

The effect that external standards can have on reconstruction can also be illustrated in the role of the EU in reforming the economies and legal systems of Bosnia and Herzegovina (BiH) and Kosovo. The identity of the EU is founded on the values of peace, democracy, the rule of law and human rights. Its internal market functions on the basis of the principles of an open market economy – private autonomy, the facilitation of trade and competition and the free movement of goods, capital, services and people[30] – and the rules that stem from primary and secondary legislation, as well as the case law of the Court of Justice. The principles, which the organisation adopts internally, are mirrored in the economic policies, including its post-conflict operations, that it pursues through its relations with other countries. In both cases of BiH and Kosovo the reconstruction programmes had three premises: first, the promotion of the values shared between the EU and the post-conflict territory, such as human rights, the rule of law and market-orientated reforms; second, the facilitation of common interests, among which are political stability in the region and the strengthening of their trade and economic relations; third, integration into the international economy.[31] The main strategies were implemented through the Stability Pact and the Stability and Socialisation Process, which continues to be the main EU policy in the region. Their main aims were to build new economic institutions and assimilate their legal systems with the regulation of the EU internal market, preparing them for future EU membership.[32] That way, the post-conflict territories could move closer to regional economic integration and the EU could expand not only geographically, if accession were realised, but also geopolitically by projecting its values and economic ties with them.

It is in this context of 'enforcing standards'[33] in the internal governance of the state that post-conflict reconstruction can be viewed. It can explain the relative

29 WB, *World Development Report 1997. The State in a Changing World* (IBRD 1997) 101; see D Nicol, *The Constitutional Protection of Capitalism* (Hart 2010).

30 A Hatje, 'The Economic Constitution within the Internal Market' in A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (2nd edn, Hart 2010).

31 This is evident in the Stabilisation Pact for South Eastern Europe and European Neighbourhood Policy. See EU's accession policies Art 49 TEU; Ana E Juncos, 'The EU's post-Conflict Intervention in Bosnia and Herzegovina: (re)Integrating the Balkans and/or (re)Inventing the EU?' (2005) *VI Southeast European Politics* 88.

32 M Cremona, 'Values in the EU Constitution: The External Dimension' (2004) Working Paper No 26; <http://iis-db.stanford.edu/pubs/20739/Cremona-Values_in_the_EU_Constitution-External__Relations.pdf> accessed 2 June 2014.

33 Tsagourias (n 13) 213.

isomorphism that is apparent in post-conflict settings, where models of good governance are implemented through international institutions, notably the UN, the WB and the IMF, but also through non-governmental organisations and business actors.[34] From a thick socio-political perspective therefore, the scope of economic self-determination in the international community is broader because it assesses the quality of governance within the state. The parameters of the right do not only entitle participation in the decision-making processes but also guarantee that the negotiators have something to negotiate about, such as the implementation of economic and political freedoms in the domestic legal system.[35] The right becomes then also mediated between the international and national actors rather than being only the concern of the latter. The terms of the debate and the mechanisms of the reforms evaluate the internal order of the state and its consistency with the norms of the international community. It is within these terms that self-determination can be negotiated and realised to construct the economic infrastructure of the state in compliance with its international policy and legal obligations.

The practice of constitution-making is analysed in the following section, as a site at which international policy and law can have an impact on substantive constitutional provisions.

Forming the constitutional identity of the post-conflict state

One of the characteristics of constitutions is that they are 'statements of national identity and aspiration that serve to differentiate countries from one another'.[36] When people are deciding about their constitution they translate their choices about how they wish to be constituted into law. For that reason, constitution-making can be seen as a means for the people to exercise their right to self-determination and determine their political, economic, social and cultural organisation. Democratic constitutional processes today assume a participatory, inclusive and transparent nature to ensure that the constitution reflects general consensus and the wishes of the people.[37] Especially in the post-conflict context, wide participation serves the reconciliation of different groups and satisfies the diverse views of the domestic constituencies.[38] International law, however, does not provide specific

34 Meyer (n 21) 158–164.

35 See C Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (OUP 2008).

36 D S Law and M Versteeg, 'The Evolution and Ideology of Global Constitutionalism' (2011) 99 *California LR 1163* at1172. See Z Elkins, T Ginsburg, B Simmons, 'Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice' (2013) 54 *Harvard International Law Journal* 62.

37 See U K Preuss, 'Perspectives on Post-conflict Constitutionalism: Reflections on Regime Change Through External Constitutionalisation' (2006) 51 *NY School Law Review* 468 at 469–470, 477–480s; K Diehl *et al.*, 'Max Planck Manuals on Constitution Building: Structures and Principles of a Constitution' (2nd edn, Max Planck Institute for Comparative Public Law and International Law, 2009) 4, 2; <http://zung.zetamu.net/Files/mpil_constitutionalism_manual_2009_2.pdf> accessed 23 March 2014.

