The Sovereignty Paradox

THE NORMS AND POLITICS OF INTERNATIONAL STATEBUILDING

Dominik Zaum

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The Norms and Politics of International Statebuilding

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To
Hans Zaum (1912–2003)
and
Hans Albert Neuman (1912–86)
In loving memory

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Contents

List of Figures

List of Acronyms

ABiH	Armija Bosne i Hercegovine (Bosniak army)
AJC	Advisory Judicial Commission
ASDT	Associação Social Democrática Timor (Timorese Social Democratic Association)
BiH	Bosnia and Hercegovina
CAFAO	Customs and Fiscal Assistance Office
CEP	Community Empowerment Project
CISPE	Civil Service and Public Employment Division
CNRT	National Council of Timorese Resistance
COE	Council of Europe
CPA	Coalition Provisional Authority
CRTR	Commission for Reception, Truth, and Reconciliation
CSCE	Conference for Security and Cooperation in Europe
DJA	Department of Judicial Affairs
DMU	Detainee Management Unit
DSRSG	Deputy Special Representative of the (United Nations) Secretary-General
DTI	Department for Trade and Industry
EC	European Commission
ESI	European Stability Initiative
ETF	Economic Task Force
ETPA	East Timor Public Administration
ETTA	East Timor Transitional Administration
EU	European Union
EUAM	European Union Administration of Mostar
EXCOM	Executive Committee
FBiH	Federation of Bosnia and Hercegovina
Fretilin	Frente Revolucionária de Timor Leste Independente (Revolutionary Front for an Independent East Timor)
FRY	Federal Republic of Yugoslavia
FTA	FBiH Tax Administration
GDP	Gross Domestic Product
GFAP	General Framework Agreement for Peace (The Dayton Accords)
HDZ	Hrvatsaka Demokratska Zajednica (Croatian Democratic Union)
HRCC	Human Rights Coordination Centre

IAC	Interim Administrative Council
IAG	International Advisory Group
ICG	International Crisis Group
ICFY	International Conference on the Former Yugoslavia
IMF	International Monetary Fund
INTERFET	International Force in East Timor
IPTF	International Police Task Force (in Bosnia and Hercegovina)
JAC	Joint Advisory Council on Judicial Appointments
JAM	Joint Assessment Mission
JIAS	Joint Interim Administative Structure
KFOR	Kosovo Force
KJI	Kosovo Judicial Institute
KJPC	Kosovo Judicial and Prosecutorial Council
KLA	Kosovo Liberation Army
KM	Konvertible Mark
KPC	Kosovo Protection Corps
KTA	Kosovo Trust Agency
KTC	Kosovo Transitional Council
KVM	Kosovo Verification Mission
LLA	Lessons Learned and Analysis Unit
NATO	North Atlantic Treaty Organization
NC	National Council
NCC	National Consultative Council
NGO	Non-Governmental Organization
OHR	Office of the High Representative
OIC	Organization of Islamic Countries
OLA	Office of the Legal Adviser
ONUC	United Nations Operation in the Congo
OSCE	Organization for Security and Cooperation in Europe
PDK	Partia Demokratike e Kosovës (Democratic Party of Kosovo)
PIC	Peace Implementation Council
PICSB	Steering Board of the Peace Implementation Council
PISG	Provisional Institutions of Self-governance
PLIP	Property Law Implementation Plan
POE	Publicly Owned Enterprise
PSC	Public Service Commission
RRTF	Reconstruction and Return Task Force
RS	Republika Srpska
SDA	Stranka Demokratske Akcije (Party for Democratic Action)
SDS	Srpska Demokratska Stranka (Serb Democratic Party)
SFOR	Stabilization Force

SFRY	Socialist Federal Republic of Yugoslavia
SOE	Socially Owned Enterprise
SRSG	Special Representative of the (United Nations) Secretary-General
TJSC	Transitional Judicial Service Commission
UDT	União Democrática Timorense (Timorese Democratic Union)
UN	United Nations
UNAMA	United Nations Assistance Mission in Afghanistan
UNAMET	United Nations Mission in East Timor
UNDP	United Nations Development Programme
UNMiBH	United Nations Mission in Bosnia and Hercegovina
UNMIK	United Nations Interim Administration Mission in Kosovo
UNTAC	United Nations Transitional Administration in Cambodia
UNTAET	United Nations Transitional Administration of East Timor
UNTAES	United Nations Transitional Administration in Eastern Slavonia, Baranja, and West Sirmium

Introduction

WHY STUDY STATEBUILDING AND INTERNATIONAL ADMINISTRATIONS?

The post-cold war years, compared to the cold war decades, have witnessed an increased willingness by the international community to intervene in the domestic affairs of states, especially with the aims of ending conflicts and rebuilding institutions in post-conflict societies.[1] The international involvement in Bosnia and Hercegovina (BiH), Kosovo, East Timor, or Afghanistan, to name just a few cases, has been far deeper than traditional peacekeeping missions, and international transitional administrations are exercising a degree of authority over the domestic arrangements in post-conflict societies that is unprecedented in the history of the United Nations (UN). In some cases, such as BiH, Kosovo, and East Timor, these administrations have become the highest legislative and executive authority in the respective territories.

The increasing number of international administrations involved in statebuilding,[2] and the scope of the authority they exercise, has sparked a debate about policymaking by international administrations and possible ways to improve it, both among scholars and practitioners. However, as David Malone has pointed out, peace implementation, which entails the statebuilding work of international administrations, has, until now, been practised more than studied.[3] Few comparative studies of statebuilding by international administrations exist.[4] Instead, most of the analysis has focused on individual country studies,[5] or on comparisons of different statebuilding experiences in different sectors, in particular the justice sector.[6] There has been little comparative analysis of the statebuilding efforts by the international community, especially with regard to lawmaking in the territories it administers, and little discussion about the nature of this 'international community', represented by the international administrations in the respective territories.

More importantly, the literature has focused predominantly on the 'mechanics' and the effectiveness of statebuilding, and on the requirements for success.[7] The underlying normative framework that informs and shapes international policy preferences with respect to statebuilding, and that underpins and justifies the authority of these administrations, has been largely ignored in International Relations.[8] This book attempts to fill this theoretical gap. It

explores how the conception of sovereignty held by the international community influences the statebuilding activities of its members with respect to post-conflict societies. Through the lens of the statebuilding efforts administered by the international community in BiH, Kosovo, and East Timor, it examines the nature of these beliefs and, more importantly, analyses the various ways in which they influence the international administrations' policies and shape their statebuilding efforts in post-conflict societies.

The book brings together two distinct debates in International Relations. First, it contributes to the debate about policymaking by international administrations, by analysing the sources of their authority, their policymaking practices, and exploring the consequences of these practices for statebuilding. Second, it addresses the question of the impact of norms on policymaking, in particular the norms associated with sovereignty. The discussion of sovereignty is part of a larger debate in International Relations theory about the importance of the international normative context for the behaviour of actors.[9] A norm is generally defined as 'a standard of appropriate behaviour for actors with a given identity'.[10] The claim that norms matter for the behaviour of international actors has been at the heart of theories of international law, international society, and the 'constructivist' project,[11] and the need for empirical evidence to support these theoretical enterprises has been singled out by parties on all sides of various academic debates, especially regarding constructivist theories.[12] I concur with the constructivist assumption that sovereignty is an inherently social concept that exists and has meaning because it encompasses a set of intersubjectively shared ideas, on which international agents act.[13] If sovereignty is treated as a social concept, its meaning is not exogenously determined; rather, it is endogenous to the interaction of international actors holding beliefs about sovereignty, and can therefore change.

The aim of this book is to better understand the international statebuilding practices since the end of the cold war, and the nature of policymaking by the international community. To that end, it explores how the norms associated with sovereignty have affected the practices of international administrations engaged in rebuilding state institutions in post-conflict societies. It looks in particular at the influence of concepts of sovereignty on three aspects of statebuilding: institution-building, the behaviour of international administrations towards local actors, and the timing and nature of the transition from international to local authority. Analysing the practices of international administrations in these three areas of statebuilding helps to highlight the influence of these norms on policymaking most clearly, for two reasons.

First, international administrations present the most pervasive contemporary form of building institutions of governance. Compared to other instances of institution-building, for example in the context of development aid or the

Stabilisation and Association Process to attain membership of the European Union (EU), international administrations have the most comprehensive mandates and the most comprehensive authority over local institutions at their disposal. Their practices therefore present the richest source of data on statebuilding available to researchers. Second, the specific spatial identity of these administrations as 'international' suggests that they are less influenced by the particular national interests of individual states, as in the cases of colonial administrations, or the occupation authority of the predominantly US-run Coalition Provisional Authority (CPA) in Iraq in 2003–4. This does not mean that specific regional or national cultures are not more influential than others, but, that the international nature of these administrations is more likely to reduce their dominance.

The concept of sovereignty is at the core of the argument made here. Sovereignty, most generally defined as *the recognition of the claim by a state to exercise supreme authority over a clearly defined territory*, is not a single norm, but an institution comprising several sometimes conflicting norms, and is associated with a bundle of properties, such as territory, population, autonomy, authority, control, and recognition.[14] Within this bundle, much attention has been paid to processes of, and conditions for, state recognition,[15] and to the right to autonomy and its corollary norm of non-intervention.[16] These properties constitute the legal dimension of sovereignty, which has also been called *negative sovereignty*, conferring to recognized states a formal-legal entitlement to non-intervention.[17] This analysis, however, focuses on the authority aspect of sovereign statehood, which is at the core of the concept of sovereignty. The focus is therefore on sovereignty as a political attribute, on 'the sociological, economic, technological, psychological, and similar wherewithal to declare, implement, and enforce public policy both domestically and internationally', in the words of Georg Schwarzenberger.[18]

The emphasis on authority, and its accompanying concept of legitimacy, fundamentally challenges the realist assessment that sovereignty is, in Stephen Krasner's words, simply 'organized hypocrisy'[19]—only followed when it provides rulers with ideational or material support for policies chosen for power–political reasons. The discussion of authority will show how the concept of sovereignty has an important effect on the behaviour of states and international organizations. In the cases of the post-conflict societies discussed here, the absence of authority in the eyes of the international community is employed as a justification for the denial of self-governance, following on from the very specific role the international community sets out for authority in establishing sovereignty. Furthermore, the international community's understanding of what constitutes legitimate political institutions influences the kind of institutions that it aims to build in post-conflict societies.

Authority as an attribute of sovereignty both allocates rights to, and imposes responsibilities on states. Sovereignty implies supreme and exclusive authority by a political community over its domestic matters, from which the right to self-governance and non-intervention is derived. The focus on recognition of states and non-intervention by other states in domestic affairs emphasizes the element of a right inherent in the granting of internal authority as an essential facet of realizing state sovereignty. However, the right to self-governance inherent in the concept of sovereignty also generates responsibilities of the state towards other states, such as the duty not to intervene. It also generates responsibilities towards its own population, a point made in arguments about a 'standard of civilization' in the nineteenth and early twentieth century,[20] in constructivist treatments of sovereignty such as Samuel Barkin's,[21] and in recent arguments about the 'responsibility to protect'.[22] All of these accounts provide different answers to the question of what obligations sovereignty might entail, ranging from the Hobbesian notion of merely providing security, to a 'right to democracy'.[23]

For a long time, this emphasis on the conditionality of sovereign authority had been largely disregarded in academic research, especially of the realist school, which stresses control over a territory and a population, rather than authority and legitimacy.[24] Similarly, as Robert Jackson has shown in his analysis of 'quasi-states' between 1945 and 1990, conditionality of authority has also played little role in the political practice of state recognition after 1945.[25] While European states in the nineteenth and early twentieth century developed a standard of civilization which political communities had to abide by to in order to attain statehood,[26] the decolonization process after 1945 ended this practice, and made the colonial experience and colonial borders, rather than empirical statehood—the ability to effectively exercise authority over a state's territory—the decisive factor for the recognition of statehood.[27]

This book argues that rather than constituting a violation of sovereignty, international involvement in statebuilding since the end of the cold war should be seen as representative of a change in the understanding of sovereignty by the international community, a changed understanding that has affected the international community's behaviour. Sovereignty, as understood by the international community, is now more than the formal–legal entitlement which formed the core of what Robert Jackson has called 'negative sovereignty', prevalent during the cold war.[28] It now also entails a dual responsibility of the state towards other members of international society on the one hand, and its own citizens on the other. As the institution of sovereignty is changing, it also gives rise to a series of tensions between the end of establishing a sovereign state and the means the international community uses to attain this. Thus, the statebuilding policies that aim to establish legitimate institutions and

empirical statehood undermine or even deny these institutions their agency, as the international community continues to intervene and to prescribe them the ends they are supposed to work towards. Furthermore, the international community considers its conception of legitimate and legitimizing institutions to be universally applicable, while the notion of autonomy inherent in the concept of sovereignty suggests the opposite: that there can be different sources of legitimate authority in different societies.

The case studies in this book provide empirical evidence for these claims about the role of norms. They demonstrate that a conception of sovereignty which emphasizes the principles of authority and empirical statehood shapes the behaviour of the actors that make up the international community, and influences the aims of their statebuilding activities. The absence of empirical statehood in BiH, Kosovo, and East Timor has established the *justification* for compromising the autonomy and self-governance aspects of their sovereignty. This focus on rationale is important because by justifying their involvement, international administrations appeal directly to norms and articulate the shared values of the international community.[29] The absence of empirical statehood also establishes the key *objective* of intervention, namely the establishment of effective and legitimate control of the national political institutions, based on a specific model of organizing domestic society. The case studies show how these administrations justify compromising the sovereignty of the societies they are governing. The international community's statebuilding efforts reflect concerns about the legitimacy and effectiveness of state institutions, and are conducted according to a certain standard (in the cases of BiH and Kosovo explicitly referred to as 'Europeanization'), which serves as a guideline and benchmark for the legislation to be passed, the institutions to be built, and the political processes to be implemented.

Both the purposes that drive the three international administrations and the way in which policymaking is conducted help to answer the question raised earlier—namely, which responsibilities are entailed by sovereignty? The treatment of the three case studies highlights a tension implicit in the interpretation of sovereignty as a set of rights with corresponding duties: the paradox of compromising sovereignty in order to establish a sovereign state. This 'paradox of sovereignty' is indicative of a deeper tension inherent in liberal internationalism: that communities can be 'forced' to be sovereign, analogous to Rousseau's notion of 'forcing man to be free'.[30] This tension was identified by John Stuart Mill over a century ago in his writings on intervention,[31] and has found a modern expression in today's practices of international administration and statebuilding.

The argument that the concept of sovereignty held by the international community shapes its aims and actions with respect to the three post-conflict

societies is only convincing if it explains these aims and actions better than alternative explanations could, or if it can shed light on aspects of the problem other theoretical accounts do not address. As this study emphasizes ideational factors, the most obvious theoretical alternative is realism, employing a materialist explanation for the aims and actions of the international community. This alternative explanation will be assessed in the final chapter, concluding that while some realist concerns, such as security, are powerful explanations for international involvement in BiH, Kosovo, and East Timor, they cannot explain the particular policies that have been chosen. Analysing the conception of sovereignty held by the international community, and the norms associated with sovereignty, helps to explain the actions taken by the international community in the light of important security concerns. Material and ideational explanations are therefore best not seen as mutually exclusive, but as complementing each other, because ideational factors to some extent construct material interests, and understanding the ideational factors helps to explain these interests, and possible policy responses arising from them.

METHODOLOGICAL CHALLENGES

There are three main methodological challenges raised by this inquiry. The first two are conceptual—how to determine the impact of norms in international relations, and how to define the notion of international community. The third challenge relates to research design, and the selection of case studies.

How Do Norms Matter?

The first problem is one that confronts all explorations of the impact of ideational factors in international relations: do norms really matter, and if so, how? Norms are social facts, and this makes them different from physical facts on several accounts. First, the existence of social facts depends on beliefs being held intersubjectively by actors. However, as norms are shared ideas, they are independent of the discourse and practices of individual actors, and can be an objective reality and constraint for individual actors.[32] Thus, an actor might consider torture to be an acceptable practice, but is constrained in his actions by the fact that such a belief is not intersubjectively shared. Second, social facts are not eternal truths, but are shaped and changed by human practice. Non-European peoples, for example, are no longer considered as innately inferior, a change that occurred not because the biological facts changed—non-European peoples were never inferior in the first place—but because beliefs

and practices with regard to them have altered. Third, social facts are partly constituted by the broader social relations within which they exist within; they therefore have, in the words of Alexander Wendt, an 'external structure'.[33] A state, for example, can only exist if there is a society over which it can govern. The challenge for those studying norms therefore is that social facts, unlike physical facts, cannot be studied with the traditional positivist methods of scientific realism. The traditional subject–object dichotomy on which scientific realism rests cannot be maintained in the analysis of social facts, which depend on a shared subjective understanding of their nature. The positivist epistemology of scientific realism, which is suitable for the analysis of physical facts, contradicts the main ontological feature of norms—their intersubjectivity—and makes it an inappropriate methodology for their study.[34]

One possibility for avoiding this contradiction is to focus on behavioural norms, which create patterns of behaviour in accordance with their prescriptions. An example of such a norm is non-intervention, which carries a clear behavioural prescription for international actors, the resilience and institutionalization of which can be tested against the actual behaviour of states.[35] Martha Finnemore advocates precisely such an approach in her study of the constitution of national interests.[36] The norms associated with sovereignty, however, are not only behavioural but also constitutive.[37] Constitutive norms affect the identities of actors, which in the case of sovereignty are states, by specifying the actions which will cause other actors to recognize their identity as a state and to define their interests and preferences according to their identity.[38]

There is a range of ways in which identity can affect state behaviour. First, states act towards other states in a particular way because of a perceived shared identity. The most prominent example for this has been the theory of the 'democratic peace', arguing that as states recognize each other as democracies they do not go to war with each other, while they will go to war with non-democratic states.[39] Similarly, Anne-Marie Slaughter has outlined how liberal states accept a much deeper involvement of other liberal states in their domestic affairs than they would from non-liberal states, based on the recognition of commonality and unity of interests among them and their societies.[40] In both cases, the source of the different behaviour lies in the shared elements of the identity of states. Second, norms constitute the identity of actors, and as a result endow them with certain interests.[41] Thus, recognition of sovereignty constitutes a political community as a state, and grants it agency in international society. A range of interests can result from this new functional identity as a state, for example an interest in maintaining diplomatic immunity, safeguarding the territorial integrity norm, or protecting the right to non-intervention. Third, constitutive norms can prescribe a

particular identity for certain agents. Sovereignty, for example, might not just constitute a political community as a state, but also require it to be a particular kind of state, protecting human rights, and organizing itself as a democracy, for example. States that fall short of this prescribed identity can be treated in a range of ways: they might be characterized as 'rogue' or 'outlaw' states and be marginalized in the institutions of international society;[42] or they might be subject to intervention, to establish the prescribed aspects of their identity—for example by establishing a democratic government. This last example of how constitutive norms might affect state behaviour is the most important in the context of this analysis, which tries to explain one of the possible outcomes outlined above: what kind of political and administrative institutions does the international community attempt to build, and how does it interact with different local actors in the territories where it has intervened?

Constitutive norms cannot act as causal mechanisms in the way positivist social scientists understand causation. Constitutive norms are not prescriptive in the way behavioural norms are, but only open up 'zones of permissibility', encompassing a range of actions that are compatible with the norms, thus making causal connections indeterminate.[43] However, as their intersubjective nature gives them a certain degree of stability, they can affect decisions by providing blueprints or roadmaps, as neo-liberal scholars have suggested.[44] While not necessarily causing a particular action, constitutive norms can inspire, rationalize, justify, or guide behaviour.[45] Thus, instead of attempting a positivist explanation, this analysis focuses on understanding different ways in which norms have influenced the behaviour of international actors engaged in statebuilding, by constructing a 'thick narrative'. This means reconstructing in detail the process of policymaking, tracing the involvement of the international community and local actors, and embedding the analysis into a broader context of both the domestic and international decision-making structures, and the political environment in which these decisions were taken.