38 Bell (n 34) 296–300.

rules for constitution-making processes. It entails only a 'general requirement'[39] for public consultation in governance, which stems from Article 25 ICCPR.[40] This has influenced the practice and expectations of constitution drafters around the world but does not create any clear legal obligations on the part of the international actors.[41] Beyond these procedural guarantees, considerable influence can be observed on the substantive constitutional provisions, which affect the economic organisation of the country.[42]

Indicative here are comparative studies of national constitutions around the world. Law and Versteeg have conducted an analysis of the rights-related content of all constitutions over the last six decades and have concluded that there is a core set of rights that is included in the vast majority of constitutions and that the number of these rights increases over time.[43] The most popular rights include freedom of religion, freedom of the press and/or expression and equality guarantees, all of which appeared in 97% of the world's constitutions in 2006, followed by the right to privacy (95%), prohibition of arbitrary arrest and detention (94%), right of assembly (94%) and the right of association (93%). The right to private property has also been one of the most popular ones being found in 97% of all constitutions. Limits on property rights have also been found in 73% of constitutions and the use of natural resources for the benefit of all in 29%.[44]

The amount of common rights increases over time for two reasons. First, when a country adds a constitutional provision, others imitate it in order to adopt the best practices and gain the approval of domestic and international actors – a kind of 'race to the bottom'[45] protection of constitutional rights. Second, states incorporate more human rights in order to improve their competitiveness in attracting foreign capital and skilled labour – a kind of 'race to the top' protection.[46] That way constitutional provisions relating to the economy are signals to external actors of the type of economic system that the country is developing. As it is expected

39 T M Franck and A K Thiruvengadam, 'Norms of International Law Relating to the Constitution-Making Process' in L E Miller (ed), *Framing the State in Times of Transition Case Studies in Constitution Making* (US Institute of Peace Press 2010) 3, 14; <http://www.usip.org/sites/default/files/Framing%20the%20State/Chapter1_Framing.pdf> accessed 15 July 2014.

40 See HRC, General Comment 25, 'The right to participate in public affairs, voting rights and the right to equal access to public service (Art 25)' CCPR/C/21/Rev1/Add7 (1996).

41 For analysis of the practice see T M Franck and A K Thiruvengadam, 'International Law and Constitution-Making' (2003) 2 *Chinese Journal of International Law* 467; see also the chapter by Turner and Houghton in this volume.

42 Diehl (n 36) 4, 5, 48.

43 Law (n 35) 1170.

44 Ibid at 1200–1201. For the role of property rights in the economy see D Kennedy, 'Some Caution about Property Rights as a Recipe for Economic Development' (2011) 1 *Accounting, Economics, and Law* 1; S Piccioto 'Paradoxes of Regulating Corporate Capitalism: Property Rights and Hyper-Regulation' (2011) 1 *Onati Socio-Legal Studies*; <http://opo.iisj.net/index.php/osls/article/view/74/177> accessed 12 May 2014.

45 D S Law, 'Globalization and the Future of Constitutional Rights' (2008) 102 *Northwestern University Law Review* 1277, 1282.

46 Ibid.

therefore, it is common practice that the right to private property is contained in the majority of post-conflict constitutions. For example, it is found in Sections 54 and 60 of the constitution of Timor-Leste, Article 23 of Iraq's (also Article 16 under Transitional Administrative Law), Articles 40 and 41 of Afghanistan's and Article 46 of Kosovo's.

The resulting constitutional convergence does not necessarily mean that the constitutional rights are implemented in practice, as their protection depends upon national legislation and long-term economic policies. It is important however, because it represents an element of the internationalised process of post-conflict reconstruction, which permeates domestic orders, and has strong implications for the substantive aspects of the constitution. Louis Aucoin, advisory to the Constitutional Commission of Kosovo, explained that the negotiations over the country's constitution were directed by the Kosovars, especially in deciding the political system they wanted to set up. The drafting however, was based on other constitutions that were used as models, especially those of regional countries such as Croatia, Albania, Slovenia and Greece, and of countries that are mostly influential in civil law, such as France and Germany. The constitution essentially incorporated every provision of the Ahttisari Plan that had been proposed as an international solution to the Security Council but had never been adopted because of the objections raised by Russia. Consistency with the Plan, along with the endorsement of European standards of governance,[47] was necessary to secure the approval of the international community, with the exception of Russia, Spain, Greece and Romania, and increase the chances of Kosovo's recognition.[48]

Constitution-making practice shows that the economic identity of the post-conflict state is an indicative factor of the extent to which the state has adopted the values and standards of behaviour expected from its operation in the international community and the international economy. Post-conflict constitutions define the economic organisation of the state with the corresponding rights and duties that are concomitant to a market-orientated economy, such as the right to private property.

Within this framework of constitution-making, the impact that international policy and law have on the process and substance of constitutions varies. On the one hand, international law does not provide any clear rules that define the process of constitution-making and the extent or mode of participation of local actors. The absence of regulation, therefore, does not guarantee the implementation of certain procedures. The extent of citizen representation then depends on the mechanisms that the international actors establish and encourage participation, as a best practice postulate.

47 UNMIK/PISG, 'Standards Before Status' (2004); <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27–4E9C-8CD3-CF6E4FF96FF9%7D/Kos%20Standards.pdf> accessed 24 July 2014.

48 'On Constitution Writing: The Case of Kosovo. Interview with Professor Louis Aucoin' (2008) XXIII *The Fletcher Journal of Human Security* 123.

However, the engagement of international actors in these processes creates certain expectations related to the substantive content of the constitution. As the international actors facilitate the people of the territory to exercise their right to self-determination by setting up the negotiations for the drafting of their constitution, the nature of self-determination that they promote is within the parameters, which restore the governability of the territory in compliance with international norms and standards. In particular, it is both the desire of the state to accept international assistance and integrate it into the international community, as well as the imperative of restoring international peace and security, which renders the community a stakeholder in post-conflict reconstruction.[49] To achieve these goals, the community ensures that the constitutional provisions of the debate and the outcomes it pursues represents its own internal value system. Thereby, self-determination does not represent only the internal actors, but accommodates the interdependence of both the local and international parties in forming the state that can be recognised and participate in the international community. Self-determination then reinvents the 'self' anew with the tools provided by the external order.

The role of international law

The difficulty in identifying applicable international law and how it affects the practice of reconstruction rests on the fact that there is not a *lex specialis* for post-conflict situations;[50] international law has not developed separate rules for the regulation of post-conflict reconstruction. International humanitarian law, international human rights and international criminal law have expanded their scopes to apply to such situations, although not always in a clear manner. International humanitarian law for example, has been revised to regulate the aims of transformative occupation;[51] international criminal law has developed rules on amnesties and transitional justice;[52] international human rights law contributes to democratic representation and pluralism. However, there is a lack of an integrated approach to understanding how international rules related to the economy are applicable in the transitional period and affect the reconstruction process.

Considering the purposes of post-conflict economic programmes in the international community, the reforms can also be understood in terms of the

49 See P Dann and ZAl-Ali, 'The Internationalized *Powoir Constituant*: Constitution-Making under External Influence in Iraq, Sudan and East Timor' (2006) 10 *Max Planck Yearbook of United Nations Law* 423; E Hay, 'International(ised) Constitutions and Peacebuilding' (2014) 27 *Leiden Journal of International Law* 141.

50 C Stahn and J K Kleffner (eds), *Jus Post Bellum: Towards a Law of Transition from Conflict to Peace* (TMC Asser Press 2008).

51 A Roberts, 'Transformative Military Occupation: Applying the Laws of War and Human Rights' (2006) 100 *American Journal of International Law* 580.

52 Bell (n 34).

international legal obligations of the post-conflict state.[53] The international rules and norms that regulate the economic reconstruction of post-conflict states emerge from a variety of sources, such as international investment law, trade law and international human rights. These rules and norms restrict the regulatory autonomy of the state by being implemented through national constitutions and thematic legislation and by complementing functions of governance. They define the internationally accepted standards of post-conflict reconstruction and the obligations that the state assumes in determining its economic arrangements with transnational entities. These rules do not form a wholly uniform area of 'post-conflict law' but are followed by the wide practice of the actors that participate in the post-conflict reconstruction, such as states, international organisations, notably the UN, the WB and the IMF, and non-governmental organisations.

From this perspective, the role of international law in regulating the post-conflict economic reforms is that it offers universal prescriptions to rebuild a particular type of state. Its potential in regulating the post-conflict operations is affected by the fact that it is constructed and operates within the international community, where there is no rigid boundary between the domestic space of governance and the 'outside'. International law, then, does not remain apolitical but translates the 'policy orientation'[54] of the international community, as expressed in this case through the post-conflict reconstruction process, into the corollary legal rights and duties.

Rules that have an impact on the understanding of economic self-determination relate to the field of international economic law, in particular international investment law, which legally constrains the operation of the state in the transitional period. International investment rules,[55] which emanate from a dense institutional fabric that supersedes the state – OECD, NAFTA, Energy Charter Treaty and the Trans-Pacific Partnership Agreement, 2,857 of BITs,[56] and UNCITRAL – provide substantive rights to foreign investors. Moreover, the common standards included in the majority of BITs can be argued to have emerged into customary international law.[57] This has important implications for the post-conflict state, because even if it has become a party to a limited number of BITs, which determine the bilateral relations between the host state and the investors, the latter is still bound by customary international rules. Examples of such rules include the fair and equitable treatment of foreign investors, equal treatment of national and foreign investors and protection from direct expropriation without

53 R Wilde, *International Territorial Administration* (OUP 2008) 442 suggests that international territorial administrations be considered 'as the internationalised version of a state-conducted paradigm, the institution is part of the broader move towards international law and international institutions that took place in the 20th century, particularly in its second half'.