What is the 'International Community'?

The second methodological problem is how to analyse the beliefs of the international community. At the core of this problem is the question about what the international community actually is. While the term appears in legal texts and UN Resolutions from both the General Assembly and Security Council, and although it is invoked by international conferences and in political speeches, its membership and values—as well as the nature of the authority it exercises—remain elusive and contested. Furthermore, while the concept of international community has been widely discussed in International Law,[46]

International Relations scholars have not devoted much attention to it, even though they frequently employ the concept.[47]

A good starting point for an attempt to operationalize the concept of international community is to determine what is distinctive about a community, and distinguish it from other social entities, such as societies.[48] One can identify two essential aspects of a community. First, the existence of any social organization such as a community requires interaction by its members, and a degree of interdependence that makes them aware of common interests. A community, however, is more than just interaction and interdependence, but also relies on shared norms and values. This is reflected in Max Weber's distinction between communal relationships (*Vergemeinschaftung*) and associative relationships (*Vergesellschaftung*), where the former are based on a subjective feeling of the parties that they belong together on the basis of shared values, and the latter on a rationally motivated adjustment of individual interests.[49] We can thus identify two constitutive elements of community, namely interdependence and interaction between its members, and the existence of common values binding the members together, prioritizing common goals and values over egoistic individual interests. Both elements were emphasized by the UN Secretary-General Kofi Annan, when he explored the term international community in a speech at a conference with non-governmental organization (NGO) representatives in November 1999:

> What binds us into an international community? In the broadest sense there is a shared vision of a better world for all people, as set out, for example, in the United Nations Charter. There is our sense of common vulnerability in the face of climate change and weapons of mass destruction. There is the framework of international law. There is equally our sense of shared opportunity, which is why we build common markets and, yes, institutions—such as the United Nations. Together we are stronger.[50]

This conception is reflected in the way International Law and International Relations use the notion of international community. Thomas Franck, for example, defines community as 'a common, conscious system of reciprocity between its constituents and . . . shared moral imperatives and values'.[51] In International Law, the existence of the international community, and its basis of common norms and values, is most explicitly recognized in Article 53 of the Vienna Convention on the Law of Treaties, on the rules of *ius cogens*.[52] It also appears in judgments of the International Court of Justice (ICJ), most importantly in the *Barcelona Traction* case, outlining the concept of obligations *erga omnes*.[53] The international legal concepts of *ius cogens* and *erga omnes*, describing non-derogatory norms and obligations towards the whole community of states respectively,[54] have been seen as reflecting the fundamental values of the international community.[55]

In International Relations, it has been the concept of an 'international society' that emphasizes the importance of common norms, describing a group of states conscious of common interests and values, bound by a common set of rules and cooperating in common institutions.[56] This international society is distinguished from a Hobbesian 'international system', where states are engaged in a zero-sum game of warfare and power politics, without any awareness of common interests and values;[57] and from a Kantian, universalist 'world society', potentially transcending the state system.[58] The notion of international community is best reflected in Hedley Bull's solidarist understanding of international society, which he distinguishes from pluralist conceptions.[59] Bull identifies three particularly important differences between pluralism and solidarism: first, the role of war in international society, second, the sources of international law, and third, the role of individual human beings in international society.[60]

In the pluralist or 'Vatellian' international society, the distinction between just and unjust war is made only with respect to the conduct of war. Norms of conduct, partly codified in the laws of war such as the Geneva and Hague Conventions, regulate issues such as the role of civilians in conflict, the treatment of prisoners of war, and the use of certain weapons, like the prohibition of the use of chemical or biological weapons. The solidarist or 'Grotian' conception, on the other hand, emphasizes the importance of just causes of war, such as grave humanitarian emergencies, in addition to just conduct.[61]

With regard to the sources of international law, pluralist international society emphasizes legal positivism and bilateralism, stating that legal obligations arise for states only on the basis of their consent, as reflected in the *Lotus* principle that: '[t]he rules binding upon States . . . emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law'.[62] By contrast, the solidarist conception emphasizes the importance of obligations arising from natural law,[63] and the existence of a community interest. The latter refers to the idea that there is a consensus among states that respect for certain fundamental values is not to be left to the free disposition of states, but is recognized as a matter of concern to all of them.[64]

Finally, in pluralist international society, states are the only relevant actors and subjects of international law, while in solidarist international society, the emphasis on human rights and justice means that individual human beings are the ultimate members of international society, and the legitimacy of the society of states is derivative of Grotius' *magna communitas humani generis*.[65] To sum up the key distinctions between pluralist and solidarist conceptions of international society, one can say that in the pluralist, Vattelian conception, the common values of international society are predominantly procedural,

regulating the interaction of states, and only marginally concerned with individual human beings; while in the solidarist, Grotian conception, the common values are morally substantive, regulating both the interaction of states and protecting the rights of individuals against their states.

While these two conceptions of international society are not mutually exclusive, and should rather be seen as ideal types for analytical purposes, this discussion suggests that what is generally referred to as the international community is closest to the solidarist conception of international society. The solidarist approach has a thicker, more substantive conception of a community interest and shared values than pluralist international society, which more closely resembles Max Weber's notion of associative social relationships. The increasing interdependence of societies since 1945,[66] the development and codification of individual human rights over the last sixty years,[67] the outlawing of wars of aggression, and the rise of universal jurisdiction with respect to international crimes such as torture, genocide, and war crimes through the establishment of international criminal tribunals and the denial of state immunity for former officials accused of such crimes, all provide evidence for the existence of an international community conceptualized in this manner.[68]

The debate about the right to humanitarian intervention,[69] and the development of individual criminal responsibility for war crimes and crimes against humanity through the tribunals for Rwanda and the former Yugoslavia, and the International Criminal Court, are indicative of a trend of considering individuals as the ultimate members of the international community. Analysis of an important function of the international community, the development and clarification of common norms and their enforcement, supports this view of its membership. Norms develop through discursive processes of interaction where norms are identified, formulated, clarified, maintained, or developed further through processes of argumentation and justification.[70] Traditionally, the participants in this activity have primarily been states. However, the membership of the international community can be subject to social transformations, and there is undoubtedly an increasingly important role for international organizations, in particular the UN, and for NGOs in influencing discursive processes, as the example of the International Campaign to Ban Landmines (ICBL) suggests. Furthermore, non-state actors are important for the formation of state interests,[71] and thus play an important indirect role in the discursive formation of norms. As a result, there is not only an increasing moral concern with individuals and the protection of their rights against the state, but also an increased number of ways in which individuals can participate in a key function of the international community: the development of norms.

The emphasis on discourse for norm development does not mean that power, in particular through access to material resources, plays no role. As Ngaire Woods has argued, the capacity for determining rules in international society rests predominantly with the powerful.[72] The ability to participate in the debate about norms, and hence also their development, is, if not determined, at least strongly influenced by the resources available to international actors. Western states and Western NGOs in particular can often shape the outcomes in accordance with their principles and interests, as they have the material and human resources available to support their views in the discourse. This is reflected, for example, in the narrowing of the debate about human rights, away from social and economic rights, claimed by developing countries, to political rights, endorsed by industrialized Western states.[73]

The international community has sometimes been invoked by various actors as a supreme moral authority, which justified their actions even in the absence of any explicit authorization, in particular from the UN Security Council, which is regarded as the primary international institution concerned with the maintenance of peace and security.[74] Whether such actions really do represent the international community and reflect its norms and interests is a topic of considerable contention, as the example of the military intervention by North Atlantic Treaty Organization (NATO) in Kosovo in 1999 showed. With regard to international administrations, however, this problem of invoking the moral authority of the international community in the absence of the procedural legitimacy gained through Security Council authorization does not arise, as they have all been based on or endorsed by Security Council Resolutions.

Who, then, represents the international community in BiH, Kosovo, and East Timor? In this book, the international community refers to the states and organizations involved in statebuilding in BiH, Kosovo, and East Timor. In BiH, most of these actors are represented in the Peace Implementation Council (PIC), mandated to review the progress of the peace implementation process. Nonetheless, the degree of involvement by different states and organizations has varied greatly, and as the analysis in Chapter 3 will show, the states and organizations most deeply involved have been predominantly Western. Discussions about the international community in relation to policymaking in BiH therefore mostly refer to the major international organizations active in BiH—the Office of the High Representative (OHR), Organisation for Security and Cooperation in Europe (OSCE), International Monetary Fund (IMF), World Bank, European Union (EU) and the European Commission (EC), and the United Nations Mission in Bosnia and Hercegovina (UNMBiH)—and the states and organizations represented on the PIC Steering Board (PICSB).[75]

In Kosovo, the main organizations involved in the international administration, through the four pillars of the United Nations Interim Administration Mission in Kosovo (UNMIK), have been the UN, the OSCE, and the EU. In addition to this, the IMF and the World Bank, as well as major Western states have been deeply involved.[76] In East Timor, the United Nations Transitional Administration in East Timor (UNTAET) has been made up exclusively of UN personnel, although the World Bank and United Nations Development Programme (UNDP) have also played an important role in the statebuilding efforts. Bilaterally, Australia and in particular Portugal, the former colonial power, have been involved in East Timor.[77] As the UN is the lead organization of both of these international administrations, and as the missions are accountable to the Secretary General and the Security Council, no mechanism like the PIC was ever established.

For such a community to be truly international, it would need common values and interests, and these values would need to be broadly representative of its membership. It is obvious that in BiH and Kosovo in particular, the latter condition is not fulfilled, as the institutions and states most deeply involved are predominantly Western. The question of whether the values and interests of the states and organizations involved in the statebuilding missions in BiH, Kosovo, and East Timor are shared in order to make it possible to speak of an international community informs the analysis in the following chapters. The so-called international community, authorizing and supporting these international administrations, often appears to be neither truly international, nor a community.

How then does one analyse the international community's beliefs, and establish a link between beliefs and actions? This question is closely linked to the problem of assessing the impact of norms discussed above: thus, the conclusions about the importance of norms constructing identities, and the preference for thick narrative are relevant here as well. Questions about the impact of norms and about the analysis of beliefs have important implications for the sources used. The sources need to reflect the thinking of the international community about the specific actions its representatives take, as well as about the environment they are working in and about the motives and reasons for their actions. Taken together, these will construct a thick narrative. The chapters analysing policymaking by the international community therefore rely heavily on primary sources, which reflect the thinking of the different members of the different international actors involved in international administration and statebuilding. They include interviews with international officials, official and internal documents on the different policy areas analysed, speeches by international officials and politicians involved, and public statements from the relevant international organizations.

Case Selection

The final methodological problem concerns case study selection. External involvement in the domestic governance of territories has been the response to very distinct challenges to international order, such as the threat of terrorism in Afghanistan, internal challenges to the legitimacy of the state in BiH, disputes about the political status of a territory in the case of Kosovo, and the need to build political and administrative institutions after delayed decolonization and large-scale physical destruction in East Timor. Interestingly, though, the response to these very different problems has been relatively similar—the establishment of international administrations with far-reaching executive and legislative authority. As the focus of this book is not on the reasons of the international community for establishing international administrations, but rather on the ideas that shape their policies once they engage in statebuilding, BiH, Kosovo, and East Timor, and the specific reform projects within these cases were chosen because the international administrations in these three territories have been the three most comprehensive attempts of statebuilding to date. The scope of their activities exceeds that of previous operations (such as the United Nations Transitional Administration (UNTAC) in Cambodia); while subsequent missions, like the United Nations Assistance Mission to Afghanistan (UNAMA), have not seen the international community formally exercising governmental authority.[78] The cases selected involve much more comprehensive mandates for the lead organizations, the OHR in BiH, and UNMIK and UNTAET in Kosovo and East Timor respectively; deeper involvement of the international community in the domestic affairs of the three societies; and an open-ended commitment to statebuilding beyond the conduct of elections. These cases therefore present the broadest available range of practices that can be analysed.

Despite the similarities of the three missions, there are some differences in their nature, which make a different treatment of the case studies necessary. Unlike the OHR in BiH, which has a controlling function, but has never been the government, both UNMIK and UNTAET were constituted as the government for their territories at the beginning of their missions. This means that the law-making process functioned very differently until political authority was devolved to local political institutions: interaction between local and international institutions was only consultative, and laws were promulgated by the Special Representatives of the Secretary General (SRSG) in Kosovo and East Timor. Thus, while the emphasis in the case of BiH is very much on the interaction between local and international institutions, the emphasis in the cases of Kosovo and East Timor is more on the influence of norms as reflected in the initiation, development, and implementation of

policies, as the intentions of the international community are best reflected in these.

In each of the three cases, two different policy areas, which have been prominent items on the international community's reform agenda are analysed. They cover three key categories of policymaking: economic reform, administrative reform, and judicial reform. In all cases, the implementation of the reforms has been problematic, and has therefore generated debates that make it possible to explore whether and how these reforms have been justified in terms of norms associated with sovereignty. The study of BiH analyses the laws on the reform of the payment bureaux and the Civil Service Law, both of which were controversial reforms and resisted by local political elites. The Kosovo case analyses the influence of human rights norms associated with sovereignty on the establishment of the judicial system, and the privatization process. The latter has been one of the most important and controversial economic decisions in Kosovo, because of the unresolved status of the province and the resulting disagreement about the actual property rights to the enterprises. Finally, the East Timor case studies the reform of the judicial system and the reform of the civil service.

OUTLINE OF THE ARGUMENT

The analysis of the influence of norms on international statebuilding practices in this book is divided into two parts. Part I outlines the theoretical framework. Chapter 1 introduces the sovereignty debate in International Relations and argues for the importance of the concepts of authority and empirical statehood for the contemporary conception of sovereignty. The chapter demonstrates that sovereignty is no longer conceived of as the undisputed control of a state over its territory, but rather as the liberal notion of sovereignty as responsibility, which claims that the state has responsibilities towards its citizens that it has to fulfil to be recognized as a fully sovereign state. Chapter 2 analyses the role of international administrations in international society. The chapter sets out a brief history of international administration since the beginning of the twentieth century, exploring the ideas and traditions on which the three contemporary international administrations analysed here draw, before developing a theoretical account of the authority of international administrations.

The three chapters in Part II contain the three case studies of statebuilding by international administrations. Each chapter briefly sketches the historical development leading to the establishment of an international administration in the respective territory, analyses the scope of international authority, and

explains how the authority of these administrations has been established. Each chapter then examines two cases of policymaking by each administration and their implications for the central arguments about the impact of conceptions of sovereignty on international statebuilding efforts, and the authority of international administrations. Chapter 3 analyses the case of BiH, looking at the involvement of the international community in the initiation, drafting, legislation, and implementation of two sets of laws: the Laws on the Reform of the Payment Bureaux and the Civil Service Law. Chapter 4 discusses the UNMIK administration of Kosovo, analysing the reform of the judicial system and the debate about the privatization laws. Chapter 5 analyses the international administration of East Timor by UNTAET, focusing on the establishment of the judicial system and the reform of the civil service. At the end of each chapter, the implications of the case for the influence of sovereignty norms on the policies of the international community are discussed.

Finally, Chapter 6 concludes the book by discussing the challenges and paradoxes of statebuilding that arise from the three case studies. The first section of the chapter assesses the notions of sovereignty and state authority introduced in Chapter 1 in the light of the discussion of statebuilding. Bringing together the findings from the three case studies, it clarifies what they suggest about the influence of sovereignty on the aims and practices of international administrations: international administrations reflect a paradox of sovereignty, as they compromise one aspect of sovereignty—the rights to non-intervention and to self-governance—to establish and strengthen another aspect of a political community's sovereignty—its empirical sovereignty. The section also explores possible alternative explanations for the behaviour of the international community, in particular realist approaches emphasizing the material interests of the states involved, to fully assess the impact of sovereignty norms on international statebuilding practices. The second section of the chapter assesses the implications of the findings from the case studies for the policymaking of international administrations. It assesses the authority of the three international administrations in the light of their statebuilding practices, and explores possibilities of enhancing their authority.

NOTES

1. The terms state- and nationbuilding are frequently used interchangeably for this activity. However, they describe different processes. *Statebuilding* refers to the establishment of institutions of government in a society, while the term *nationbuilding* implies the creation of a nation, addressing issues of identity rather than government. Statebuilding and nationbuilding can overlap, as the creation

of political institutions can also aim at the strengthening of a common identity, as is the case in BiH, discussed in Ch. 3. As the emphasis of the analysis here is on institution-building, the term statebuilding will be used throughout.

2. See Ch. 2 for a brief history of international administrations.
3. David Malone, 'Preface', to Susan L. Woodward, *Economic Priorities for Peace Implementation* (New York: International Peace Academy, 2002), 1.
4. Exceptions are Richard Caplan, *International Governance of War-Torn Territories—Rule and Reconstruction* (Oxford: Oxford University Press, 2005); Simon Chesterman, *You, the People: The United Nations, Transitional Administration, and State-Building* (Oxford: Oxford University Press, 2004); Ralph Wilde, 'From Danzig to East Timor and Beyond: The Role of International Territorial Administration', *American Journal of International Law*, 95/3 (2001). For a broader comparative study, including statebuilding missions which were not overseen by international administrations, see Roland Paris, *At War's End: Building Peace After Civil Conflict* (Cambridge: Cambridge University Press, 2004).
5. On BiH, see David Chandler, *Bosnia: Faking Democracy After Dayton* (London: Pluto Press, 1999); Elizabeth M. Cousens and Charles K. Cater, *Toward Peace in Bosnia: Implementing the Dayton Accords* (Boulder, Co: Lynne Rienner Publishers, 2001). On Kosovo, see William G. O'Neill, *Kosovo: Unfinished Peace* (Boulder, Co: Lynne Rienner, 2002); Alexandros Yannis, 'Kosovo Under International Administration', *Survival*, 43/2 (2001). On East Timor, see Joel C. Beauvais, 'Benevolent Despotism: A Critique of U.N. State-Building in East Timor', *New York University Journal for International Law and Politics*, 33/4 (2001); Simon Chesterman, 'East Timor in Transition: Self-Determination, Statebuilding, and the United Nations', *International Peacekeeping*, 9/1 (2002); Jarat Chopra, 'The UN's Kingdom of East Timor', *Survival*, 42/3 (2000).
6. For example Simon Chesterman, *Justice Under International Administration: Kosovo, East Timor and Afghanistan* (New York: International Peace Academy, 2002); Suzannah Linton, 'New Approaches to International Justice in Cambodia and East Timor', *International Review of the Red Cross*, 845 (2002); Hans-Jörg Strohmeyer, 'Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor', *American Journal of International Law*, 95/1 (2001).
7. See in particular Caplan, *Rule and Reconstruction;* Chesterman, *You, the People*; and the studies by the Conflict, Security, and Development Group in King's College, London (CSDG), *A Review of Peace Operations: A Case for Change—East Timor Study* (London: King's College, 2003); and *A Review of Peace Operations: A Case for Change—Kosovo Study* (London: King's College, 2003).
8. Important exceptions are William Bain, *Between Anarchy and Society: Trusteeship and the Obligations of Power* (Oxford: Oxford University Press, 2003); Paris, *At War's End*.
9. Both liberal institutionalists and constructivists have explored the influence of ideas on the behaviour of international actors. Liberal institutionalists consider ideas predominantly as injunctions into decision-making processes. See, for

example, Judith Goldstein and Robert Keohane (eds), *Ideas and Foreign Policy: Beliefs, Institutions, and Political Change* (Ithaca, NY: Cornell University Press, 1996); Albert S. Yee, 'The Causal Effects of Ideas on Policies', *International Organization*, 50/1 (1996). The role of ideas is central to constructivist approaches, which explore both the constitutive and the regulatory effects of ideas on behaviour. See, for example, Emanuel Adler, 'Constructivism and International Relations', in Walter Carlsnaes, Thomas Risse, and Beth Simmons (eds), *Handbook of International Relations* (London: Sage, 2002); James Fearon and Alexander Wendt, 'Rationalism v. Constructivism: A Sceptical View', in Walter Carlsnaes, Thomas Risse, and Beth Simmons (eds), *Handbook of International Relations* (London: Sage, 2002); Martha Finnemore, *National Interests in International Society* (Ithaca, NY: Cornell University Press, 1996); Peter J. Katzenstein (ed.), *The Culture of National Security: Norms and Identity in World Politics* (New York: Columbia University Press, 1996); Friedrich V. Kratochwil, *Rules, Norms, and Decisions: On the Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge: Cambridge University Press, 1991); Thomas Risse, Stephen Ropp, and Kathryn Sikkink, *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999); John Gerard Ruggie, *Constructing the World Polity: Essays in International Institutionalization* (London: Routledge, 1998).

10. Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change', in Peter Katzenstein, Robert Keohane, and Stephen Krasner (eds), *Exploration and Contestation in the Study of World Politics* (Cambridge, MA: MIT Press, 1999), 251.
11. On norms and international law, see Friedrich V. Kratochwil, 'How Do Norms Matter?' in Michael Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford: Oxford University Press, 2000). On norms and international society, see Hedley Bull, *The Anarchical Society: A Study of Order in World Politics*, 2nd edn (Basingstoke: Macmillan, 1995); Timothy Dunne, *Inventing International Society* (Basingstoke: Macmillan in Association with St. Antony's College, Oxford, 1998); Nicholas J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford: Oxford University Press, 2000). On norms and constructivist approaches, see above, n. 9.
12. For example, Thomas Biersteker and Cynthia Weber (eds), *State Sovereignty as Social Construct* (Cambridge: Cambridge University Press, 1996), 11–18; Finnemore, *National Interests*, 31–2; Robert Keohane, 'International Institutions: Two Approaches', *International Studies Quarterly*, 32/4 (1988), 392.
13. Thomas Biersteker and Cynthia Weber, 'The Social Construction of State Sovereignty', in Thomas Biersteker and Cynthia Weber (eds), *State Sovereignty as Social Construct* (Cambridge: Cambridge University Press, 1996), 1–4; Alexander Wendt, *Social Theory of International Politics* (Cambridge: Cambridge University Press, 1999).
14. Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton, NJ: Princeton University Press, 1999), 220.

15. See, for example, James Crawford, *The Creation of States in International Law* (Oxford: Clarendon Press, 1979); Christian Hillgruber, 'The Admission of New States to the International Community', *European Journal of International Law*, 9/3 (1998); Brad R. Roth, *Governmental Illegitimacy in International Law* (Oxford: Oxford University Press, 1999).
16. On non-intervention, see Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention in International Law* (Oxford: Oxford University Press, 2002); R. John Vincent, *Non-Intervention and International Order* (Princeton, NJ: Princeton University Press, 1974).
17. Robert H. Jackson, *Quasi-States: Sovereignty, International Relations and the Third World* (Cambridge: Cambridge University Press, 1990), 27.
18. Cited in Jackson, *Quasi-States*, 29.
19. Krasner, *Sovereignty*, 24.
20. Gerrit W. Gong, *The Standard of 'Civilisation' in International Society* (Oxford: Clarendon Press, 1984).
21. J. Samuel Barkin, 'The Evolution of the Constitution of Sovereignty and the Emergence of Human Rights Norms', *Millennium*, 27/2 (1998).
22. Francis M. Deng, *Sovereignty as Responsibility: Conflict Management in Africa* (Washington, DC: Brookings Institution Press, 1996); International Comission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre, 2001).
23. Thomas M. Franck, 'The Emerging Right to Democratic Governance', *American Journal of International Law*, 86/1 (1992).
24. See, for example, Krasner, *Sovereignty*. However, liberal scholars have increasingly argued that the sovereign right to non-intervention and self-governance of states lacking legitimacy because of their lack of democracy and their human rights record should be constrained by liberal, democratic states. See, for example, Robert Keohane, 'Political Authority after Intervention: Gradations in Sovereignty', in J. L. Holzgrefe and Robert Keohane (eds), *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (Cambridge: Cambridge University Press, 2003).
25. Jackson, *Quasi-States*, 32–49.
26. Gong, *The Standard of 'Civilisation'*.
27. Jackson, *Quasi-States*, 21–6.
28. Ibid., 27.
29. Martha Finnemore, 'Constructing Norms of Humanitarian Intervention', in Peter Katzenstein (ed.), *The Culture of National Security: Norms and Identity in World Politics* (New York: Columbia University Press, 1996), 159.
30. Jean-Jacques Rousseau, *The Social Contract* (London: Penguin, 1968), 64.
31. John Stuart Mill, 'A few Words on Non-Intervention', in John Stuart Mill (edited by Gertrude Himmelfarb), *Essays on Politics and Culture* (Garden City, KS: Anchor Books, 1963).

32. Kratochwil, 'How Do Norms Matter?' 55–6; Wendt, *Social Theory of International Politics*, 75.
33. Wendt, *Social Theory of International Politics*, 71.
34. Ruggie, *Constructing the World Polity*, 95–7.
35. Krasner, *Sovereignty*, 56–67.
36. Finnemore, *National Interests*, 22–4.
37. On the distinction between behavioural and constitutive rules, see John Rawls, 'Two Concepts of Rules', *The Philosophical Review*, 64/1 (1955).
38. Ruggie, *Constructing the World Polity*, 22–5.
39. The issue of the democratic peace has generated a vast literature. For an introduction, see Michael E. Brown, Sean M. Lynn-Jones, and Steven E.Miller (eds), *Debating the Democratic Peace* (Cambridge, MA: MIT Press, 1996); Michael W. Doyle, 'Kant, Liberal Legacies, and Foreign Affairs', *Philosophy and Public Affairs*, 12/3&4 (1983). Some scholars have highlighted, however, that democratization increases the danger of conflict. See in particular Jack Snyder, *From Voting to Violence: Democratization and Nationalist Conflict* (New York: Norton, 2000).
40. Anne-Marie Slaughter-Burley, 'International Law and International Relations Theory: A Dual Agenda', *American Journal of International Law*, 87/1 (1993), 229–30.
41. Alexander Wendt, 'Anarchy is What States Make of it: The Social Construction of Power Politics', *International Organization*, 46/2 (1992), 399.
42. See, for example, Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge: Cambridge University Press, 2004).
43. Kratochwil, 'How Do Norms Matter?', 43–51. For the argument that a causal theory of the impact of norms is possible, see Wendt, *Social Theory of International Politics*, 72–7.
44. On the role of norms as blueprints and roadmaps, see Goldstein and Keohane, 'Ideas and Foreign Policy'.
45. Ruggie, *Constructing the World Polity*, 97.
46. See, for example, Thomas M. Franck, *Fairness in International Law and Institutions* (Oxford: Clarendon Press, 1995); Dino Kritsiotis, 'Imagining the International Community', *European Journal of International Law*, 13/2 (2002); Andreas Paulus, 'The Influence of the United States on the Concept of the "International Community"', in Michael Byers and Georg Nolte (eds), *United States Hegemony and the Foundations of International Law* (Cambridge: Cambridge University Press, 2003); Andreas L. Paulus, *Die Internationale Gemeinschaft im Völkerrecht: Untersuchung zur Entwicklung des Völkerrechts im Zeitalter der Globalisierung* (Munich: Beck, 2001); Bruno Simma, 'From Bilateralism to Community Interest in International Law—Bilateralism and Community Interest Confronted', *Recueil des Cours*, 250 (1994); Christian Tomuschat, 'Die internationale Gemeinschaft', *Archiv des Völkerrechts*, 33 (1995); Christian Tomuschat, 'Obligations Arising for States Without or Against Their Will—The International Community', *Recueil des Cours*, 241 (1993).

47. Among the exceptions are Chris Brown, 'Moral Agency and International Society', *Ethics and International Affairs*, 15/2 (2001); Peter Sutch, *Ethics, Justice, and International Relations: Constructing an International Community* (London: Routledge, 2001). Scholars of the English School have frequently invoked the concept of 'international community', often using it interchangeably with the notion of 'international society'. See, for example, Hedley Bull, *Justice in International Relations: The Hagey Lectures 1983–1984* (Waterloo, Ontario: University of Ontario, 1984).
48. For a detailed discussion of different conceptions of community, see Paulus, *Die Internationale Gemeinschaft*, 9–44.
49. Max Weber, *Economy and Society* (New York: Bedminster Press, 1968), 40–1. This distinction is different from Ferdinand Tönnies' famous distinction between an organic, predominantly ethnically defined community (*Gemeinschaft*), and a voluntarist, contractual society (*Gesellschaft*). See Ferdinand Tönnies, *Community and Society* (New York: Harper and Row, 1957).
50. Kofi Annan, 'The Meaning of International Community', Address to the 52nd DPI/NGO Conference, 15 September 1999.
51. Franck, *Fairness in International Law*, 10–11.
52. *Vienna Convention on the Law of Treaties*, 22 May 1969. For a review of the use of 'international community' in legal texts, resolutions by UN organs, and judgments of the ICJ see Tomuschat, 'The International Community', 222–32.
53. Barcelona Traction, Light and Power Company, Limited, Judgment, *ICJ Reports 1970*, 46.
54. On the concepts of *ius cogens* and *erga omnes*, see Michael Byers, 'Conceptualising the Relationship between Jus Cogens and Erga Omnes Rules', *Nordic Journal of International Law*, 66/2 (1997).
55. '[C]oncepts such as *ius cogens,* international crimes, and obligations *erga omnes*, . . . emanate from the recognition of the international community of their overriding quality'; Vera Gowland-Debbas, 'Judicial Insights into Fundamental Values and Interests of the International Community', in A. S. Muller, D. Raic, and J. M. Thuránszky (eds), *The International Court of Justice: Its Future Role after 50 Years* (The Hague: Martinus Nijhoff, 1997), 363.
56. Bull, *The Anarchical Society*, 13.
57. Ibid., 23–4.
58. Ibid., 24. On the Kantian tradition, see also Fernando Tesón, 'The Kantian Theory of International Law', *Columbia Law Review*, 92/1 (1992). Similarly, Martin Wight distinguished between realist, rationalist, and revolutionary traditions in International Relations. See Martin Wight, *International Theory: The Three Traditions* (Leicester: Leicester University Press, 1991). The concept of a 'world society', one of the three pillars of the English School's conceptualization of international order, is traditionally the weakest and least developed in English School writing. For a discussion of world society, see Barry Buzan, *From International to World Society? English School Theory and the Social Structure of Globalisation* (Cambridge: Cambridge University Press, 2004).

59. Hedley Bull, 'The Grotian Conception in International Society', in Herbert Butterfield and Martin Wight (eds), *Diplomatic Investigations: Essays in the Theory of International Politics* (London: Allen and Unwin, 1966).
60. Ibid., 52.
61. Ibid., 53–7. On Grotius' conceptions of 'just war', see G.I.A.D. Draper, 'Grotius' Place in the Development of Legal Ideas about War', in Hedley Bull, Benedict Kingsbury, and Adam Roberts (eds), *Hugo Grotius and International Relations* (Oxford: Clarendon Press, 1990), 191–201. On Vattel, see Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford: Oxford University Press, 1999), 191–6.
62. Permanent Court of International Justice (PCIJ), *Series A, No. 10* (1927), 18.
63. On the increasing tendency of Western states to argue from a natural law perspective, see Nico Krisch, 'More Equal than the Rest? Hierarchy, Equality and US Predominance in International Law', in Michael Byers and Georg Nolte (eds), *United States Hegemony and the Foundations of International Law* (Cambridge: Cambridge University Press, 2003), 142.
64. Simma, 'Bilateralism and Community Interest', 233.
65. Bull, 'The Grotian Conception', 68. See also Tesón, 'The Kantian Theory of International Law'; Wheeler, *Saving Strangers*; David Armstrong, 'Law, Justice and the Idea of World Society', *International Affairs*, 75/3 (1999).
66. See, for example, Robert Keohane and Joseph Nye, *Power and Interdependence*, 3rd edn (London: Longman, 2001).
67. Jack Donelly, 'Human Rights: A New Standard of Civilisation?', *International Affairs*, 74/1 (1998).
68. For an assessment of the existence of such an international community, see Bruno Simma and Andreas Paulus, 'The "International Community": Facing the Challenge of Globalization', *European Journal of International Law*, 9/2 (1998). See also Andrew Hurrell, 'Society and Anarchy in the 1990s', in Barbara Roberson (ed.), *International Society and the Development of International Relations Theory* (London: Pinter, 1998).
69. See, for example, Chesterman, *Just War or Just Peace*; Robert Keohane and J. L. Holzgrefe (eds), *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (Cambridge: Cambridge University Press, 2003); Jennifer Welsh (ed.), *Humanitarian Intervention and International Relations* (Oxford: Oxford University Press, 2004); Wheeler, *Saving Strangers*.
70. Jürgen Habermas, *The Theory of Communicative Action (Vol. I): Reason and the Rationalization of Society* (London: Heineman, 1984), 8–43; Christian Reus-Smit, 'The Constitutional Structure of International Society and the Nature of Fundamental Institutions', *International Organization*, 51/4 (1997), 563–6; Thomas Risse, ' "Let's Argue!": Communicative Action in World Politics', *International Organization*, 54/1 (2000).
71. Finnemore, *National Interests;* Margaret Keck and Kathryn Sikkink, *Activists Beyond Borders: Transnational Advocacy Networks in Advocacy Politics* (Ithaca, NY: Cornell University Press, 1998).

72. Ngaire Woods, 'Order, Globalization, and Inequality in World Politics', in Ngaire Woods and Andrew Hurrell (eds), *Inequality, Globalization, and World Politics* (Oxford: Oxford University Press, 1999), 21–2.
73. See, for example, Stephen Krasner, 'Sovereignty, Regimes, and Human Rights', in Volker Rittberger and Peter Mayer (eds), *Regime Theory and International Relations* (Oxford: Oxford University Press, 1993), 161–4. On the relationship between power and human rights, see also Andrew Hurrell, 'Power, Principles and Prudence: Protecting Human Rights in a Deeply Divided World', in Timothy Dunne and Nicholas Wheeler (eds), *Human Rights in Global Politics* (Cambridge: Cambridge University Press, 1999).
74. Sutch, *Ethics, Justice, and International Relations*, 1–4. An example is Tony Blair, *Speech by the Prime Minister at the Lord Mayor's Banquet, Mansion House, London, Monday, 12 November 2001*, available at http://www.number10.gov.uk/output/page1661.asp (accessed April 2006).
75. See Ch. 3.
76. The states most deeply involved have been the so-called 'Quint States': France, Germany, Italy, UK, and USA. See Ch. 4.
77. See Ch. 5.
78. Arguably, the case of the CPA in Iraq in 2003–4 was an exception to this. However, it was conducted as a military occupation under the effective control of a single country, and not as an international administration.

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Part I

Concepts and Theories

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1

Sovereignty in International Society

The institution of sovereignty is central to understanding the normative framework underlying the statebuilding activities of international administrations. By establishing international administrations and denying self-governance to the affected populations, the international community compromises one of the fundamental aspects of sovereignty, the norm of self-determination.[1] However, as sovereignty is closely related to the notion of statehood, arguably even constitutive of it, it is the institution which necessarily incorporates the relevant elements of the normative framework that shapes statebuilding. The relationship between sovereignty and statebuilding is therefore a complex and seemingly contradictory one. By treating sovereignty as a composite concept, which addresses the relations between states internationally as well as the relations between states and their societies domestically, and which has both legal and a political attributes, it is possible to explore and resolve these contradictions, and understand the relationship between statebuilding and sovereignty.[2] The statebuilding practices of international administrations reveal a sovereignty paradox: international administrations compromise a fundamental aspect of a political community's sovereignty by violating its right to self-governance, but do so with the aim of making it sovereign with regard to the relations between state and society.

One might argue that this sovereignty paradox can only apply to one of the three cases of international administration discussed here, to BiH, as Kosovo and East Timor after all did not possess statehood when they were put under international administration. However, while they lacked statehood, both had the right to autonomy and self-determination, which was affirmed by the international community before the international administrations were established.[3] These rights are compromised by the statebuilding practices of international administrations.

In the following chapter, the concept of sovereignty, and how beliefs about sovereignty have developed in particular since 1945 are discussed. Beliefs about sovereignty are reflected in the practices and interactions of international actors, and it is necessary to analyse these practices to discern the different properties of sovereignty at various points in time. Because

sovereignty is constructed of beliefs that are held intersubjectively, it only changes when these intersubjective beliefs, not individually held ideas, change.[4] This gives sovereignty norms a certain degree of stability and independence from the discourse and practices of individual actors.

The remainder of the chapter is divided into two sections. The first section develops the concept of sovereignty and explores its evolution, looking in particular at the concept of political authority, and at the practices of recognition of statehood and sovereignty. The second section explores to what extent a new 'standard of civilization' for the recognition of sovereignty has developed following the end of the cold war, and to what extent this might influence contemporary statebuilding practices.

THE PROBLEMATIC CONCEPT OF SOVEREIGNTY

In the words of Lassa Oppenheim,

> there exists perhaps no conception the meaning of which is more controversial than that of sovereignty. It is an indisputable fact that this conception, from the moment when it was introduced into political science, until the present day, has never had a meaning which was universally agreed upon.[5]

As sovereignty is an institution comprising several sometimes conflicting norms, and is associated with a basket of properties such as territory, population, autonomy, authority, control, and recognition,[6] it is a contested concept, with both legal and political attributes. Because of the apparent complexity of sovereignty, it is difficult to provide a definition that is sufficiently broad to encompass all its different meanings, yet specific enough to be analytically useful. In its original and most basic meaning, sovereignty is referred to as the ultimate source of authority in a polity,[7] and thus addresses primarily the relationship between this authority and the polity. This definition, however, is not clear about the nature of the polity in question. With respect to state sovereignty, a more useful definition is one similar to Robert Walker's, where sovereignty is *the recognition of the claim by a state to exercise supreme authority over a clearly defined territory*.[8]

This definition raises questions about several important issues: territory, supremacy, the state, authority, and recognition of the state's claims. Territoriality delineates sovereign authority spatially, not by any other form of common identity, such as ethnicity or religion. Supremacy suggests that there is no higher authority than the holder of sovereignty. If individual states are the highest authority over their respective polities, the international order is anarchic.[9] The nature of the state is a complex and contested question, and

is beyond the scope of this discussion.[10] Barry Buzan has suggested that the state consists of three interlinked components: first, the affective dimension or idea of the state (its traditions, history, culture, and ideology); second, the physical basis of the state (its territory, population, and resources); and third, its institutional expression (its government, laws, and institutions).[11] These give rise to an important distinction in the way the 'state' is regularly understood. On the one hand, the concept is frequently used to describe the whole political community, linking the affective dimension of the state to a specific territory and a set of institutions, on the other hand, the concept of the state can be employed to describe only the institutional dimension of statehood, the bureaucratic and legal apparatus of government, separate from and potentially in conflict with society.[12] Unless specified, state will refer to the narrow conception of the state as the bureaucratic apparatus of government, not the broader conception of the whole political community. This also clarifies the meaning of 'statebuilding', which addresses the institutional dimension of the state, rather than its affective dimension, which is the province of nationbuilding. The distinction between state and society raises the question of who makes claims to supreme authority, and to what extent sovereignty is divisible. This makes the issue of supremacy, which is conceptually unproblematic for the relations between states, problematic with respect to the relationship between state and society.