54 Kennedy (n 22) 33.

55 D Schneiderman, *Constitutionalizing Economic Globalisation* (CUP 2008).

56 UNCTAD, *World Investment Report* (UN 2013).

57 For an opposite view see M Sornarajah, *The International Law on Foreign Investment* (CUP 2004).

full compensation. [58] In the process of establishing a market economy, these rules become part of the domestic legal system.[59]

The parameters of the economic reconstruction of the state and its legal rights and duties are also determined by the prospects of its accession to international organisations. Membership in the WTO, for example, requires a package of rules, which reforms the domestic economic policies and legislation, and influences the capacity of the state to pursue socioeconomic policies that are not consistent with the rules of the Organisation. For BiH and Kosovo, their prospects of accession to the WTO, but also to the EU, had a significant impact on harmonising their national legal systems with international trade rules.[60] For the example of Timor-Leste, the government has not applied to accede to the WTO, but it has applied for membership in ASEAN. In such a case, it will negotiate the free trade agreements regulating the ASEAN Free Trade Area, which will also have a significant effect on the laws of the country.[61] It becomes apparent, therefore, that to the extent that the post-conflict state commits to engaging with the international economic order and the international community, the potential of international law is to internalise the rules, which promote an open market and guarantee the state's compliance with international rules and customary international law.[62]

To conclude this section, what emerges from the post-conflict operations is a network of international rules adapting to the asymmetric legal relations between the international administrators and the local actors and between legal authority and social expectations. Old rules adopt new functions and are reinterpreted to apply to this context,[63] as economic self-determination does. That said, both understandings of the right coexist in the socio-political relations of states in the international society and the international community. For that reason, the application of economic self-determination in post-conflict operations can be manifested both in the efforts of international parties to receive the consent of the state

58 OECD, 'Fair and equitable treatment standard in international investment law' (2004) Working Papers on International Investment 2004/3; <http://www.oecd-ilibrary.org/docserver/download/5lgsjhvj76d0.pdf?expires=1402481131&id=id&accname=guest&checksum=EC2D2B43AF834840EDE9A450F4F994FE> accessed 10 March 2014; R Dolzer and C Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012).

59 See K Boon '"Open For Business": International Financial Institutions, Post-conflict Economic Reform, and the Rule of "Law"' (2007) *NYU International Law and Politics* 513; for the role of international trade law see Audi (n 1) 344.

60 For example, one of the most important measures was the signing of Central European Free Trade Agreement in 2006. See SCSP Constituent Document, Cologne Document (1999); <http://www.stabilitypact.org/constituent/990610-cologne.asp accessed> 12 May 2014; S Kathuria, *Western Balkan Integration and the EU. An Agenda for Growth* (IBRD 2008).

61 'Growing Together Inclusively: Regional Integration, ASEAN, and Timor Leste' Speech Delivered at Inaugural Seminar on ASEAN Economic Community by 2015: Challenges and Opportunities for Timor-Leste Membership; <http://www.unescap.org/speeches/growing-together-inclusively-regional-integration-asean-and-timor-leste accessed 5 March 2014.

62 R Dolzer, 'New Foundations of the Law of Expropriation of Alien Property' (1981) 71 *American Journal of International Law* 553 at 576–579.

63 Bell (n 34).

or local actors before their engagement, as a requirement of the international society, and the endorsement of the values and standards of the associational international community by the post-conflict territory.

The following section considers the economic reforms that took place in Timor-Leste. The case study is relevant to the above discussion because a UN administration was established, which undertook the legislative, executive and administrative powers of the territory for two-and-a-half years. For that reason, the reconstruction of Timor-Leste illustrates how international involvement had an important role in assisting the transition to an open market economy. Two more aspects, however, make the case study relevant for the purposes of self-determination.

First, Timor-Leste demonstrates the difficulties of assessing self-determination in a post-conflict context where there is no state infrastructure and a body which represents the will of the people and can govern effectively. Second, from the beginning of the international administration, the aim and outcome of the post-conflict operation had been pre-determined by a referendum that the territory would become an independent state. This aspect is crucial because it differentiates Timor-Leste from other cases, such as Kosovo, where the administration was set up for an indefinite period. In this framework, the case of Timor-Leste is a successful example where the right to economic self-determination, in its wider interpretation offered above, was in operation, as both the local and international actors leading the reconstruction process aimed at creating a state in compliance with the principles of the international community.

Case study: Timor-Leste[64]

Background

East Timor had been a Portuguese colony from the middle of 1850s until the middle of 1970s. In 1975, Indonesian forces invaded the territory and occupied it until 1999. Following internal political changes, Indonesia agreed to hold a referendum in East Timor for the people of the territory to decide between independence or integration into Indonesia as an autonomous region. The referendum took place in August 1999, with 90% participation of the population; 78.5% voted in favour of independence. However, pro-integration militias that did not agree with the result started a new wave of violence causing the death and displacement of many Timorese nationals and the assault of international officers. Being under strong international pressure, Indonesia formally accepted the results of the referendum and started removing its troops from East Timor. It also agreed with Portugal to transfer authority to the UN until local authorities could take over.