Treatments of sovereignty generally emphasize authority over a political entity, and the right to speak and act for this unit externally, as the quintessential rights that characterize a state as sovereign.[13] Both authority and the recognition of claims to authority are crucial for the understanding of sovereignty, and therefore need to be addressed in greater detail. Furthermore, these elements of authority and recognition emphasize the social nature of sovereignty, with regard to both the relation between states, and between state and society. Recognition is a social process, based on shared norms and on interaction between agents. Similarly, authority requires a normative framework accepted by everybody involved in an authoritarian relationship: the state and society. To explore the normative framework underlying statebuilding practices, it is therefore essential to understand both authority and recognition in the context of sovereignty.

Sovereignty and Authority

Political theorists generally distinguish between two notions of authority—being *in* authority and being *an* authority.[14] An agent who is *in* authority has the right to do something, or to give someone else the permission to

do something, on the basis of the position he occupies. Thus, he can either exercise authority himself or delegate it. Being in authority therefore predominantly refers to the exercise of political power—that is the monopoly of making, applying, and enforcing rules within an authority's jurisdiction.[15] On the other hand an agent who is *an* authority, or in the words of Allen Buchanan, *authoritative*, can make claims to expertise and special knowledge, and should therefore be believed.[16] Commands issued by an agent who is authoritative constitute a compelling reason to comply, but not an obligation, as in the case of commands issued by someone in authority. Unlike being in authority, authoritativeness applies in social realms beyond the political, such as the sciences, arts, and economics.

As sovereignty is concerned with political authority, this discussion will focus on the notion of being in authority. Two aspects of authority are important in this context. First, the exercise of political authority has to be legitimate: it has to be justified by moral and other socially embedded beliefs. Second, authority entails the right to be obeyed within the scope of its rules. This right to obedience emphasizes voluntary submission to the commands of an authority and distinguishes authority clearly from other forms of power, such as coercion or persuasion, as the reason for compliance is different.[17] In the case of coercion, compliance is the result of the use of force or the threat thereof, even if it is morally justified.[18] In the case of authority, on the other hand, compliance is voluntary, based on a sense of obligation arising from the acceptance of the legitimacy of an authority's orders.[19] Similarly, authority is different from persuasion, since submission to an authority involves the a priori surrender of private judgement, without questioning whether a superior is correct.[20] In the words of Hannah Arendt,

> The authoritarian relation between the one who commands and the one who obeys rests neither on common reason nor on the power of the one who commands; what they have in common is the hierarchy itself, whose rightness and legitimacy both recognise and where both have their predetermined stable place.[21]

The reason for obedience, then, is legitimacy rather than coercion or reason. This underlines the fundamentally social and subjective nature of the concept of authority, which relies on the recognition of a hierarchy as legitimate, based on a broader set of norms into which authority is embedded.[22] What are these norms that legitimize authority? Or, to put it another way, what are the 'rules of recognition'[23] of authority? One can distinguish between intersubjectively held beliefs about the social purpose of the exercise of authority, shaping the ends towards which authority is exercised; and beliefs about processes establishing authority and the way authority is exercised, such as the external recognition by other states, democratic decision-making procedures, or

inherited title. These two kinds of legitimizing shared beliefs are discussed in more detail below.

The emphasis on legitimacy suggests that authority cannot be absolute, but is inherently limited. As Charles Hendel argues, the moral counterpart to obligations owed to an authority is the responsibilities of the authority towards those subjected to it.[24] Similarly, Joseph Raz suggests that authority must involve a 'doctrine of limited government', as a system where individuals cannot exercise any choices because they are constrained by absolute authority cannot be legitimate.[25] This emphasis on accountability that the notions of responsibility and limited government imply is important for the contemporary understanding of sovereignty developed in the course of this chapter.

How then does authority affect our understanding of sovereignty? Sovereign authority describes two sets of relationships, between the state and society domestically and between sovereign states internationally, which are governed by different normative frameworks and involve different recognition processes. Sovereignty delineates authority horizontally between states internationally, and vertically between state and society domestically. These boundaries, however, are not fixed in time but can change; they are products of history and social practices.[26] While the emphasis of this analysis is on the international level and the implications of understandings of sovereignty for the behaviour of the international community, the distinction between the domain of the state—the political—and the domain of society—for example the private, the social, or the economic—remains crucial. This distinction is recognized and reified by interstate relations as well,[27] in particular by the statebuilding practices of international administrations. How and where the authority of the state over society is limited by sovereignty affects the activities of international administrations and will be addressed by the case studies in Chapters 3 to 5.

At the international level, we can distinguish between two recognition processes: the recognition of statehood, and the recognition of sovereignty. Recognition of statehood establishes the status of a political entity as a state in the broad sense of defining a political community in international society, and thus determining the membership of international society. It creates, in the words of Stephen Krasner, the international legal sovereignty of a state.[28] Recognition of sovereignty, on the other hand, addresses the issue of state autonomy, or in Krasner's words, a state's Westphalian sovereignty.[29] It recognizes the exclusion of external actors from domestic structures of authority, and thus establishes the principle of non-intervention. Unlike recognition of statehood, recognition of sovereignty does not occur through a single declaratory act, but by regular confirmation through interaction with other states and international actors. Looking at the conditions for and procedures of

recognition of sovereignty helps to uncover the conditions for authority, and in particular the way in which the relation between state and society influences the perception of a state's authority by the international community. It is through these conditions for the exercise of authority that Krasner's third dimension of sovereignty, domestic sovereignty, which addresses the question of how public authority is organized within a state, the contestation over rights between state and society,[30] is inextricably linked to the other two, and shapes the recognition processes. Only if public authority within a state is organized in a particular way, does the international community recognize this state as legitimate and recognize its legal or its Westphalian sovereignty.

Recognition of Statehood

The main debate among international lawyers with respect to state recognition has been between recognition as a declaratory act, which merely confirms the independent existence of a state as a subject under international law; and recognition as a constitutive process, turning a political community into a state as a subject under international law.[31] Either conception of state recognition seems insufficient on its own to capture the practice of states since 1945: the Turkish Republic of Northern Cyprus, for example, is not recognized as a state, despite its exercise of full control over its territory (albeit under Turkish protection); conversely, BiH became a state through its recognition by other states in 1992, even though it clearly did not constitute a functioning political community, and its government failed to exercise control far beyond the capital Sarajevo.

Given that the analytical focus of this book is on the social nature of international relations, it will concentrate on the constitutive aspects of state recognition. It suffices to note that to the extent that state recognition is constitutive and makes states subjects of international law, and consequently assigns them certain rights and responsibilities, it does so on the basis of certain material facts and broader normative principles.[32] Hersch Lauterpacht was right when he noted in 1947, that

> [t]here are only very few branches of international law which are of greater, or more persistent interest and significance for the law of nations than the question of Recognition of States. . . . Yet there is probably no other subject in the field of international relations in which law and politics appear to be more interwoven.[33]

To what extent have material facts and broader normative principles influenced state recognition, and what has been the role of sovereign authority with respect to state recognition? The most prominent account of statehood

is offered by the 1933 Montevideo Convention on Rights and Duties of States, which defines four criteria for statehood: (*a*) a permanent population, (*b*) a defined territory, (*c*) a government, and (*d*) the capacity to enter into relations with other states.[34] While the ability of the government to exercise effective control over its population and territory is implicit in these conditions,[35] the exercise of authority is not among the criteria for statehood. Thus, the nature of a political community's domestic sovereignty—the relationship between a state in the narrow sense and society—do not appear to matter for the international recognition of statehood. The 1960 General Assembly *Declaration on the Granting of Independence to Colonial Countries and Peoples* does not make the exercise of sovereign authority a condition for the recognition of statehood either; instead, it effectively reduces the criteria for statehood outlined in the Montevideo Convention to a defined territory and a permanent population, by declaring that '[a]ll peoples have a right to self-determination' and '[i]nadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence'.[36] How have these accounts of statehood been reflected in the recognition practices since 1945?

In his analysis of Quasi-States, Robert Jackson discusses the conditions under which the political communities in the Third World have been recognized as states by the existing international society.[37] He argues that recognition after 1945 was conducted under a regime of negative sovereignty, conferring to these states a formal–legal entitlement to non-intervention.[38] Under negative sovereignty, there is no requirement of substantive control over a territory and its population (i.e. no monopoly of force by the state, no effective control over the state territory, no effective bureaucracy), and no consideration of the form and nature of government, to be recognized as a state. The condition for the recognition of statehood was a colonial experience and the existence of colonial borders defining the territory to be recognized as a state, not the proven ability to exercise authority over a territory.[39]

Jackson's observations are predominantly based on the experience of decolonization and the resulting expansion of European international society into Africa and Asia. In the post-cold war period, the example of the dissolution of Yugoslavia and the recognition of its successor states offers an instructive case qualifying Jackson's observations.[40] When the domestic crisis in Yugoslavia escalated,[41] both Croatia and Slovenia declared their independence on 25 June 1991. The states of the European Community, however, originally refused to recognize their independence in the absence of a political settlement of the Yugoslav crisis.[42] In November 1991, the Arbitration Commission established by the European Community (named 'Badinter Commission' after its president, the President of the French *Conseil Constitutionnel*, Robert Badinter)

declared Yugoslavia to be a 'state in dissolution',[43] and later established the borders of the Yugoslav republics as international borders.[44] In December 1991, the European Community agreed that the former Yugoslav republics could be recognized as states by January 1992, but made recognition conditional on the Conference for Security and Co-operation in Europe's (CSCE) principles of human rights, democratic rule, protection of minorities, and inviolability of international borders,[45] thereby introducing state–society relations into the recognition criteria. However, recognition was granted to all the successor states of Yugoslavia long before many of the criteria were fulfilled, in particular in BiH,[46] after Germany unilaterally recognized Croatia and Slovenia on 23 December 1991.[47]

The example of Yugoslavia shows how normative criteria such as human rights or democracy were prominent in the rhetoric of state recognition after the end of the cold war. As Richard Caplan argues, the conditions attached to recognition by the European Community have influenced the provisions for the protection of ethnic minorities across the region,[48] and even if Germany unilaterally recognized Croatia and Slovenia prematurely, it still took the European Community six months to decide on whether to recognize them both in the light of concerns about human rights, and the lack of effective control exercised by Croatia over significant parts of its territory. In contrast to the cold war period, normative concerns thus seem to have mattered.

However, the example of Yugoslavia also shows how an originally principled approach, as embodied in the European Community's criteria for state recognition, interacted with political considerations, such as domestic pressures for quick recognition in Germany, and the priority of other European interests, such as the fate of the Soviet Union after the coup in August 1991, and the Maastricht Treaty;[49] but also how the recognition process became a tool for conflict resolution, based on the hope that it would internationalize the conflict and deter against the use of violence.[50] The political nature of state recognition, to which Lauterpacht referred, was as notable in 1991–2 as it had been in 1947.[51] Indeed, the resolution of Kosovo's status, which for the Kosovo Albanians inevitably contains statehood, and the debate on which has been conducted explicitly with reference to standards of human rights, democracy, and the rule of law, has also been influenced by broader political considerations, in particular concerns about regional stability, highlighting the fact that Lauterpacht's observation held in 2006.[52] Finally, the decision to internationalize the internal borders of the Yugoslav republics and not to accept the break-up of the country along ethnic lines, demonstrates the international unwillingness to accept territorial changes, and the durability of international borders.[53]

Recognition of Sovereignty

This brief review of state recognition practices reveals an international order that is characterized by a regime of negative sovereignty, where the exercise of authority over a specific polity is externally legitimized by mutual recognition. It also suggests that the division of authority between state and society has been of minor importance for the practice of state recognition. However, recognition as a state and recognition of sovereignty should not be conflated. Recognition of statehood territorially defines a political community and identifies it as a member of international society. It is a single, declaratory act which allows this political community to make certain claims to authority over this territory. Recognition of sovereignty, on the other hand, is the external recognition of these claims to authority. This recognition is confirmed through the continuous interaction with other states and international actors, and can be guided by norms distinct from those associated with the recognition of statehood. While statehood, once recognized, is usually not withdrawn,[54] sovereignty can be withheld, completely or partially, and restored by the international community. Jackson has argued convincingly that during the cold war not only recognition as a state, but also recognition as a sovereign was generally conducted under a negative sovereignty regime, granting states a formal–legal entitlement to non-intervention. While recognition of statehood has continued to be conducted mostly under this normative framework, which pays no regard to the authority of a state, this does not necessarily hold true for the recognition of sovereignty.

Already during the cold war, states were not only granted the right to self-determination and statehood, and thus the right to non-intervention, but weak and impoverished countries received development aid if they lacked 'empirical statehood'. Empirical statehood describes the ability of a state to effectively exercise authority over its territory and population, and the ability to develop and implement public policy.[55] Jackson suggests that development aid, aimed at addressing the lack of empirical statehood, constitutes the remnants of a regime of 'positive sovereignty' that was in place until the middle of the twentieth century. While negative sovereignty describes a legal entitlement to non-intervention, based on the legal status of a political community as a state, the possession of positive sovereignty describes a state that has this entitlement to non-intervention because of its ability to provide political goods for its population:[56] it has the 'economic, sociological, technological, and similar wherewithal to declare, implement, and enforce public policy'.[57] As a minimum it fulfils all the criteria for statehood set out in the Montevideo Convention. Positive sovereignty implies that a state has to exhibit empirical statehood as a condition for recognition of sovereignty, as reflected in Hedley

Bull's dictum that '[a]n independent political community which merely claims a right to sovereignty (or is judged by others to have such a right), but cannot assert this right in practice, is not a state properly so-called'.[58] Therefore, under a regime of positive sovereignty, the domestic relations between state and society, whether or not a state can provide political goods and protect the rights of society, matter for the recognition of its sovereignty by other states.

The concept of positive sovereignty, as embedded in the nineteenth- and early twentieth-century notions of a standard of civilization,[59] raises another aspect of sovereignty that has not yet been explored, namely sovereignty as responsibility.[60] This aspect of sovereignty is implied by the condition of empirical statehood, and linked to the concept of authority discussed earlier. A state's responsibility can be directed internationally towards other states, and domestically towards its own citizens. The most obvious international responsibility is the negative responsibility of abstaining from intervention in the domestic affairs of other countries, which is the corollary of the notion that the sovereign is the supreme domestic authority. Other international responsibilities, for example, include the implementation of treaties to which a state is a signatory.[61] The suggestion that states have responsibilities towards their citizens seems more controversial in the light of state practice during the cold war. However, it is inherent in the notion of authority, and has been central to the major theoretical accounts of state authority, such as those of Locke and Hobbes.[62] The concept of sovereignty entails the contractarian claim that there is a need for an ultimate authority within every political society for this society to function effectively or even to exist at all,[63] and that individuals need to surrender part of their autonomy to the sovereign to achieve this. Sovereignty primarily is an instrument to maintain domestic order; it is not an end in itself but has a social purpose. The minimal responsibility arising from sovereignty is therefore to ensure the physical security of the political community, to legitimize the exercise of sovereign authority, in particular the state's monopoly on the legitimate use of force domestically.

However, there is also a more ambitious conception of sovereignty as responsibility, different versions of which are held in particular in the West, and which has been contested by a range of both scholars and policymakers in particular from developing countries, including China and India.[64] It is founded on the notion of popular sovereignty, which broadened the responsibilities of the state towards society beyond the provision of security. This notion of popular sovereignty maintains that sovereignty rests in the society, not in the state,[65] raising the issue of how authority is divided between state and society. Society delegates sovereign authority to the state, thereby separating the source and the exercise of authority. As the ultimate bearer of

sovereignty, society not only retains rights towards the state concerning the provision of the essential requirements for life, but also a right of control over political processes, arguably even to democratic participation,[66] both as a means of delegating sovereign authority, and of holding this authority accountable.[67] The exercise of authority is legitimized both by social purpose (the provision of essential requirements for life) and by legitimizing procedures (participation in, or institutional control of, the exercise of authority). The concept of popular sovereignty thus suggests that claims to sovereign authority have to be recognized not only by other states, but also by the society over which authority is exercised.

This understanding of sovereignty as responsibility has been underpinned by the emergence of the concept of individual human rights, rights which individuals hold against the state, that has affected Western understandings of sovereignty in particular.[68] The emphasis on individual human rights has changed the relation between the state and those it governs, strengthening the notion of popular sovereignty and the rights of the governed vis-à-vis the state. To legitimize the exercise of sovereign authority, the state has to grant civil and political rights to its citizens and respect these rights,[69] reinforcing the claim to political participation that emerged from the notion of popular sovereignty.

Whether sovereignty has evolved fully towards this ambitious conception remains a highly controversial question.[70] State practice suggests that human rights, human security, welfare, and democracy have become important elements of the beliefs that legitimize authority held in particular by Western members of the international community, though not necessarily of all states in the world.[71] This division was revealed by the debate in the Security Council about NATO's intervention in Kosovo in March 1999, in particular Russia's and China's opposition.[72] Even among Western states, the notion of sovereignty as responsibility does not seem to have evolved to the extent that all human rights violations, and in particular a right to democratic governance necessarily justify military intervention. Sovereignty as responsibility and the corresponding requirements for domestic authority continue to conflict with the well-established norm of non-intervention, and how this conflict is resolved or adjudicated needs to be analysed in each specific case.

This emphasis on the responsibilities inherent in sovereignty reinforces the impression that the international community has embraced a conception of positive sovereignty since the end of the cold war. The empirical statehood that positive sovereignty demands requires states to live up to these responsibilities, because positive sovereignty requires effective authority over the territory and population of a political community. This authority depends on the legitimacy afforded to it by the willingness and ability of the state to protect its

population, and to respect its rights. The exercise of sovereign authority by the state therefore depends on where the line is drawn between the authority of the state and the rights of society.

TOWARDS A NEW 'STANDARD OF CIVILIZATION'?

Recognition and the 'Standard of Civilization'

In the nineteenth and early twentieth century, the obligations of a state and substantive issues of empirical statehood constituted the standard of civilization, which a political community had to fulfil to be recognized as a civilized state. Gerrit Gong identifies five requirements of this historic standard of civilization. First, civilized states had to guarantee basic rights, such as life, dignity, property, and freedom of travel, especially to foreign nationals. Second, a civilized state had to have an organized political bureaucracy, with some efficiency in running the state, and some capacity for self-defence. Third, such a state had to demonstrate the rule of law domestically, and adhere to international law. Fourth, it had to fulfil its obligations towards international society by maintaining a diplomatic system.[73] Finally, and most subjectively, a civilized state was expected to conform to the 'accepted norms' of international society, such as eschewing slavery or polygamy; in the words of Gerrit Gong 'an intuitive effort to guarantee the general acceptability of its cultural practices'.[74]

The standard of civilization thus defined a particular social purpose, the maintenance of a society committed to free trade and certain liberal values, to the attainment of which the state was given authority. This standard was established by European powers, who generally fulfilled the obligations required by it, and who had the power to enforce it outside Europe. It invoked an exclusive, particularistic conception of 'civilization', stigmatizing communities not attaining it as 'savages' or 'barbarians'.[75] To be recognized and treated as a full member of international society, non-European societies had to conform to the standard. The safest route these societies could choose to attain membership in international society and to avoid colonization and the division of their sovereignty with a metropolitan state was therefore 'defensive Westernization', that is, the imitation of Western institutions and cultural practices.[76]

The standard of civilization made the domestic relationship between state and society, and the division of authority between them, an international concern by establishing rules according to which the line between the powers of the state and the rights of society had to be drawn. Post-war decolonization ended this practice and replaced it with the negative sovereignty regime

outlined earlier. The development of human rights norms since the Second World War (in particular through the Universal Declaration of Human Rights (1948) and the International Covenant on Civil and Political Rights (1966)), the continued failure of many developing countries to attain empirical statehood under the negative sovereignty regime, and the end of the cold war have called this old sovereignty regime into question once more. Have we moved back towards a regime where empirical statehood and domestic legitimization of authority matter for full sovereign recognition? If such a new regime exists, what kind of legitimacy does it require from states, and what is the new content of empirical statehood?

Positive Sovereignty after the Cold War

Many of today's statebuilding activities involve international interventions into the domestic affairs and authority structures of states, and thus compromise the self-government of weak states. This is clearly the case for international administrations, where aspects of domestic governance are taken over by representatives of the international community, and authority is shared between domestic and international actors.[77] However, other less intrusive statebuilding measures such as development aid can violate the domestic aspect of sovereignty, because their disbursement is frequently conditional on domestic structural changes. It is tempting to view these activities as violations of sovereignty, suggesting that the norms associated with sovereignty have no influence on state behaviour. This interpretation, however, ignores the state–society dimension of sovereignty, the state's responsibilities towards its population, which under the conception of sovereignty as responsibility need to be fulfilled to legitimize the exercise of authority and the rights associated with sovereignty.

The lack of authority and empirical statehood can serve as a justification for international intervention. In the words of Sergio Vieira de Mello, Special Representative of the UN Secretary-General in East Timor,

> the state is now viewed as having an obligation to protect its citizens: when this is not fulfilled there is a growing acceptance that the international community has a right—perhaps even a duty—to step in to fill that gap.[78]

The assertion that the state's failure to live up to its responsibilities not only allows the population to resist the state, but also the international community to intervene on society's behalf, reflects the view that fundamental human rights are universal, and their protection the concern of the whole international community.

For the international community, effectiveness of rule, observance of fundamental human rights norms, and rule of law have become the legitimization for authority and are considered necessary for a state to be regarded as a full member of the international community. They therefore constitute an essential part of the new standard of civilization. The notion of popular sovereignty in particular emphasizes the importance of the guarantee of basic human rights.[79] However, as the discussion of the human rights mandates of the international administrations in Chapter 2 suggests, the standard's conception of human rights goes beyond the protection of basic rights, like the prohibition of genocide or torture, but stretches across a broad range of civil and political rights.

A further element of the standard is democratic government. States have so far not used the right to democracy in their legal justifications for intervention, but the restoration of democratic governments, for example in Panama in 1989, has been among the political goals of their intervention.[80] Democratic models of organizing society and relations between state and society have been implemented by international administrations in their statebuilding activities. This suggests that although the notion of a right to democratic governance remains highly contested, it is considered by the international community as the most appropriate form of domestic governance. In particular among Western states and international organizations, who constitute the part of the international community analysed here, the contestation over whether a human right to democracy exists is far less pronounced.

Finally, the new standard of civilization includes the pursuit of economic development and material wellbeing. As David Williams has argued, '[b]eing a sovereign state is now intimately bound up with the pursuit of what we might call "the national economic project", and being the government of a sovereign state entails a duty to provide for the material wellbeing of the populace.'[81] Considering that the collapse of the Soviet empire thoroughly discredited the socialist planned economy for the time being, this implies the establishment of market economies. As Roland Paris has noted,

> Although debates continue over the appropriate balance between the market and the state in economic development, there is near-universal agreement today that non-market economic policies (that is, those that do not give the market the primary role in allocating scarce resources) are too inefficient to generate sustained economic growth.[82]

We can therefore identify five key elements of this new standard of civilisation: (*a*) administrative effectiveness; (*b*) human rights; (*c*) democratisation; (*d*) rule of law; and (*e*) the establishment of a free market economy. The standard promotes a broadly liberal vision, which is not surprising in the light of the

political, economic, cultural, and military dominance of liberal democracies in the post-cold war world. While a closer analysis of the sources of this new normative framework is beyond the scope of this book, it does not seem by chance that the shifting understanding of sovereignty towards a liberal notion of sovereignty as responsibility coincided with a geopolitical shift after the end of the cold war towards Western liberal states, raising interesting questions about the relationship between power and norms, and about the universality of the standard.

Anne-Marie Slaughter points to an apparent sovereignty paradox in the dealings among liberal states, where prerogatives of sovereignty are less likely to be honoured and states will be more critical about each other's treatment of society than with non-liberal states, based on the recognition of commonality and unity of interests among them and their societies.[83] The conception of sovereignty as responsibility suggests that we face a similar paradox when we look at sovereignty with respect to statebuilding. It suggests that the international community compromises one important norm associated with sovereignty—self-governance—to create the conditions for full empirical statehood and sovereign authority in the country it intervenes in, by establishing the capacity of the state to fulfil its international and domestic obligations.

The example of the recognition of the Yugoslav republics has shown that the standard of civilization associated with sovereignty as responsibility has influenced the policies of state recognition by the European Community. Furthermore, the standard of civilization matters for attaining membership of international organizations like the EU or the WTO, which enable states to participate in a denser network of international institutions and access their resources. The membership criteria thus can serve as a 'carrot' to enhance a state's positive sovereignty. Finally, the standard does matter for the recognition of sovereignty: absence of empirical statehood, and the failure of a state to live up to the most basic responsibilities towards society, in particular the 'responsibility to protect', can serve as a justification for international coercive intervention. While the denser network of institutions can serve as a carrot to achieve positive sovereignty, the possibility of military intervention, together with non-military options such as the threat of sanctions or aid conditionalities serve as a stick.

However, this new standard of civilization legitimizing sovereign rule seems to imply that most states in the world lack legitimacy. As John Vincent has argued with respect to human rights, 'if we made [these standards] the basis for international conduct, . . . there would be no end to wars of intervention'.[84] However, despite increasing political rhetoric and academic argument along these lines, in particular since the attacks on the Pentagon and the World Trade Center on 11 September 2001,[85] there has been no proliferation of wars and

interventions towards this end. Does that suggest that the emphasis on human rights, democracy, free markets, and the rule of law is pure rhetoric?

The importance of the new standard of civilization cannot be dismissed that easily. Instead, one must consider, first, the existence of competing normative frameworks; and second, that norms exist within a particular political context, and are appropriated by different actors as instruments of power in political argument.[86] Thus, the norms associated with the standard of civilization compete with other well-established and codified norms, in particular the norm of non-intervention. In addition, these norms are applied by different actors in political arguments about intervention in a particular political context, within which consequentialist considerations also play a role. Such concerns about the costs and consequences of an intervention—whether it will actually improve the situation with regards to human rights for example—suggest that there is a threshold of violation of the standard of civilization that needs to be passed before an intervention occurs. There is still little consensus on what precisely constitutes this threshold,[87] however, since it is not only determined by the degree of violation of the norms, but also by broader political interests in the affected state. In the case of Rwanda in 1994, for example, the Security Council failed to intervene not because of the concern for the sovereignty and the right to non-intervention of Rwanda—a markedly different stance than the UN had taken in 1971 with regard to the Pakistani killings of Bengalis—but because member states did not want to risk the lives of their troops, and were uncertain about the success of any intervention.[88] As Nicholas Wheeler argues,

> [I]t is simply inconceivable that the Security Council would have blocked any states or group of states from intervening to stop the genocide in those crucial weeks in April and May when outside intervention could have saved hundreds of thousands of lives.[89]

Failure to intervene has sometimes been the result of concerns and interests of states other than normative ones. Moreover, international society has a range of instruments available with which these violations can be addressed, ranging from sanctions and political and economic conditionalities to military intervention and international administration. Hence, the standard of civilization is a good example of how norms create zones of permissible action, rather than causal links.

The influence of the standard on the decision to intervene militarily in a conflict is therefore mitigated by other competing norms, political interests, and pragmatic concerns. As the case studies in Part II show, however, this is different with regard to the institution-building practices of international administrations established by the international community after a military intervention. International administrations encompass a much broader range

of practices than military intervention, most importantly the development of political institutions, which are central not only to effective governance, but also to the protection of human rights in any state. Furthermore, considerations about the human cost or the utility of force no longer apply in the same measure as in decisions to intervene militarily, and one can therefore quite clearly discern the content and the influence of the standard of civilization.

The historic standard of civilization was a benchmark for state recognition, while today the standard is more influential in the ongoing recognition of sovereignty. It is therefore better seen as a benchmark for governance and development, imposing a duty—moral, not legal—on states to fulfil these responsibilities towards their citizens.[90] The new regime of positive sovereignty that underpins the standard of civilization also implies a different vision of international order. Rather than the pluralist order of the negative sovereignty regime,[91] it espouses a solidarist conception, emphasizing universal minimum standards states have to adhere to, and which is permissive of international intervention to maintain these standards. The extent to which this solidarist conception is universal, or merely reflects a predominantly Western or even European standard, is a question that informs much of the empirical analysis in the following chapters.

NOTES

1. *Charter of the United Nations*, art. 1(2). See also Bruno Simma and Hermann Mosler (eds), *The Charter of the United Nations: A Commentary*, 2nd edn (Oxford: Oxford University Press, 2002), 47–61.
2. On the treatment of sovereignty as a composite concept, see Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton, NJ: Princeton University Press, 1999); Victoria Tin-bor Hui, 'Problematizing Sovereignty: Relative Sovereignty in the Historical Transformation of State–Society Relations', in Michael C. Davis et al. (eds), *International Intervention in the Post-Cold War World: Moral Responsibility and Power Politics* (London: M.E. Sharpe, 2004).
3. On East Timor, see SC Res. 384 of 22 December 1975. On Kosovo, see SC Res. 1244 of 10 June 1999.
4. Martha Finnemore, *National Interests in International Society* (Ithaca, NY: Cornell University Press, 1996), 22–4.
5. Cited in Alan James, *Sovereign Statehood* (London: Allen & Unwin, 1986), 3.
6. Thomas Biersteker and Cynthia Weber, 'The Social Construction of State Sovereignty', in Thomas Biersteker and Cynthia Weber (eds), *State Sovereignty as Social Construct* (Cambridge: Cambridge University Press, 1996), 3; Krasner, *Sovereignty*, 220.

7. Francis H. Hinsley, *Sovereignty*, 2nd edn (Cambridge: Cambridge University Press, 1986), 1; W. Michael Reisman, 'Sovereignty and Human Rights in Contemporary International Law', *American Journal of International Law*, 84/4 (1990), 866–7.
8. Walker defines sovereignty as 'the claim by states to exercise legitimate power within strictly delimited territorial boundaries'. Robert Walker, 'State Sovereignty and the Articulation of Political Space/Time', *Millennium*, 20/3 (1991), 449.
9. Daniel Philpott, *Revolutions in Sovereignty: How Ideas Shaped Modern International Relations* (Princeton, NJ: Princeton University Press, 2001), 16–17.
10. For introduction into the debate on the concept of the state, see Patrick Dunleavy, 'The State', in Robert E. Goodin and Philip Pettit (eds), *A Companion to Contemporary Political Philosophy* (Oxford: Blackwell, 1993).
11. Barry Buzan, *People, States and Fear: An Agenda for International Security Studies in the Post-Cold War Era* (London: Harvester Wheatsheaf, 1991), ch. 2.
12. For example Carl Schmitt, *The Concept of the Political* (Chicago, IL: University of Chicago Press, 1996). See also Janice E. Thomson, 'State Sovereignty in International Relations: Bridging the Gap Between Theory and Theoretical Research', *International Studies Quarterly*, 39/2 (1995), 220.
13. Nicholas Onuf, 'Intervention for the Common Good', in Gene M. Lyons and Michael Mastanduno (eds), *Beyond Westphalia? State Sovereignty and International Intervention* (Baltimore, MD: Johns Hopkins University Press, 1995), 47–8.
14. Richard B. Friedman, 'On the Concept of Authority in Political Philosophy', in Richard E. Flathman (ed.), *Concepts in Social and Political Philosophy* (New York: Macmillan, 1973).
15. Allen Buchanan, 'Political Legitimacy and Democracy', *Ethics*, 112/4 (2002), 689–90.
16. Ibid., 692.
17. Hannah Arendt, 'What is Authority', in Hanna Arendt (ed.), *Between Past and Future: Eight Exercises in Political Thought* (New York: Viking Press, 1954), 93; Peter M. Blau, 'Critical Remarks on Weber's Theory of Authority', *American Political Science Review*, 57/1 (1963), 306.
18. William E. Connolly, *The Terms of Political Discourse* (Oxford: Blackwell, 1993), 109–10.
19. Ibid.
20. Blau, 'Weber's Theory of Authority', 307.
21. Arendt, 'What is Authority', 93.
22. Ian Hurd, 'Legitimacy and Authority in International Politics', *International Organization*, 53/2 (1999), 381; Steven Lukes, 'Perspectives on Authority', in J. Roland Pennock and John W. Chapman (eds), *Authority Revisited: Nomos XXIX* (New York: New York University Press, 1987), 65.
23. H. L. A. Hart, *The Concept of Law*, 2nd edn (Oxford: Oxford University Press, 1994), 105.
24. Charles W. Hendel, 'An Exploration of the Nature of Authority', in Carl J. Friedrich (ed.), *Authority: Nomos I* (Westport, CT: Greenwood Press, 1958), 16. See also

Andreas Schedler, Larry Diamond, and Marc Plattner (eds), *The Self-Restraining State: Power and Accountability in New Democracies* (London: Lynne Rienner, 1999).

25. Joseph Raz, 'Introduction', in Joseph Raz (ed.), *Authority* (New York: New York University Press, 1990), 12–14. Similarly, John Locke argued that a sovereign cannot legitimately be absolute. See A. John Simmons, *On the Edge of Anarchy: Locke, Consent, and the Limits of Society* (Princeton, NJ: Princeton University Press, 1993), 50; Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford: Oxford University Press, 1999), 176.
26. Walker, 'State Sovereignty and the Articulation of Political Space/Time', 452–4. For an empirical study of the contestation over boundaries between state and society, see Charles Tilly, *The Formation of National States in Western Europe* (Princeton, NJ: Princeton University Press, 1975).
27. Stephen Hopgood, 'Reading the Small Print in Global Civil Society: The Inexorable Rise of the Liberal Self', *Millennium*, 29/1 (2000); Thomson, 'State Sovereignty in International Relations', 222.
28. Krasner, *Sovereignty*, 14–20.
29. Ibid., 20–5.
30. Ibid., 11–12. Krasner introduces a fourth dimension, interdependence sovereignty, describing a state's ability to regulate cross-border flows. As this dimension of sovereignty is not relevant for the debate here, it is not discussed any further.
31. James Crawford, *The Creation of States in International Law* (Oxford: Clarendon Press, 1979), 17–23.
32. For a similar position, see Brad R. Roth, *Governmental Illegitimacy in International Law* (Oxford: Oxford University Press, 1999), 127–9.
33. Hersch Lauterpacht, *Recognition in International Law* (Cambridge: Cambridge University Press, 1947), v.
34. *Convention on the Rights and Duties of States (Montevideo Convention)*, 26 December 1933, art. 1.
35. James Mayall and Rick Fawn, 'Recognition, Self-Determination, and Secession in Post-Cold War International Society', in Rick Fawn (ed.), *International Society After the Cold War: Anarchy and Order Reconsidered* (Oxford: Clarendon Press, 1996), 194.
36. GA Res. 1514 (XV) of 14 December 1960.
37. Robert H. Jackson, *Quasi-States: Sovereignty, International Relations and the Third World* (Cambridge: Cambridge University Press, 1990).
38. Ibid., 27.
39. Ibid., 77–8. See also Robert H. Jackson, 'Sovereignty in World Politics: A Glance at the Conceptual and Historical Landscape', *Political Studies*, 47/3 (1999), 446; Benedict Kingsbury, 'Sovereignty and Inequality', *European Journal of International Law*, 9/4 (1998), 607–8.
40. On the practice of recognition of new states in Central and Eastern Europe by European states, see Richard Caplan, *Europe and the Recognition of New States*

in Yugoslavia (Cambridge: Cambridge University Press, 2005); Christian Hillgruber, 'The Admission of New States to the International Community', *European Journal of International Law*, 9/3 (1998); Mayall and Fawn, 'Recognition, Self-Determination and Secession'.

41. For the origins and unfolding of the crisis in Yugoslavia, see Laura Silber and Allan Little, *The Death of Yugoslavia*, rev. edn (London: Penguin, 1996); Susan L. Woodward, *Balkan Tragedy: Chaos and Dissolution After the Cold War* (Washington, DC: Brookings Institution Press, 1995).
42. Steven L. Burg and Paul S. Shoup, *The War in Bosnia and Hercegovina: Ethnic Conflict and International Intervention* (Armonk, NY: M.E. Sharpe, 1999), 93.
43. Conference on Yugoslavia Arbitration Commission, Opinion No. 1, 29 November 1991, *International Legal Materials*, 31 (1992), 1494. Susan Woodward argues that the existence of Yugoslavia was systematically de-legitimized by the Yugoslav Republics of Croatia and Slovenia, leading to the EC classification of Yugoslavia as a 'state in dissolution'. See Susan Woodward, 'Compromised Sovereignty to Create Sovereignty: Is Dayton Bosnia a Futile Exercise or an Emerging Model?', in Stephen D. Krasner (ed.), *Problematic Sovereignty: Contested Rules and Political Possibilities* (New York: Columbia University Press, 2001), 260–9.
44. Conference on Yugoslavia Arbitration Commission, Opinion No. 3, 11 January 1992, *International Legal Materials*, 31 (1992), 1499.
45. European Political Cooperation Declaration on Yugoslavia, Extraordinary EPC Ministerial Meeting (Brussels), EPC Press Release 129/91, 16 December 1992, *International Legal Materials*, 31 (1992), 1485. See also Richard Caplan, 'Conditional Recognition as an Instrument of Ethnic Conflict Regulation: The European Community and Yugoslavia', *Nations and Nationalism*, 8/2 (2002).
46. Conference on Yugoslavia Arbitration Commission, Opinion No. 4, 11 January 1992, *International Legal Materials*, 31 (1992), 1501.
47. Woodward, 'Compromised Sovereignty', 260–9. The constitutions of Croatia and Slovenia drafted during the final months of 1991 with international advice incorporated most of the CSCE principles. In Croatia, however, they were not applied in practice at the time, in particular with regard to minority rights. See Human Rights Watch, *Civil and Political Rights in Croatia* (New York: Human Rights Watch, 1995). Following Greek objections to the recognition of Macedonia, based on unsubstantiated claims that Macedonia harboured territorial claims against Greece, it was only recognized by the EU in December 1993. For details, see Caplan, *Europe and the Recognition of New States in Yugoslavia*, 37.
48. Caplan, 'Conditional Recognition', 173. The influence of the recognition conditions on the constitutional provisions in Croatia seems to be confirmed by a statement from the Badinter Commission on 4 July 1992, more than seven months after the recognition of Croatia: 'Furthermore, the Arbitration Commission finds that even if the Constitutional Law in question does sometimes fall short of the obligations assumed by Croatia when it accepted the draft Convention of 4 November 1991, it nonetheless satisfies the requirements of general international

law regarding the protection of minorities.' Conference on Yugoslavia Arbitration Commission, Comments on the Republic of Croatia's Constitutional Law of 4 December 1991, as last amended 1 May 1992, 4 July 1992, 31 *International Legal Materials*, 1506 (1992).