In October 1999, the United Nations Transitional Administration in East Timor (UNTAET) was established under SC Resolution 1272 (1999). Its mandate

64 The name East Timor is used when referring to events that occurred before 2002. For events after 2002 and the establishment of the independent state, the name Timor-Leste is used.

was (a) to provide security and maintain law and order throughout the territory of East Timor; (b) establish an effective administration; (c) assist in the development of civil and social services; (d) ensure the coordination and delivery of humanitarian assistance, rehabilitation and development assistance; (e) support capacity-building for self-government; and (f) assist in the establishment of conditions for sustainable development.[65] UNTAET could pass legislation on almost any civil and economic sector, as it exercised full 'legislative and executive authority, including the administration of justice'[66] in the territory. The applicable law during the transitional period and after the first government was elected was a mix of UNTAET Regulations and Indonesian laws that had not been replaced.[67] On 20 May 2002, East Timor officially gained its independence and, on the same day, its Constitution came into force. The new state was named Timor-Leste.

Economic reforms: 'from subsistence to a market economy'

The referendum on independence and the transition from a non-self-governing territory to a sovereign state was a significant act of external self-determination on the part of the Timorese population. The post-conflict reconstruction period was not only a process of transition from conflict to peace but also a project to build a new state and institutions that would be governed by the Timorese people.[68] A Joint Assessment Mission of the WB that took place in 1999 reported that the economic situation in East Timor was very different from the typical contexts in other post-conflict countries. It was as if 'a vicious hurricane [had] destroyed all buildings and most crops and removed all records and institutional memory'.[69]

The rapid departure of the Indonesian civil authorities had resulted in a vacuum in public administration and the collapse of public institutions. The involvement of the UN, therefore, was necessary to assist the local actors develop their capacities in order to eventually undertake the administration and governance of the state. Three aspects of the reconstruction operations, which are relevant to the right to economic self-determination, are mentioned below: first, the involvement of the Timorese in the decision-making procedures to initiate the international administration; second, the participation of local actors during the post-conflict

65 UNSC Res 1272 (25 October 1999); UN Doc S/RES/1272 para 2.

66 Ibid, para 1.

67 UNTAET Regulation 1999/1, 'On the Transitional Administration in East Timor' UNTAET/REG/1991/1 (27 November 1999), Section 3.

68 See C Stahn, 'The United Nations Transitional Administrations in Kosovo and East Timor: A First Analysis' (2001) 5 *Max Planck United Nations Yearbook* 105; R Wilde, 'From Danzig to East Timor and Beyond: The Role of International Territorial Administration (2001) 95 *American Journal of International Law* 583.

69 WB, 'Project Performance Assessment Report Timor Leste' (30 June 2008) Report No 44468, 5; <http://lnweb90.worldbank.org/oed/oeddoclib.nsf/24cc3bb1f94ae11c85256808006a0046/3ff799fd356553f485257ba500737fc9/$FILE/PPAR-44468-P075796-Timor_Leste_TSP_I_II_III.pdf> accessed 21 March 2014.

reconstruction; third, the content of the economic reforms that followed the dissolution of UNTAET. These instances are selected because they demonstrate how economic self-determination was exercised at three different points in time: before, during and after UNTAET.

First, the Timorese nationals had been indirectly consulted by the UN officials as to whether they consented to the international administration. The legal basis of UNTAET was SC Resolution 1272 but the initiative for international engangement had been agreed before the 1999 referendum and the outbreak of hostilities. On 5 May 1999, the governments of Indonesia and Portugal had signed an Agreement under the auspices of the UN, which set out the organisation of the referendum by a UN mission. Articles 6 and 7, in particular, stipulated that in the event that the outcome of the public consultation was in favour of independence the administration of the territory would be transferred to the UN to enable the transitional process.[70]

The decision not to include Timorese nationals in the preparation of the Agreement and the establishment of UNTAET can be explained by the political circumstances surrounding the negotiations. The Indonesian Army was not willing at that time to withdraw from the territory and the participation of Timorese in the talks could, therefore, compromise the intentions of Indonesia to reach an agreement.[71]

On the one hand, the omission to involve Timorese nationals directly in these decision-making processes and the lack of their express consent as to whether they wished to be supervised by the UN could be considered a significant limitation of their right to self-determination. It would be a restriction that would affect not only the procedural requirement of popular participation but would also have substantive implications for the reconstruction. That is because acceptance of the international engagement by local actors suggests that the latter also agree to building a democratic state with respect for human rights, the rule of law and a market-oriented economy in accordance with international norms and standards. Rejection of international involvement, however, indicates that the domestic actors choose to follow their own path to post-conflict reconstruction without external involvement. Consequently, the lack of any effort to receive consent could signify that the reconstruction process does not comply with the wishes of the population and that any subsequent reforms could restrict the right of Timorese to choose their political and economic organisation.

However, such a debate could be resolved by the fact that UN officials had consulted regularly with the Timorese throughout the whole negotiating process of the May Agreement. National representatives had organised themselves through the Council of Timorese Resistance (CNRT) in 1997 and, as it was reported, had

70 Agreement between the Republic of Indonesia and the Portuguese Republic on the question of East Timor 1999 (May Agreement), Arts 6, 7; see UNGA 'Question East Timor. Report of the Secretary-General' (1999) UN Doc A/53/951; preamble of Resolution 1272 that recalled the May Agreement.