49. Susan Woodward, *Balkan Tragedy*, 147–77. On the German decision to unilaterally recognize Slovenia and Croatia, see Beverly Crawford, 'Explaining Defection from International Cooperation: Germany's Unilateral Recognition of Croatia', *World Politics*, 48/4 (1996); Michael Libal, *Limits of Persuasion: Germany and the Yugoslav Crisis, 1991–1992* (Westport, CT: Praeger, 1997).
50. Caplan, 'Conditional Recognition', 163.
51. See also Roland Rich, 'Recognition of States: The Collapse of Yugoslavia and the Soviet Union', *European Journal of International Law*, 4/1 (1993).
52. The resolution of Kosovo's status is discussed in more detail in Ch. 4.
53. Libal, *Limts of Persuasion*; Alexander B. Murphy, 'The Sovereign State as Political-Territorial Ideal: Historical and Contemporary Considerations', in Thomas Biersteker and Cynthia Weber (eds), *State Sovereignty as Social Construct* (Cambridge: Cambridge University Press, 1996); Mark W. Zacher, 'The Territorial Integrity Norm: International Boundaries and the Use of Force', *International Organization*, 55/2 (2001), 224–9.
54. The Socialist Republic of Yugoslavia is arguably an exception to this, as it was declared to be a 'state in dissolution' by the Badinter Commission on 29 November 1991. See Conference on Yugoslavia Arbitration Commission, Opinion No. 1.
55. Jackson, *Quasi-States*, 40–7.
56. Jackson derives the concepts of positive and negative sovereignty of states from Isaiah Berlin's concept of positive and negative liberty possessed by individuals. See Ibid., 26. Berlin describes negative liberty as 'simply the area within which a man can act unobstructed by others', and positive liberty as 'the wish of the individual to be his own master . . . to be a subject, not an object; to be moved by reasons, by conscious purposes'. See Isaiah Berlin, 'Two Concepts of Liberty', in David Miller (ed.), *Liberty* (Oxford: Oxford University Press, 1991).
57. Jackson, *Quasi-States*, 29.
58. Hedley Bull, *The Anarchical Society: A Study of Order in World Politics*, 2nd edn (Basingstoke: Macmillan, 1995), 8.
59. Gerrit W. Gong, *The Standard of 'Civilization' in International Society* (Oxford: Clarendon Press, 1984).
60. Francis M. Deng, *Sovereignty as Responsibility: Conflict Management in Africa* (Washington, DC: Brookings Institution Press, 1996); International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre, 2001).
61. Bull, *The Anarchical Society*, 18.
62. Roth, *Governmental Illegitimacy*, 17–35. On Hobbes, see Noel Malcolm, *Aspects of Hobbes* (Oxford: Clarendon Press, 2002), 447. On Locke, see Simmons, *On the Edge of Anarchy*, 68–72.

63. Hinsley, *Sovereignty*, 18.
64. See, for example, Mohammed Ayoob, 'Humanitarian Intervention and State Sovereignty', *The International Journal of Human Rights*, 6/1 (2002); Albrecht Schnabel and Ramesh Thakur (eds), *Kosovo and the Challenge of Humanitarian Intervention—Selective Indignation, Collective Action, and International Citizenship* (Tokyo: United Nations University Press, 2000).
65. The concept of popular sovereignty has been formulated most eloquently by Locke: 'Men, being . . . by nature all free, equal and independent, no one can be put out of this estate, and subjected to the political power of another, without his own consent.' John Locke, 'The Second Treatise of Government', in Peter Laslett (ed.), *Locke: Two Treatises of Government* (Cambridge: Cambridge University Press, 1988), para. 95. Similarly, James Madison suggested that 'As the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived, it seems strictly consonant to the republican theory, to recur to the same original authority, . . . whenever it may be necessary to enlarge, diminish, or new-model the powers of government . . . ' James Madison, 'The Federalist No. 49', in James Madison, Alexander Hamilton, and John Jay (eds), *The Federalist* (London: Everyman, 1996), 258.
66. Gregory H. Fox, 'The Right to Political Participation in International Law', *Yale Journal of International Law*, 17/2 (1992); Thomas M. Franck, 'The Emerging Right to Democratic Governance', *American Journal of International Law*, 86/1 (1992). Brad Roth, on the other hand, has argued that under international law, popular consent has been articulated in a range of ways, not only through democratic systems. Roth, *Governmental Illegitimacy*, ch. 3.
67. Deng, *Sovereignty as Responsibility*, 5–6; Franck, 'The Emerging Right to Democratic Governance'; ICISS, *The Responsibility to Protect*, 13; Frederic L. Kirgis, 'The Degrees of Self-Determination in the United Nations Era', *American Journal of International Law*, 88/2 (1994); Andreas Schedler, 'Conceptualizing Accountability', in Andreas Schedler, Larry Diamond, and Marc Plattner (eds), *The Self-Restraining State: Power and Accountability in New Democracies* (London: Lynne Rienner, 1999).
68. J. Samuel Barkin, 'The Evolution of the Constitution of Sovereignty and the Emergence of Human Rights Norms', *Millennium*, 27/2 (1998), 247.
69. Ibid., 246–9.
70. This controversy is reflected in particular in the debate about humanitarian intervention. See, for example, Robert Keohane and J. L. Holzgrefe (eds), *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (Cambridge: Cambridge University Press, 2003); Jennifer Welsh (ed.), *Humanitarian Intervention and International Relations* (Oxford: Oxford University Press, 2004).
71. ICISS, *The Responsibility to Protect*, 15–16.
72. For an overview of the Security Council deliberations on Kosovo, see Paul Heinbecker, 'Kosovo', in David M. Malone (ed.), *The UN Security Council: From the Cold War to the 21st Century* (Boulder, CO: Lynne Rienner, 2004); Ian Johnstone,

'Security Council Deliberations: The Power of the Better Argument', *European Journal of International Law*, 14/3 (2003).

73. Gong, *The Standard of 'Civilization'*, 14–15.
74. Ibid., 19.
75. Jack Donelly, 'Human Rights: A New Standard of Civilization?', *International Affairs*, 74/1 (1998), 15.
76. David Strang, 'Contested Sovereignty: The Social Construction of Colonial Imperialism', in Thomas Biersteker and Cynthia Weber (eds), *State Sovereignty as Social Construct* (Cambridge: Cambridge University Press, 1996), 36–43.
77. Jarat Chopra, *Peace Maintenance: The Evolution of International Political Authority* (London: Routledge, 1999), 13–16.
78. Sergio Vieira de Mello, 'UNTAET: Lessons to Learn for Future United Nations Peace Operations, Presentation to the Oxford University European Affairs Society', Oxford, 26 October 2001. On file with the author. For similar views, see Deng, *Sovereignty as Responsibility*; ICISS, *The Responsibility to Protect*; Report of the High-level Panel on Threats, Challenges and Change, UN Doc. A/59/565, 1 December 2004.
79. Barkin, 'The Evolution of the Constitution of Sovereignty'; Donelly, 'Human Rights'; Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton, NJ: Princeton University Press, 2001), 17.
80. Christine Gray, *International Law and the Use of Force* (Oxford: Oxford University Press, 2000), 42–4. Arguably the intervention in Haiti in 1991, restoring the democratically elected government to power, is an exception in this context, though it was authorized under a Ch. VII resolution to restore peace and security. See David Malone and Sebastian von Einsiedel, 'Haiti', in David Malone (ed.), *The UN Security Council: From the Cold War to the 21st Century* (Boulder, CO: Lynne Rienner, 2004).
81. David Williams, 'Aid and Sovereignty: Quasi-States and the International Financial Institutions', *Review of International Studies*, 24/4 (2000), 557.
82. Roland Paris, *At War's End: Building Peace after Civil Conflict* (Cambridge: Cambridge University Press, 2004), 199.
83. Anne-Marie Slaughter-Burley, 'International Law and International Relations Theory: A Dual Agenda', *American Journal of International Law*, 87/1 (1993), 229–30.
84. R. John Vincent, *Human Rights and International Relations* (Cambridge: Cambridge University Press (in association with the Royal Institute of International Affairs), 1986).
85. See, for example, Michael Ignatieff, *Empire Lite: Nation-Building in Bosnia, Kosovo, and Afghanistan* (London: Vintage, 2003); Robert Keohane, 'Political Authority after Intervention: Gradations in Sovereignty', in J. L. Holzgrefe and Robert Keohane (eds), *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (Cambridge: Cambridge University Press, 2003). For a similar anti-pluralist argument, see John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999).

86. See Ian Hurd, 'The Strategic Use of Liberal Internationalism: Libya and UN Sanctions, 1993–2003', *International Organization*, 59/3 (2005).
87. For a reflection of this lack of consensus on the threshold of intervention, see *Report of the High-level Panel*, paras 199–203.
88. Nicholas J. Wheeler, 'The Humanitarian Responsibilities of Sovereignty: Explaining the Development of a New Norm of Military Intervention for Humanitarian Purposes in International Society', in Jennifer Welsh (ed.), *Humanitarian Intervention and International Relations* (Oxford: Oxford University Press, 2004), 36.
89. Ibid.
90. Christopher Clapham, 'Degrees of Statehood', *Review of International Studies*, 24/2 (1998), 146.
91. For an argument in favour of a pluralist international order, see Robert Jackson, *The Global Covenant: Human Conduct in a World of States* (Oxford: Oxford University Press, 2000).

2

International Administrations in International Society

The previous chapter introduced the theoretical framework for discussing the concept of sovereignty in international society, arguing for a conception of sovereignty as responsibility, which emphasizes the importance of legitimacy and effective control. This chapter will fill a remaining conceptual gap and look at the place of international administrations in international society. Its first section provides a brief history of international administrations, developing the historical context in which the three administrations analysed in this study are embedded, and exploring the ideas and traditions on which contemporary international administrations draw. The second section examines the sources of authority of international administrations. Based on the discussion of authority in the previous chapter, it identifies five sources of international authority—consent, delegation, the maintenance of peace, and security, the protection of fundamental human rights norms, and the need for government—and analyses to what extent they can be traced in the mandates and practices of the administrations in BiH, Kosovo, and East Timor.

Before developing a brief history of international administrations and discussing the nature of their authority, it is necessary to clarify the concept of 'international administration'. In particular, this concept needs to be distinguished from other incidences of compromised sovereignty, such as colonial protectorates, or unilateral military occupations. I understand international administrations to be international bodies exercising governmental functions over a territory, which are locally based, and the most recent of which have been engaged in the establishment or reform of that territory's political and social institutions.[1]

This definition suggests three structural characteristics, which make international administrations distinct from colonial protectorates and trusteeship mandates, but also from other forms of international involvement, for example from development organizations. First, international administrations are not established and staffed by a single country, but by international organizations like the League of Nations, the UN, the OSCE, or the EU, or by

conferences with broad international participation, to which they are also accountable.[2] Second, international administrations are involved in governance, rather than monitoring and assistance, distinguishing them from less intrusive incidents of international involvement, such as election monitoring or development work.[3] Third, the spatial identity of the administrations as 'international' is distinct from the 'local' identity of the territory and the population affected by it, even if the administration's jurisdiction is limited to this territory. This distinguishes them from international bodies like the European Communities, which share the spatial identity with the states and people affected by their governance.[4] An additional characteristic of international administrations is functional: they assert responsibility for certain governmental functions. This responsibility can be limited to a few functions, such as security or fiscal policy as in the case of UNTAC in Cambodia, or it can be all-encompassing, as with UNMIK in Kosovo and UNTAET in East Timor.

A HISTORY OF INTERNATIONAL ADMINISTRATIONS

Based on this conception, we can find a range of incidences of international administration, starting after the First World War with the creation of the free city of Danzig and the Saar regime in the Versailles Treaty. One can divide the cases of international administration into three groups, which are distinct both chronologically and in terms of their purpose, reflecting the normative frameworks of their time.

The first group contains the League mandates from 1919–45, and includes the administration of the free city of Danzig, the Saar regime, and the administration of the Leticia Trapeze in the border region of Colombia and Peru. These administrations did not engage in statebuilding, but addressed competing sovereignty claims, suggesting that despite the influential Wilsonian ideal of self-determination, there was still a distinction made between 'civilized' and 'uncivilized' states, with the latter either under colonial control or League mandates. The second group contains the UN administrations during the cold war: Western Papua, the Congo, and Namibia. All these missions were heavily influenced by notions of decolonization and corresponding understandings of self-determination and international order, emphasizing the importance of Westphalian sovereignty. The third and largest category, which contains the three administrations at the heart of this study, is the group of post-cold war administrations concerned predominantly with post-conflict statebuilding. It includes the cases of Cambodia, Eastern Slavonia, Mostar, Bosnia and Hercegovina, Kosovo, East Timor, and most recently Afghanistan.[5] These missions reflect a solidarist conception of international order as outlined in the previous chapter, emphasizing the importance of human rights norms,

but also broad conceptions of good governance, both in terms of economic structures and the rule of law.

The League Mandates, 1919–45

Out of the attempts at Versailles to create a new international order after the carnage of the First World War, two incidences of international administration emerged, both with respect to former German territory: Danzig and the Saar basin. The free city of Danzig was established in 1919 to prevent Polish control over a town with an almost exclusively German population, but to grant Poland access to a deep-sea harbour at the Baltic Sea.[6] It was legally an independent entity under the protection of the League, and part of the Polish customs regime.[7] What was intended to be a permanent arrangement was undermined by the gradual collapse of the League in the 1930s, and the international administration was terminated with the German attack on Poland in September 1939, after which Danzig was incorporated into the Third Reich.

The Saar basin was put under League authority in 1919, after France had been given possession of the Saar coal mines as compensation for the German war-time destruction of mines in the north of France. French claims to the political control over the territory were rejected in particular by Woodrow Wilson, who considered this to be a major violation of the principle of national self-determination, and the Saarland legally remained part of Germany.[8] The international administration of the territory by the League ended in 1934 with a referendum, in which, under threats and pressure from the Nazi party, 90 per cent of the Saar population voted in favour of rejoining Germany.[9]

The one-year administration of Leticia from June 1933 till June 1934 was established after armed Peruvian civilians occupied the Colombian territory of Leticia in September 1932, which was inhabited predominantly by Peruvians. In May 1933, both countries accepted mediation by the League to resolve the conflict, and agreed to a League-appointed administration over the disputed territory while bilateral negotiations proceeded. The League-appointed administration eased the transition of the territory from Peruvian back to Colombian control, preventing the clash of opposing military forces and governed the territory until Colombian control was re-established.[10] While administered by the League, Leticia legally remained part of Colombia.

The administrations of Danzig, the Saar, and Leticia exhibit some important common characteristics, which help to understand the normative framework into which practices of international administration were embedded in the interwar period. Thus, in all cases the League-appointed authorities were

involved in the governance of the territories. In Danzig, which was internally self-governed, the involvement of the High Commissioner was limited to certain foreign policy issues, such as the relations between Danzig and Poland, but he was also responsible for guaranteeing Danzig's internal self-government and its international standing as a free city.[11] In the Saar basin and Leticia, the League-appointed international commissions were responsible for all aspects of domestic governance in the territory.[12]

Also, the League administrations were established to resolve competing sovereignty claims, not to address problems of governance and development, which was considered to be the responsibility of the mandate system and the colonial powers.[13] The cases of Danzig and the Saar basin are particularly interesting in this respect, as one reason for League administration was the protection of the German right to self-determination in the light of foreign control over the resources of the territories. It is specifically this last element which distinguishes the administrations of the League period from the later ones (discussed in the following sections). It reflects the division of societies during that period into civilized and uncivilized.[14] As the latter category did not possess statehood or the same right to self-determination, these entities could make no competing sovereignty claims that might have to be resolved by the League.

Cold War Decolonization, 1945–91

International administration did not remain a feature only of the interwar period, but re-emerged in the context of decolonization during the cold war. Two international administrations were established by the UN to address problems arising from the transition from colonial rule to independent statehood: the United Nations Transitional Executive Authority (UNTEA) in Western Papua/West New Guinea (1962–3), and the United Nations Transition Assistance Group (UNTAG) in Namibia (1990–1). In addition to these, the UN temporarily took over state functions as part of its peacekeeping mission in Congo (ONUC, 1960–4), but never comprehensively and predominantly with the aim of supporting the peacekeeping mission in the light of the collapse of government with the departure of the Belgian colonial administration.[15]

These cold war missions exhibit five core characteristics. First, the missions were established to ease transition from colonial rule to self-governance. In both Western Papua and Namibia, UNTEA and UNTAG were created to take over functions of the former colonial administration, to ensure a smooth transition to self-governance in the case of Namibia, or to Indonesian rule in the case of Western Papua, providing a buffer between control by the Dutch

and South Africans on the one hand, and the Indonesians and Namibians on the other.[16] In the Congo, ONUC was established to ensure the withdrawal of the Belgian authorities, and to support the new government in maintaining order and security.

Second, the missions were all deployed with the consent of the affected states, or the states that controlled the territory. UNTEA was established on the basis of a bilateral agreement between the Netherlands and Indonesia in August 1962 which requested the establishment of UNTEA, and which was endorsed by a resolution of the UN General Assembly on 21 September 1962.[17] UNTAG was established in 1978 by Security Council Resolution 435,[18] but because of South Africa's resistance and the linkage it made between its control of Namibia and the presence of Cuban troops in Angola, UNTAG did not deploy until an agreement was reached in 1988 between South Africa, Angola, and Cuba to simultaneously deploy UNTAG and withdraw Cuban troops from Angola.[19] Similarly, ONUC was deployed in the Congo with the consent of the Congolese government. The importance of consent for these missions emphasizes the dominance of the Westphalian conception of sovereignty and the norm of non-intervention for the decolonization process and the newly formed states during the cold war period.[20]

Third, in most cases the UN asserted legal authority to administer the territory in question. The bilateral agreement between the Netherlands and Indonesia and its endorsement by the General Assembly granted legal authority over Western Papua to UNTEA. When the General Assembly ended the South African mandate over Namibia in 1967, it assigned responsibility for administering the territory to the UN, in the form of the UN Council for South West Africa,[21] and in 1978, this 'legal responsibility' for Namibia was reasserted by the Security Council.[22]

Fourth, the missions ended with elections or 'popular consultations', which were seen as an expression of the self-determination of the population of the territory in question. In Western Papua, UNTEA was mandated to assist with the organization of a 'popular consultation', which, however, was conducted by the Indonesian authorities in such a way as to ensure unanimous approval of its incorporation into Indonesia.[23] In Namibia, UNTAG's mandate wound down after the elections in November 1989, and Namibia's attainment of statehood on 21 March 1990. Only in the Congo, where international administration had never been formally part of the mandate of ONUC, did the mission not end with elections; instead, the UN left in 1964, a year after defeating the secessionist forces in the province of Katanga, the main threat to the territorial integrity of the Congo at the time.[24]

Fifth, the UN took over administrative functions because of the absence of an administrative class in the wake of decolonization. In Western Papua,

three quarters of the Dutch civil servants left before 1 October 1962, the day authority over the territory was transferred from the Netherlands to UNTEA; while in the Congo governance structures collapsed with the rapid withdrawal of the Belgian colonial administrators, making their replacement with international officials an urgent necessity to ensure the provision of basic government functions.

The nature of these missions cannot be understood without reference to the decolonization process and the corresponding understandings of self-determination and international order. The normative environment at that time emphasized the ideas of non-intervention and state autonomy, and the practice of states and international organizations during this period reflects a commitment to Westphalian sovereignty most prominently reflected in the 1960 General Assembly's *Declaration on the Granting of Independence to Colonial Countries and Peoples*.[25]

Post-Cold War Statebuilding Since 1991

After the cold war, incidences of international administration increased significantly, and of the thirteen international administrations identified here, seven were initiated after 1991. Furthermore, the scope and the depth of international administrations expanded significantly, displaying an unprecedented international involvement in the governance of the affected territories. As the core characteristics of the post–cold war statebuilding missions will be discussed in greater detail in Part II of this study, at this point I will only briefly outline the seven administrations in this period.

In 1991, UNTAC was established on the basis of the Paris Peace Agreements between the conflicting parties in Cambodia. It was mandated to provide for the return of refugees, to implement the separation and cantonment of forces, to monitor human rights, to organize elections, and to control core government agencies to provide for a fair and neutral environment for the elections.[26] UNTAC attempted (with limited success) to exercise control over several key ministries, including defence, foreign affairs, national security, and finance.[27] The mission ended with the successful conduct of elections; however, the continued security problems after UNTAC's withdrawal have raised the question of how successful the mission has been.

Of the four international administrations in the territory of the former Yugoslavia, the first one, the European Union Administration of Mostar (EUAM), was established in July 1994 to administer the divided city of Mostar in Bosnia and Hercegovina, which was claimed by both Bosnian Croats and Bosnian Muslims (Bosniaks). In December 1996, the administration of Mostar

was subsumed in the structure of the international civilian presence in Bosnia and Hercegovina, which was established at the Dayton Peace Conference in November 1995. The EUAM was taken over by the lead organization of the international administration, the OHR. The case of Bosnia and Hercegovina is discussed in more detail in Chapter 3.

Parallel to the Dayton peace agreement, Croatia and Serbia agreed on the establishment of the United Nations Transitional Administration in Eastern Slavonia, Baranja, and Western Sirmium (UNTAES) to oversee the transfer of this predominantly Serb-populated territory from self-governance to Croatian sovereign control. The administration was established under Chapter VII of the Charter in January 1996 by Security Council Resolution 1037.[28] UNTAES was initially mandated for a period of twelve months, and on Serb request was extended by another year. The Transitional Administrator oversaw both the military and civilian components of the mission, which included disarming paramilitary forces, facilitating refugee return, taking over tasks of civil administration, and initiating economic reconstruction and development.[29] UNTAES was fully deployed in May 1996, and was concluded in January 1998.

The fourth administration in the Balkans, UNMIK, was established by the Security Council on 10 June 1999, after NATO's air campaign against the Federal Republic of Yugoslavia (FRY) from March to June 1999. It was designed to protect the population in the Serb province against repression and major human rights violations, and lead the province towards 'substantial autonomy' within Yugoslavia.[30] The future status of Kosovo was not resolved by the Security Council after the war, with the Albanian parties unanimously supporting independence, and the Serbian government insisting on Serbia's territorial integrity and on Kosovo remaining part of Serbia. This case is discussed in more detail in Chapter 4.

The remaining administrations to date are both located outside the European continent, in East Timor and Afghanistan. UNTAET was established in October 1999.[31] It was created to facilitate the transition of East Timor from Indonesian rule to independence, but also to establish state institutions, and to rebuild the country's physical infrastructure after the violence of the pro-Indonesian militias following the referendum in favour of independence in August 1999.[32] This case is discussed further in Chapter 5.

Finally, UNAMA was established after the toppling of the Taliban regime following the September 11 Al-Qaeda attacks. It was mandated to coordinate the UN humanitarian and reconstruction efforts, and support the Afghan Interim Administration, as well as the establishment of permanent political institutions. UNAMA differs significantly from the international administrations of BiH, Kosovo, and East Timor. The UN committed itself to a policy of the 'light footprint' in Afghanistan, and did not take over governmental

functions, instead focusing on capacity building and supporting the local administration. However, it has exercised significant informal political influence over the Afghan institutions in Kabul, mainly because of the financial weakness of the government.[33]

SOURCES OF AUTHORITY OF INTERNATIONAL ADMINISTRATIONS

The previous chapter clarified the concept of authority, and its importance for the discussion of sovereignty as responsibility. It argued that an agent can have authority in two senses: he can be 'in authority', or he can be 'an authority'. As the political aspect of authority is predominantly encapsulated in the concept of being in authority, it is the main focus of this analysis.

The exercise of authority has to be legitimate; it has to be justified by moral or other socially embedded beliefs. To analyse the authority of international administrations, one therefore has to examine these processes and social purposes that legitimize their exercise of power. Beliefs about legitimizing processes and social purposes are reflected both in the way international administrations are established—the process of endowing them with authority—and in their later practices. Authority also relies on the capacity to exercise it, on the ability to develop and enforce public policy. An international administration's authority is compromised if it lacks the capacity to promote the social purposes legitimizing its exercise of authority.

Five Sources of Authority

From Security Council resolutions, peace treaties, the regulations issued by the international administrations, and from their practice one can identify five different sources of authority invoked by the international administrations and the institutions establishing them. Two of these are procedural: consent of the affected states or societies to international administration, and the delegation of authority to an administration. The remaining three involve the appeal to fundamental social purposes of international society, which are viewed as being under threat without the exercise of international authority: the maintenance of peace and security; the protection and promotion of human rights and democracy; and the need for governance in the light of the absence of functioning political and administrative institutions. In addition, the way in which international administrations exercise power affects their authority, as the emphasis on accountability and limited government for legitimate authority suggests. Accountability, however, is not a source of authority,

but a condition for it. As its absence would compromise the authority of international administrations, it is discussed here as well.

Consent

In the liberal literature on authority in political philosophy, consent is generally presented as the most powerful source of creating political obligations and hence political authority. As Allen Buchanan reminds us, the prominence of consent theory arises from its ability to provide an elegant solution to the problem of how to square the exercise of political power with two central notions of liberal political thought: the fundamental equality of persons, and the notion that liberty is the proper condition of human beings.[34] If an individual consents to being ruled by someone else, neither her equality nor her liberty are compromised, as everybody has an equal say, and no one is coerced into accepting a decision. However, in any complex society it is unlikely that the conditions for explicit consent exist. As John Simmons points out, for a consent theorist '[a] government has only authority over those citizens who have granted that authority through their consent, and only a government which has authority over all its citizens is legitimate.'[35] This is clearly a condition which is almost impossible to obtain, in particular in divided post-conflict societies. It raises the question whether in practice consent is a useful source of political authority.

Despite this caveat, expressions of consent have been central to the attempts to establish the authority of the three administrations analysed here. The transitional administration in BiH has relied most strongly on consent for its authority. The international civil and military presence and its lead agency, the OHR, were authorized by the General Framework Agreement for Peace (GFAP), or the Dayton Accord, which was signed by all parties involved in the conflict.[36] The emphasis on consent can be traced through the decisions of the High Representative under the so-called 'Bonn Powers', which allow him to impose and amend laws, and to dismiss any official obstructing the implementation of the Dayton Accord. These powers were granted to the High Representative by the PIC in December 1997, two years into the international presence in BiH, and are based on a reinterpretation of the High Representative's role in the Dayton Accord.[37] The preamble of each decision refers to the High Representative's authority under the Dayton Accord, implicitly invoking Bosnian consent, as represented by the agreement of all parties to the GFAP, to his authority. However, two of the parties, the Bosnian Serbs and the Bosnian Croats, did not sign the agreement themselves, instead they were represented by the FRY and Croatia respectively. Furthermore, the Bonn powers are based on a re-interpretation of the Accord by the PIC, which has been endorsed by

the Security Council[38] but which has never explicitly been consented to by the Bosnian governments or even the Bosnian people (but never been openly rejected either). Both issues challenge the legitimacy of Bosnian consent as a source of the OHR's authority.

In the cases of Kosovo and East Timor, the role of consent has only been supplementary to delegation from the Security Council (discussed in the next section), and has generally not been invoked as a source of authority by either UNMIK or UNTAET in their regulations. In the case of Kosovo, the Resolution establishing UNMIK, Resolution 1244, welcomed the acceptance by the FRY—the state holding legal title to the territory of Kosovo—of an international interim administration in Kosovo.[39] However, this consent, expressed first in the Kumanovo Agreement between the Yugoslav army and NATO on 3 June 1999, was given under duress. While not invalidating the consent, such duress, which characterizes most peace agreements signed under the threat of continued use of force, raises questions about the degree to which one should consider such consent legitimate.[40] In East Timor, on the other hand, both Portugal, the former colonial ruler over East Timor, and Indonesia, which had controlled the territory since 1975, agreed in May 1999 to transfer authority over East Timor to the UN for a transitional period in case of a vote in favour for independence,[41] and thus both gave their consent to a UN administration.

Whenever consent has been invoked as a source of authority for an international administration, it has been state consent, not explicit individual consent. Even if the concept of state consent is well established in international law and essential for the international law-making process,[42] the absence of explicit popular consent raises the important concern as to whether state consent is sufficient to create political obligations for the population. This issue is particularly problematic if one considers that it was the lack of government legitimacy in the eyes of the international community that contributed to the establishment of international administrations in the first place. However, even though this poses a problem for political theory, international law has generally considered a government as speaking for a political community if it exercises effective control over this community, even if it lacks democratic legitimation.[43] While this suggests a strong degree of sociological legitimacy of the practice of state consent, it challenges the importance of a norm of democratic governance, now discussed in more detail.

Delegation

Another process which can establish an institution's authority is delegation. In this case, an institution with authority over a particular jurisdiction grants another institution the right to exercise part or all of this authority. Thus, the

authority of an agent is derivative of the authority of the delegating agent or institution. For delegation to be a process legitimizing the exercise of power, it must clarify the scope of the delegated authority (which may not exceed the scope of the original institution's authority), and the purpose to which it is exercised. Furthermore, the institution originally exercising authority should be able to reassume authority at any time if power is not exercised towards the appropriate ends or in the appropriate way, and should hold the delegate authority accountable.[44]

In the case of international administrations, the UN Security Council can assert authority over a territory under Chapter VII and delegate this authority to a transitional administration.[45] Under Chapter VII, the Security Council also has the right to take all necessary measures to maintain or restore international peace and security, even without the consent of the affected states.[46] This has been understood to include the right to assume the governance of a specific territory under Article 41 of the Charter.[47] By becoming members of the UN, states have consented to this right of the Security Council if it considers a situation to be a threat to peace and security, one of the fundamental values of contemporary international society.[48] The Council can then delegate these powers either to the Secretary-General, subsidiary organizations, or to states to enforce the measures decided on by the Council.

By passing Resolution 1244 and invoking Chapter VII of the UN Charter, the Security Council asserted its authority over Kosovo and delegated it to the international interim administration. Thus, the Council

> Authorises the Secretary General, with the assistance of the relevant international organizations, to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions.[49]

In East Timor, the Security Council, in Resolution 1272,

> [a]cting under Chapter VII of the Charter of the United Nations, *Decides* to establish, in accordance with the report of the Secretary General, a United Nations Transitional Administration in East Timor (UNTAET), which will be endowed with overall responsibility for the administration of East Timor and will be empowered to exercise all legislative and executive authority, including the administration of justice.[50]

As in the case of Kosovo, the Security Council asserted authority under Chapter VII and delegated it to the international administration. Both UNMIK and UNTAET explicitly base their authority on the Security Council mandates in the regulations they have issued.

Chapter VII resolutions are the most important mechanism for granting authority to international administrations, as most of them have been established by the UN. Even if they have not had explicit resolutions establishing their existence, as in BiH, they have still been endorsed in some form by a Chapter VII resolution.[51] However, the dominance of a few states over proceedings in the Security Council, and the special veto rights of the five permanent members, challenge the legitimacy of the Council's power.[52] Even if states have consented in general to the Security Council's powers under Chapter VII to determine the existence and nature of a threat to peace and security, to order provisional measures, and to authorize enforcement measures, a further decision by the Security Council is needed in each case, which is not based on explicit consent by all members. Because of the possibility of a veto by the permanent five members of the Security Council, it is predominantly their consent that counts during these decisions, not that of the members at large, against whose wishes action can be taken. Furthermore, decisions under Chapter VII are not always the result of the consent of the permanent five members, as they can abstain and as a result action can be taken without their explicit approval, as in the case of Resolution 1244 establishing UNMIK, where China abstained. This problem is not confined to the authorization of international administrations, but to the use of the Security Council's Chapter VII powers in general. However, to what extent this undermines the authority of the Security Council is beyond the scope of this analysis.[53]

The Maintenance of Peace and Security

In addition to processes of authorization, authority is justified by the ends towards which it is exercised. One of the most important ends of political authority is the provision of security, reflected in Thomas Hobbes' assertion that,

> The office of the sovereign, be it a monarch or an assembly, consisteth in the end, for which he was trusted with the sovereign power, namely the procuration of the safety of the people, to which he was obliged by the law of nature . . . [54]

The maintenance of peace and security is one of the fundamental social purposes of international society[55] and has been codified in Chapter VII of the UN Charter, granting the Security Council the right to take measures to maintain or restore international peace and security. One aspect of the establishment of all three international administrations discussed here has been the link between their authority and the purpose of maintaining peace and security.

Thus Resolution 1031, endorsing the establishment of an international presence in BiH and the appointment of the first High Representative, is a

Chapter VII resolution. Similarly, the resolutions establishing UNMIK and UNTAET, Resolutions 1244 and 1272 respectively, have been passed under Chapter VII. The invocation of Chapter VII with respect to the three administrations is indicative of a change in the interpretation of 'peace and security' by the Security Council since the end of the Cold War, deeming events and developments that were previously considered to be within the domestic jurisdiction of states to be of concern to the Security Council.

Human Rights and Democratization

The second social purpose legitimizing the authority of international administrations is the promotion of human rights and democracy. All three administrations have been established in the light of extensive violations of human rights during the preceding conflicts. References to human rights norms feature prominently in the mandates of the administrations, committing them to promote and protect human rights.

In BiH, the GFAP includes very extensive provisions for human rights: an entire Annex of the Agreement is devoted to them, listing all the fundamental human rights and freedoms applicable in BiH.[56] It also establishes a Human Rights Ombudsperson appointed by the OSCE, and a Human Rights Chamber largely constituted of international members appointed by the Council of Europe (COE), and which are mandated to follow up claims of human rights violations, decide on them, and impose penalties on offenders. Furthermore, the constitution of BiH, which is part of the GFAP, lists all the human rights agreements applicable in BiH.[57]

Resolution 1244 mandates UNMIK not only to support humanitarian operations and refugee return, which both have bearings on human rights, but also explicitly to protect and promote human rights, without, however, specifying the nature of these rights.[58] The importance of international human rights standards is emphasized in the first regulation issued by UNMIK, outlining the scope of the interim administration's authority in Kosovo, which states that all persons performing public duties or holding public office shall observe internationally recognized human rights standards.[59] However, only five months later, in December 1999, did UNMIK specify which human rights legislation is applicable in Kosovo.[60] In the case of UNTAET, Regulation 99/1 on the authority of the transitional administration demands the observance of international human rights standards by persons holding public office, and it explicitly lists the applicable human rights agreements UNTAET is expected to promote.[61]

In addition to human rights, international administrations have promoted democracy as the most appropriate form of governance in post-conflict

societies. The three international administrations have been explicitly mandated to establish democratic governments,[62] and have implemented democratic models of organizing society and relations between state and society in their statebuilding activities.[63] As Gregory Fox has argued, international law has increasingly identified democracy as the preferred form of national governance, and international organizations like the UN, the EU, or the OSCE, who are among the main organizations involved in statebuilding activities, have all expressed their commitment to democratic governance.[64] The promotion and protection of democracy can therefore be considered to be an important purpose of international society, though the nature of democracy, and the means for promoting it, remains contested.

However, there is a problem with the purported universality of international society's social purposes through which authority is legitimized. The broad interpretation by the agencies of international society, such as the Security Council, of 'threats to peace and security' to include the gross violation of human rights has not been unreservedly endorsed by all states, in particular major non-western states such as China, Russia or India, who have been wary of the UN's 'new interventionism' since the 1990s. While there seems to be agreement that genocide and crimes against humanity constitute such a threat,[65] there is no such agreement on the violation of civil and political rights, or of the right to democracy.[66] Thus, the Indian ambassador to the UN stated at the Security Council's discussion of the NATO air campaign against Yugoslavia, in March 1999:

> Those who continue to attack the Federal Republic of Yugoslavia profess to do so on behalf of the international community and on pressing humanitarian grounds. They say that they are acting in the name of humanity. Very few members of the international community have spoken in this debate, but even among those who have, NATO would have noted that China, Russia and India have all opposed the violence that it has unleashed. The international community can hardly be said to have endorsed their actions when already representatives of half of humanity have said that they do not agree with what they have done.[67]

The agreement on common norms therefore seems thinner than a mere look at the language of the resolutions suggests. It raises the question as to whether the commitment to civil and political rights and democracy is universal or limited to a western community of values once it goes beyond a limited canon of human rights established as *ius cogens*,[68] such as the prohibitions against aggressive use of force, genocide, slavery, torture, and apartheid.[69]

The Provision of Government

Finally, the exercise of governmental authority by international administrations is frequently justified with the need for government. When the

international community became involved in the administration of the three territories discussed here, they all faced significant problems of governance. In BiH, the society and its political class were deeply divided and antagonistic towards one another after almost four years of war, and cooperation in the common institutions has been difficult to achieve.[70] In addition to the problem of political division along ethnic lines, the local administration lacked the capacity to develop and implement policy.[71] The lack of progress with regard to the implementation of the GFAP has been stated regularly by the international community as a reason for the expansion and extension of the mandate of the international presence in BiH, in particular for the extension of the High Representative's powers in 1997.[72]

In Kosovo and in East Timor, functioning institutions of government were lacking after the withdrawal of the Serb and Indonesian authorities respectively. Furthermore, in the case of East Timor, the conflict preceding UNTAET's deployment had led to the destruction to most of the administrative infrastructure in the country. Both UNMIK and UNTAET were explicitly tasked to provide for interim or transitional administration in the light of these capacity problems.[73] When justifying the scope of their authority, both administrations have emphasized the purpose of establishing and maintaining the transitional administration over the territories, in particular the building of political institutions to which authority can be transferred.[74]

The provision of government as a source of authority, however, is qualified in two ways. First, it is qualified by the norm of self-determination, requiring that government is ultimately *self*-government. Just as the norm of self-determination of peoples de-legitimized colonial rule,[75] it constrains the policies of international administrations, who need to legitimize their authority with the establishment of institutions for self-government. The provision of government can therefore only temporarily legitimize international authority, for a transition period until a territory has the political institutions to govern itself.

Second, it is qualified by the degree of effectiveness of international administrations as governments.[76] If international administrations do not markedly improve the development and implementation of public policy and the provision of public services, it is hard to see how they could justify the fact that they exercise political authority instead of a locally elected, democratically legitimized government. A closer analysis of the governance record of international administrations, however, suggests that often they have not been very effective as governments, predominantly for two reasons.

The first reason is a lack of resources and insufficient planning. In almost all cases of international administration since the end of the cold war, missions had to be established quickly in the wake of a peace agreement, and consequently planning was frequently ad hoc and conducted in a very short

time.[77] Thus, with the organizational structures still being established and staff being recruited, often the presence of international administrations in the early months hardly went beyond the principal cities.

The second reason for the lack of effectiveness has been insufficient information about local conditions, customs, and circumstances, which has compromised the ability of international administrations to develop and implement public policy. One example for this is the privatization process in Kosovo, where the lack of knowledge about the unique Yugoslav system of property rights, about the number of socially owned enterprises (SOEs), and about ownership claims to them stalled both the drafting of legislation and later the implementation of the privatization process, while competition over the control of these assets continued outside the legal system.[78]

Similarly, the lack of knowledge about local conceptions of justice in East Timor, and about how the local population accesses the judicial system, hindered any engagement of UNTAET with the traditional legal system, to integrate it into the formal legal system. As a consequence, the judicial system in East Timor was dysfunctional when UNTAET ended and authority was handed over to Timorese institutions in 2002. Even after two more years of international support for the judiciary, little improved. In 2003–4, the four district courts barely functioned, and almost a quarter of detainees in East Timor's prisons were in jail under expired warrants, as there was no capacity to conduct the trials. Between October 2001 and June 2003, the Court of Appeal did not sit because of a lack of judges. In the absence of a functioning formal legal system, the majority of the population continues to rely on traditional justice mechanisms, with often problematic human rights implications.[79]

In BiH, where more than half of the population is thought to live in the countryside and engages predominantly in subsistence agriculture, the OHR over ten years did not develop a rural development strategy,[80] which it itself conceded to be central to Bosnia's economic and political stability.[81] The detailed agricultural statistics necessary to develop such a policy are lacking, and in contrast to neighbouring countries with similar structural problems, like Bulgaria or Romania, which with EU support have developed extensive rural development plans, the OHR's efforts by 2005 had culminated in a public information campaign with television and radio broadcasts, and a 50-page booklet on how to make profits in agriculture, rather than a comprehensive development effort.[82]

Given that international administrations base their authority claims on their expertise and their effectiveness in addressing governance problems, this lack of effectiveness as a consequence of insufficient planning and insufficient capacity to collect and manage the information necessary for public policymaking strongly compromises these claims. Importantly, for the local

populations affected by international administrations, effectiveness of government is one of the key sources of authority. Understandably, they are more concerned about public security, running water, electricity, healthcare, and unemployment than about discussions on the authority of the Security Council to delegate its powers to an international administration.