71 See A Suhrke, 'Peacekeepers as Nation-builders: Dilemmas of the UN in East Timor' (2001) 8 *International Peacekeeping* 1, 4.

readily accepted Article 6 of the Agreement and their transition to independence under the auspices of the UN.[72] Examining the validity of consent in this case would be a relevant factor to the law of self-determination. Notwithstanding, the law demonstrates a certain degree of openness related the identification of the appropriate local actors that provide valid consent and lead the reconstruction process.[73] In the absence of strict legal criteria regulating the identity of actors and mode of consent, these indirect consultations with organised nationals could be viewed as an important step to ascertaining the wishes of the people of a territory without a government and experience in state administration.

Second, UNTAET ensured that Timorese nationals participated in decision-making processes from the early steps of the post-conflict period. According to Regulation 1999/1, the Transitional Administrator of UNTAET was under an obligation to 'consult and cooperate closely with representatives of the East Timorese people'.[74] To that effect, the National Consultative Council (subsequently substituted by the National Council) and the National Cabinet were established with the aim to provide the proper framework for involving the local actors in the administration of the territory.[75] The two bodies consisted primarily of Timorese representatives of political groups and civil society and both had quasi-legislative powers. They could recommend and draft regulations and formulate policies, which would guide the legislative powers of UNTAET. The establishment of these bodies constituted a significant procedural measure for the exercise of the right to internal self-determination, including its economic aspect. Indeed, their contribution might be observed in the substantive economic measures that were adopted during the post-conflict period, as will be discussed later, particularly in relation to legislating on property rights.

Third, the reconstruction of the post-conflict territory under the assistance of the international administration and the involvement of other international actors, such as the WB and the IMF, meant that the domestic legal system of Timor-Leste would be reformed to adopt the standards of good governance and the rules of international law. For example, the measures prioritised development goals, which corresponded to the Millennium Development Goals (MDG), as indicated in the

72 M Benzing, 'Midwifing a New State: The United Nations in East Timor' (2005) 9 *Max Planck United Nations Yearbook* 295 at 307; see J Morrow and R White, 'The United Nations in Transitional East Timor: International Standards and the Reality of Governance' (2002) 22 *Australian YBIL* 1.

73 See Chapter 1 of this volume by M Saul 'International Law and the Identification of an Interim Government to Lead to Post-conflict Reconstruction'; M Saul, 'International Law and the Will of the People in Post-Conflict Rebuilding' in *The Future of Statebuilding: Ethics, Power and Responsibility in International Relations* (2010); <https://www.westminster.ac.uk/__data/assets/pdf_file/0009/81594/Saul.pdf> accessed 23 June 2014.

74 Regulation 1999/1, Section 1.

75 UNTAET Regulation 1999/2, 'On the establishment of a National Consultative Council' UNTAET/REG/1999/2 (2 December 1999); UNTAET Regulation 2000/23, 'On the Establishment of the Cabinet of the Transitional Government in East Timor' UNTAET/REG/2000/23 (14 July 2000) and UNTAET Regulation 2000/24, 'On the Establishment of the National Council' UNTAET/REG/2000/24 (14 July 2000).

2002 National Development Plan (NDP) of the country. The primary objective, however, was the transition from subsistence to market economy securing sustainable development and social goals, such as gender equality and social inclusion. According to the NDP there were three principles, which, among others, defined the management of the economy:

> (a) a market economic system with strategic and regulatory roles for Government, including the provision of social safety nets, (b) a strong role for the private sector in development (c) a role for government to ensure that physical and social infrastructure and services are provided, and to provide a growth enabling policy and legal environment, including the maintenance of monetary and fiscal stability.[76]

These policy objectives and international law had a significant impact on the post-conflict economic reforms and national legislation that was implemented. The constitution of Timor-Leste is a notable example of the extent to which international law has affected the legal system of the country. The drafting process of the constitution involved a significant degree of community consultations and public hearings, which took place throughout the drafting period. To that effect, an elected Constitutional Assembly consisting primarily of Timorese nationals conducted the negotiations on the constitution.[77] It has been suggested that the Assembly was dominated by Fretilin members (the political party that had contributed to the independence movement from Indonesia) and that the public consultation of the final constitutional draft was inadequate because it was carried out over just one month, from June to July 2001.[78] The constitutional provisions however, were decided by the local actors providing, in the words of Graham Nicholson, a real effort to reach out to the wider population in the process and with the constitution makers being democratically chosen by the people. Surprisingly, it is apparent that western constitutional concepts were mainly employed in the process in East Timor, the view being that they derived from the Mozambican example, which in turn, was derived from the Portuguese Constitution.[79]

The influence of UNTAET was demonstrated primarily in setting the legal framework and timeline for electing the Assembly and organising the drafting processes but reserved a 'hands-off' approach in relation to the substance of the constitutional provisions.[80] UNTAET's role then was to guarantee the appropriate procedures since the early stages of the transitional period so that the Timorese

76 East Timor NDP 2002 (Planning Commission Dili May 2002) 20, para 2.15; <http://siteresources.worldbank.org/INTPRS1/Resources/Timor-Leste_PRSP(may2002).pdf> accessed 30 January 2014.

77 UNTAET Regulation 2001/2 'On the Election of a Constituent Assemblyto Prepare a Constitution for an Independent and Democratic East Timor' UNTAET/REG/2001/2 (16 March 2001).

78 See L Aucoin and M Brandt, 'East Timor's Constitutional Passage to Independence' in Miller (n 38).

79 G Nicholson, 'Observations on the New Constitution of East Timor' (2002) 27 *Alternative Law Journal* 203 at 204.

80 Aucoin (n 77) 265.

people could negotiate and decide on the future of their country and therefore to exercise their right to self-determination. The fact that the constitution was adopted by an elected Assembly following an act of independence is evidence to that effect. The impact of international law, however, is apparent in the substantive provisions of the constitution. The domestic legal system is required to incorporate customary international law and all international rules provided by international treaties, which Timor-Leste has ratified.[81] The list of constitutional provisions that protect human rights is extensive and comparable with the constitutional guarantees of most democratic states.[82] It incorporates all generally recognised civil, political, socioeconomic and cultural rights and specifies that they should be interpreted in accordance with the Universal Declaration of Human Rights.[83]

The constitution also includes an express provision for the protection of the right to private property, which brings it in line with the majority of national constitutions around the world.[84] The right to private ownership of land is granted, however, only to Timorese nationals. The restriction secures state control over the natural resources and is common in neighbouring countries, such as Australia, Papua Guinea and Philippines. Instead, foreigners may contract leases for up to 50 years.[85] Section 54 also incorporates the international customary standards for the protection of foreign property from expropriation. It permits the right of the state to expropriate and nationalise property but only for public purposes, in accordance with the law and upon the payment of fair compensation.

During the two-and-a-half years of its operation before the election of the Timorese government, UNTAET passed regulations on bank licensing, customs, taxes, registration of businesses and labour to create an enabling environment for the private sector. Regulation 2000/1 established the Central Fiscal Authority, under the supervision of the Transitional Administrator, to formulate tax policies and prepare the budget of East Timor. The Banking and Payments Authority was promulgated, as a step toward creating a central bank after independence.[86] The mandate of the Authority was to license and supervise banks, regulate their liquidity and solvency in a stable market-based manner, execute the foreign exchange policy of East Timor and promote a sound payment system. Its operations were also established in compliance with international accounting standards issued by the International Accounting Standards Committee. As a result of these measures, a new institutional structure for economic policy emerged under the authority of UNTAET.

81 Constitution of the Democratic Republic of Timor-Leste 2002, Section 9.

82 Law (n 35).

83 Section 23.

84 Section 54. Other treaties, for example, which contain provisions for the protection of property rights and to which Timor-Lest is a party: Convention relating to the Status of Refugees 1951 Art 13; International Convention on the Elimination of All Forms of Racial Discrimination 1965 Art 5 and Convention to Eliminate all forms of Discrimination against Women 1979 Arts 15 and 16.

85 Decree Law No 19/2004 Legal Regime of Immovable Property: Official Allocation and Lease of State Property, Art 14.

86 UNTAET Regulation 2001/30, 'On the Banking and Payments Authority' UNTAET/REG/2001/30 (30 November 2001).

Under the broad mandate of UNTAET, set out in Regulation 1999/1, these measures fell within the jurisdiction of the international administrators to establish the foundations for self-governance in the territory. A crucial issue of the post-conflict reconstruction strategy, however, was the identification and registration of property rights. The nature of this issue was highly controversial and it was not possible to implement any permanent solutions during the period of international administration. One of the most important problems was caused by the regime changes that had taken place in the territory, from the Portuguese colonial administration to the occupation authorities by Indonesia. They resulted in conflicts of property titles over a single parcel of land between persons who held property titles issued by Portuguese authorities before 1975 but had been dispossessed by the Indonesian occupation, and persons who had acquired the titles during the occupation. Under international humanitarian law, the occupation regime was deemed illegal and thus the property titles issued by the Indonesian authorities were void.[87] At the same time, however, the annulment of the property rights under the Indonesian titles would result in massive evictions. Arguably, the evictions could breach human rights protected by international law, such as Article 11(1) of ICCPR, Article 27(3) of the Convention on the Rights of the Child and Article 14(2)(h) of CEDAW, to which Timor-Leste acceded in 2003.[88]

Indeed, no permanent solution was found by UNTAET and the issue remained to be resolved by the elected government after 2002. Under Regulation 1999/1, UNTAET had the authority to administer 'immovable or movable property' registered in the name of Indonesia, as well as property 'privately owned that was abandoned after 30 August 1999, the date of the popular consultation, until such time as the lawful owners are determined'.[89] The mandate, however, did not allow the adoption of permanent measures that would affect the ownership of property. UNTAET for example, had drafted legislation that would promote the registration of property rights, the establishment of a Land Commission and alternative dispute settlements but the National Cabinet rejected it.[90] The major mechanism that UNTAET established then, following the recommendations of the Cabinet, was the provision of temporary use agreements over public or abandoned property.[91] The purpose of this measure was to regulate the occupancy of these properties by Timorese nationals in the short- and mid-term and to convert them to temporary sites for foreign investments. At the same time, these agreements would

87 See Y Ronen, *Transition from Illegal Regimes under International Law* (CUP 2011) 292.

88 See D Fitzpatrick, 'Property Rights in East Timor's Reconstruction and Development' in H Hill and J M Saldanha (eds), *Development Challenges for the World's Newest Nation* (Asia Pacific Press, 2001) 177.

89 Regulation 1999/1, Section 1.

90 UNSC, 'Report of the Secretary-General on the UNTAET (for the period 27 July 2000 to 16 January 2001)' (2001) UN Doc S/2001/42; 'UNTAET Land Policy' (2004) 2 *East Timor Law Journal*; <http://easttimorlawjournal.blogspot.com.au/2012/04/united-nations-transitional.html> accessed 23 February 2014.

91 'Guidelines for the Administration of Public and Abandoned Property' (2004) 11 *East Timor Law Journal*; <http://easttimorlawjournal.blogspot.com.au/2012/05/untaet-guidelines-for-administration-of.html> accessed 20 March 2014.

not affect the ownership claims that would be resolved by the elected government. This can be seen as an important element of the reconstruction process, which suggests that the international administrators respected the right of the Timorese people to economic self-determination by not adopting permanent measures on the matter. The local actors also played an important role in the decision-making processes by being able to approve economic policies and promulgate regulations that would affect their future.

The most significant legislative changes were therefore realised after 2002, the dissolution of UNTAET allowing the new state to organise its economy and allocation of property rights. From 1999 to 2004, Timor-Leste remained without any comprehensive legislation to regulate investments and commercial transactions. Even though the state was not party to any BITs at that time, the government was bound by customary international rules. The measures that were adopted subsequently were typical of those required by a country that is opening its economy, one of which being the protection of foreign investments in accordance with international law. In 2004 and 2005, three important laws passed: the Law on Commercial Companies (Law 4/2004), the Law on Domestic Investment Law (Law 4/2005) and the Law on External Investment (Law 5/2005).

The Law on External Investment and the Private Investment Law (Law 14/2011), for instance, set out a legal framework conducive toward foreign investment and compliance with international legal standards. At the same time, these laws define an important role for the state to regulate investments to promote national development goals and the provision of socioeconomic welfare. Foreign and national investors are guaranteed equal treatment and the latter may freely repatriate their profits. They may also employ foreign workers but external investors are under the obligation to employ Timorese nationals and advance their vocational training and technical skills.

In light of these changes, the legislative framework that was adopted during the period of international administration and after its dissolution suggests two main things. First, there was an effective effort by UNTAET to involve Timorese nationals in decision-making procedures and in drafting both the constitution and economic regulations. Second, the fact that the constitutional identity of the country and the content of the economic reforms were influenced by the involvement of UNTAET, the WB and the IMF does not imply that economic self-determination was breached. The reason for this proposition is that between 1999 and 2002 there was no state structure in place or elected authorities that could represent the will of the people and exercise their rights. Instead, the international administration promoted the exercise of self-determination in a legal and institutional framework that incorporated and represented both the local circumstances and the norms and standards of the international community. That said, both interpretations of economic self-determination identified above operated during the transitional period: the participation of Timorese nationals, as a measure of the international society to ascertain their wishes, and the transition from subsistence economy to open market, as a requirement of the international community.

After 2002 and the election of the Timorese government, the choice of the local actors was to continue with the economic and legislative measures that implemented a market-oriented economy. They relied, for example, on the loans and proposed reforms of the WB and the IMF and applied to ASEAN for accession. At that point in time, Timor-Leste was a sovereign state with a government that was able to negotiate or even reject additional financial and structural assistance from international actors. Instead, the decision of local actors was to further their integration into the regional and international economy. This choice can be considered, therefore, as a *post facto* legitimating factor of the reconstruction policies pursued by UNTAET, as the elected government could have opted for a change in its course after 2002 and replace any measures that had been set up so far. Within the framework of transition from subsistence to market economy, the local actors in Timor-Leste were able to negotiate important aspects of their legal system that would determine their socioeconomic organisation, such as the provisions of their national constitution and the laws on property rights and investments. It is within the parameters of a market economy, therefore, that the Timorese people decided to exercise their right to economic self-determination during and after the international administration.

Conclusion

In conclusion, the right to economic self-determination in international society and during the period of decolonisation was silent on the economic organisation that states adopted and accommodated the establishment of a closed economy without external interference. This framework, however, is not adequate to describe the impact of post-conflict operations on our understanding of the right after the 1990s. Post-conflict reconstruction is a policy which reforms and validates the legal system and domestic governance of the state by international standards. In the transitional processes whereby the territory negotiates the measures to restore its governability and become associated with the international community, it finds itself influenced by international norms and rules, which generate substantive outcomes.

The right in this context is wider than in the international society, in that it concerns the economic governance of the territory and does not insulate the domestic from the international. The international community rather becomes also a stakeholder in the process that restores international peace and security and provides the mechanisms of reform reflecting its own policy and legal expectations. The outcome of self-determination in the post-conflict context then is to re-invent the 'self' within the standards and rules of the embedding external order.