All five sources of international authority have been invoked by the international community to justify the authority exercised by international administrations. While no single source seems sufficient to legitimize international administrations on its own, the three administrations rely most heavily on the procedural sources of consent and delegation. While both authorization processes of consent and delegation are subject to a range of challenges as outlined above, they also have a strong sociological legitimacy, reflected in well-established international practice and the absence of serious challenges to these rights. The provision of government, on the other hand, is qualified by the right to self-determination and the limited effectiveness of international administrations as governments. Similarly, the legitimacy of interventions protecting a broader set of human rights beyond the prohibition of genocide and crimes against humanity, in particular interventions promoting democracy or civil and political rights, is consistently challenged by a range of members of international society. They are thus only invoked to supplement and strengthen the authority based on the two procedural sources of consent and delegation.

Accountability and Authority

As discussed in the previous chapter, authority cannot be absolute and has to be held accountable: the moral counterpart to authority is responsibility towards those over whom authority is exercised. Accountability, while not a source of authority, is therefore a condition for authority and needs to be addressed in this context.

One of the characteristics of international administrations is that they have a distinct spatial identity separate from the communities over which they govern, and that they are not elected by the local community but established by external institutions, such as the Security Council. As Simon Chesterman has remarked, the international administrations in Kosovo, BiH, East Timor, and elsewhere do not depend in any meaningful way on local individual consent or ownership by the people over whom authority is exercised.[83] The lack of any local control means that the democratic dimension of accountability, '... the right of persons who are affected by the actions or decisions of officeholders or leaders to renew, rescind, or revise the mandates of those who exercise

authority',[84] is missing. On the one hand, this absence of democratic accountability is problematic, as one of the aims of the international community is the establishment of democratic political institutions. The lack of democratic accountability can therefore set a bad precedent for local politicians and has the potential to undermine the transition process towards democracy. On the other hand, the reason why an international administration is established in the first place is to foster self-government which has been deemed impossible in the wake of conflict, as legitimate local political institutions do not exist. Democratic accountability, or control over the ends to which authority is exercised by those affected by it, seems impossible to combine with the mandate of international administrations.

If democratic accountability is impossible to establish, what about accountability through agencies mandated to oversee and sanction the actions and omissions of a transitional administration, either vertically to a 'principal' like the UN Security Council, or horizontally, to independent agencies?[85] To the extent that such institutions exist, they are mostly outside the territory over which an international administration exercises authority. In the case of UN-established administrations like UNMIK and UNTAET, it is the Security Council and the UN Secretariat which exercise a degree of vertical accountability, through reporting requirements to the Council (normally three- or six-monthly), or through bureaucratic oversight by the Secretariat.[86] That this accountability structure can lead to conflicts with local actors, who pursue different interests, is evident from the experience of the privatization laws in Kosovo, discussed in Chapter 4. It is also not necessarily particularly effective, as in particular the Security Council is generally more concerned with the general developments and strategies than with the details of the day-to-day administration. The OHR in BiH also reports to the Security Council, as well as to the European Parliament and the PIC, which, however, has not met since 2000. Instead, the OHR is predominantly accountable to the PIC Steering Board, composed of the G8 states, Turkey, and the EU Presidency. In November 2000, the Constitutional Court in BiH asserted the right to review legislation imposed by the High Representative, and while it has reviewed several laws, it cannot review decisions of the High Representative to dismiss officials from office.[87]

The weakness of these accountability structures was exposed during the summer of 2004. At that time, the COE's Parliamentary Assembly concluded in its resolution on democracy in BiH that

> The scope of the OHR is such that, to all intents and purposes, it constitutes the supreme institution vested with power in Bosnia and Hercegovina. In this connection, the Assembly considers it irreconcilable with democratic principles that the OHR should be able to take enforceable decisions without being accountable for them or obliged to justify their validity and without there being a legal remedy.[88]

The Assembly even questioned whether BiH still qualified for membership in the COE, not because of the undemocratic practices of BiH's own political institutions, but in the light of the High Representative's powers and the way in which they were exercised.[89]

Not a week later, the High Representative dismissed 59 Serb officials, all members of the Srpska Demokratska Stranka (Serb Democratic Party) (SDS), the largest party in the Republika Srpska (RS), blocking individuals' and companies' bank accounts, and transferring public funds for the party to other institutions. The reason stated by the High Representative was that 'we cannot be confident that the party is no longer providing financial assistance to its indicted founder, Radovan Karadzić.'[90] However, no evidence for such a link was ever provided by OHR, and the officials removed from office were not accused of being individually involved in protecting or supporting Karadzić. Instead, it was merely their association with an institution accused of corrupt and non-transparent financial practices, as well as tax evasion, that were invoked to justify their dismissal from office, without any legal remedy.

The existing institutions of accountability in the three administrations discussed here offer those subject to their authority little influence over their policies, and little judicial recourse. All three administrations have established Ombudspersons,[91] but their rulings have only advisory character.[92] In the words of the Ombudsperson in Kosovo: 'The people are . . . deprived of protection of their basic rights and freedoms three years after the end of the conflict by the very entity set up to guarantee them.'[93] This lack of accountability undermines the authority of international administrations.

Liability of International Administrations

Liability, the legal responsibility for the consequences of one's actions, is a special form of accountability. The law on international organizations has generally established that international organizations, as they have legal personality, can be made liable for their actions under international law, under the domestic laws of the states they operate in, and under their own internal regulations.[94] Thus, also international administrations can be liable for damages they cause through their activities.

To protect themselves against liability claims, international organizations have generally invoked immunity for their staff, and argued that immunity is necessary for the exercise of their functions in a sovereign state, to be protected against interventions from the host state. The principle of immunity is well established in international law, and enshrined in the Vienna Convention on Diplomatic Relations,[95] the UN Charter,[96] and the Convention on Privileges and Immunities of the United Nations.[97] All three international administrations analysed here have claimed immunity for their staff, ranging

from functional immunity for acts performed in their official capacity, to full immunity for any civil or criminal act performed in the respective territory.[98]

As Frederick Rawski has argued, the claim to immunity by international administrations is conceptually problematic, for several reasons. First, the logic underlying the concept of functional immunity, that the sovereign state in which an international organization operates does not interfere with the organization's activities, cannot be applied to international administrations who exercise sovereign functions, and in several cases have control over the executive organs of the state. International administrations do not need to be protected against themselves. Second, the claim to immunity is incompatible with the mandate of international administrations to establish democratic institutions and the rule of law, as it removes international officials from any democratic and legal control. Finally, such immunity violates an important human right, namely the right to a remedy.[99] Until 2005, officials and politicians dismissed by the High Representative in BiH, for example, had no legal remedy available to appeal against such a decision. This underlines the argument that the lack of accountability undermines the authority of international administrations, made earlier in this chapter.

However, immunity does not put into question the principle of liability, but only its implementation. Thus, international administrations continue to have an obligation to compensate for damages, even if liability claims cannot be enforced.[100] The Convention on the Privileges and Immunities of the UN explicitly recognizes this, and requires the UN to have appropriate modes of settlements for disputes.[101] In cases of serious crimes, such as murder, rape, or child abuse, immunities have normally been waived by the head of the mission.[102] In addition, international administrations have generally established Ombudspersons, Boards of Inquiry, or Claims Commissions. However, as these institutions are normally only advisory, and their rulings have no binding character, they are insufficient to protect the right to remedy of persons bringing liability claims against international administrations. They therefore do little to strengthen the authority of international administrations.

INTERNATIONAL ADMINISTRATIONS IN INTERNATIONAL SOCIETY

This chapter analysed the development and the role of international administrations in international society. The brief historical overview of international administrations since the end of the First World War suggests that they have been a feature of international society throughout the century, but that the purposes for which they were established have changed, together with the legal

and normative framework within which they have exercised their authority. One can distinguish between three different periods of international administration: the League-mandated administrations of the interwar period, the cold war decolonization efforts by the UN, and the post-cold war statebuilding missions. In addition to being chronologically distinct, they embrace different normative frameworks, reflecting a distinction between civilized and uncivilized communities in the case of the League mandates, with Wilsonian ideas of self-determination only applying to the former; decolonization and Westphalian sovereignty in the case of the cold war missions; and a broader notion of sovereignty as responsibility in the case of the post-cold war statebuilding missions.

Aspects of this normative framework are also reflected in the sources of authority which are invoked by the international community when it establishes international administrations. They emerge not only from particular processes of legitimation, but also from the social purposes to which the international community establishes these administrations, such as the broadened understanding of maintaining peace and security, democracy, and the importance of fundamental human rights norms. However, the social purposes as well as the procedures legitimizing the authority of international administrations can be challenged on a range of grounds, such as the lack of representativeness in the case of delegation and consent, the lack of universal agreement on the content of human rights, and the tension between the need for government and the right to self-determination. Given these problems, as well as the lack of accountability mechanisms in the policymaking process of international administrations, the authority of international administrations is compromised in the light of the international community's own standards. These issues inform the analysis in the case studies in Part II.

NOTES

1. Wilde defines an international territorial administration as a 'formally constituted, locally based management structure operating with respect to a particular territorial unit; it can be limited . . . or plenary . . . in scope'. Ralph Wilde, 'From Danzig to East Timor and Beyond: The Role of International Territorial Administration', *American Journal of International Law*, 95/3 (2001), 585. Chesterman describes statebuilding by transitional administrations as 'extended international involvement (primarily, though not exclusively, through the United Nations) that goes beyond traditional peacekeeping and peace-building mandates, and is directed at developing the institutions of government by assuming some or all of those sovereign powers on a temporary basis'. Simon Chesterman, 'East

Timor in Transition: Self-Determination, Statebuilding, and the United Nations', *International Peacekeeping*, 9/1 (2002), 47.

2. Wilde, 'From Danzig to East Timor', 585.
3. Ibid.
4. Ibid.
5. The CPA in Iraq (2003–4) is not considered to be an international administration, as it was not 'international' but predominantly US-run, albeit with a significant British contribution. Furthermore, it originally based its authority predominantly on occupation law, and should therefore be considered as a form of military occupation, rather than international administration. See David Scheffer, 'Beyond Occupation Law', *American Journal of International Law*, 97/4 (2003).
6. For a brief history of the free city of Danzig, see John Kurt Bleimaier, 'The Legal Status of the Free City of Danzig 1920–1939: Lessons to be Derived from the Experiences of a Non-State Entity in the International Community', *Hague Yearbook of International Law*, (1989).
7. See ibid., 71; Francis Paul Walters, *A History of the League of Nations* (Oxford: Oxford University Press, 1960), 90.
8. *Treaty of Versailles*, art. 49. See also Alan Sharp, *The Versailles Settlement: Peacemaking in Paris, 1919* (Basingstoke: Macmillan, 1991), 113–16.
9. Walters, *History of the League of Nations*, 586–98.
10. Ibid., 536–40; L. H. Woolsey, 'The Leticia Dispute Between Colombia and Peru', *American Journal of International Law*, 29/1 (1935).
11. Bleimaier, 'The Legal Status of the Free City of Danzig', 71; Sharp, *The Versailles Settlement*, 119–22.
12. Walters, *History of the League of Nations*, 89; Woolsey, 'Leticia Dispute', 96.
13. Arguably, an exception to this is the responsibility of the High Commissioner in Danzig for overseeing the drafting of the constitution for the free city. See *Treaty of Versailles*, art. 103. The High Commissioner's involvement and the League of Nation's guarantee of the constitution reflect a concern about the independence of the territory from German and Polish influence rather than doubts about its level of development.
14. See Gerrit W. Gong, *The Standard of 'Civilisation' in International Society* (Oxford: Clarendon Press, 1984).
15. For detailed discussion of the UN involvement in the Congo, See William J. Durch, 'The UN Operation in the Congo: 1960–64', in William J. Durch (ed.), *The Evolution of UN Peacekeeping—Case Studies and Comparative Analysis* (Basingstoke: Macmillan, 1993).
16. Wilde, 'From Danzig to East Timor', 588.
17. GA Res. 1752 (XVII) of 21 December 1962.
18. SC Res. 435 of 29 September 1978.
19. Simon Chesterman, *East Timor in Transition: From Conflict Prevention to State Building* (New York: International Peace Academy, 2001).
20. Hedley Bull, *Justice in International Relations: The Hagey Lectures 1983–1984* (Waterloo, Ont: University of Ontario, 1984), 2–5.

21. GA Res. 2248 (S-V) of 19 May 1967. The resolution established the UN Council for South West Africa, to be locally based in the territory, and mandated to administer the territory and organize the transition to independence. While the Council was established in 1967 and a UN Commissioner was appointed, neither went to South West Africa and administered the territory.
22. SC Res. 435.
23. See William J. Durch, 'UN Temporary Executive Authority', in William J. Durch (ed.), *The Evolution of UN Peacekeeping—Case Studies and Comparative Analysis* (Basingstoke: Macmillan, 1993).
24. See Durch, 'The UN Operation in the Congo'.
25. GA Res. 1514 (XV) of 14 December 1960.
26. Michael W. Doyle, *UN Peacekeeping in Cambodia: UNTAC's Civil Mandate* (Boulder, CO: Lynne Rienner, 1995), 27–31.
27. Ibid., 37–40.
28. SC Res. 1037 of 15 January 1996.
29. See Jelena Smoljan, 'Socio-economic Aspects of Peacebuilding: UNTAES and the Organization of Employment in Eastern Slavonia', *International Peacekeeping*, 10/2 (2003); Department of Peacekeeping Operations, Lessons Learned Unit, *The United Nations Transitional Administration in Eastern Slavonia, Baranja, and Western Sirmium (UNTAES), 1996–1998: Lessons Learned* (New York: Department for Peacekeeping Operations, 1998).
30. SC Res. 1244 of 10 June 1999.
31. SC Res. 1272 of 25 October 1999.
32. For an account of the violence preceding the establishment of UNTAET, see Ian Martin, *Self-Determination in East Timor: The United Nations, the Ballot, and International Intervention* (Boulder, CO: Lynne Rienner, 2001).
33. Simon Chesterman, *Tip-Toeing Through Afghanistan: The Future of UN State-Building* (New York: International Peace Academy, 2001), 3–6.
34. Allen Buchanan, 'Political Legitimacy and Democracy', *Ethics*, 112/4 (2002), 697–99.
35. A. John Simmons, *Moral Principles and Political Obligations* (Princeton, NJ: Princeton University Press, 1979), 71.
36. *General Framework Agreement for Peace in Bosnia and Hercegovina (GFAP)*.
37. Peace Implementation Conference, 'Bosnia and Hercegovina 1998: Self-sustaining Structures', Bonn, 9–10 December 1997, sec. XI.
38. SC Res. 1144 of 19 December 1997. The resolution *welcomes* and *expresses support* for the conclusions of the Bonn PIC, which extended the High Representative's powers.
39. SC Res. 1244.
40. Enrico Milano, 'Security Council Action in the Balkans: Reviewing the Legality of Kosovo's Territorial Status', *European Journal of International Law*, 14/5 (2003).
41. Report of the Secretary-General on East Timor, 5 May 1999, Annex I, art. 6. East Timor's population voted with an overwhelming majority of 78.5% in favour of independence, with a turnout of 97% of the registered voters. See Martin, *Self-Determination in East Timor*, 11.

42. Terry Nardin, 'Legal Positivism as a Theory of International Society', in David Maple and Terry Nardin (eds), *International Society: Diverse Ethical Perspectives* (Princeton, NJ: Princeton University Press, 1998); Bruno Simma, 'From Bilateralism to Community Interest in International Law—Bilateralism and Community Interest Confronted', *Recueil des Cours*, 250 (1994).
43. Brad R. Roth, *Governmental Illegitimacy in International Law* (Oxford: Oxford University Press, 1999), 26–30.
44. Bruno Simma and Hermann Mosler (eds), *The Charter of the United Nations: A Commentary*, 2nd edn (Oxford: Oxford University Press, 2002), 712–13.
45. Danesh Sarooshi, *The United Nations and the Development of Collective Security—the Delegation by the UN Security Council of its Chapter VII Powers* (Oxford: Clarendon Press, 1999), 16–19.
46. Art. 39 of the UN Charter states that 'The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security', where Article 41 refers to non-military action, and Article 42 to military action. More generally, Inis Claude has characterized the UN as a provider of collective legitimacy, 'a dispenser of politically significant approval and disapproval of claims, policies, and actions of states'. See Inis Claude, 'Collective Legitimization as a Political Function of the United Nations', *International Organization*, 20/3 (1966), 367.
47. Michael J. Matheson, 'United Nations Governance of Postconflict Societies', *American Journal of International Law*, 95/1 (2001); Simma and Mosler (eds), *Charter of the United Nations*, 743. For a view qualifying the right of the Security Council to establish administrations over post-conflict societies, see Frederic L. Kirgis, 'Security Council Governance of Postconflict Societies: A Plea for Good Faith and Informed Decisionmaking', *American Journal of International Law*, 95/1 (2001).
48. Christian Tomuschat, 'Die Internationale Gemeinschaft', *Archiv des Völkerrechts*, 33 (1995), 7.
49. SC Res. 1244.
50. SC Res. 1272.
51. In BiH, the Security Council '*Endorses* the establishment of a High Representative, following the request of the parties, who, in accordance with Annex 10 on the civilian implementation of the Peace Agreement, will monitor the implementation of the Peace Agreement and mobilize and, as appropriate, give guidance to, and coordinate the activities of, the civilian organizations and agencies involved.' See SC Res. 1031 of 15 December 1995, art. 26.
52. David D. Caron, 'The Legitimacy of the Collective Authority of the Security Council', *American Journal of International Law*, 87/4 (1993), 562–6; Sean D. Murphy, 'The Security Council, Legitimacy, and the Concept of Collective Security after the Cold War', *Columbia Journal of Transnational Law*, 32/2 (1994), 201.
53. For a more detailed discussion of this issue, see Caron, 'Collective Authority of the Security Council'.

54. Thomas Hobbes, *Leviathan* (Harmondsworth: Penguin, 1968), Ch. 30.
55. Thomas Franck, for example, argues that states '…join in common protective measures and institute institutional processes to secure safety, peace, and the promotion of prosperity.' See Thomas M. Franck, *Fairness in International Law and Institutions* (Oxford: Clarendon Press, 1995), 27. See also Tomuschat, 'Die Internationale Gemeinschaft', 1.
56. GFAP, Annex 6.
57. *Constitution of Bosnia and Hercegovina*, Annex 1: Additional Human Rights Agreements to be Applied in Bosnia and Hercegovina.
58. SC Res. 1244, para. 11(j).
59. UNMIK Regulation 1999/1, On the Authority of the Interim Administration in Kosovo, 25 July 1999, sec. 2.
60. UNMIK Regulation 1999/24, On the Law Applicable in Kosovo, 12 December 1999.
61. UNTAET Regulation 1999/1, On the Authority of the Transitional Administration in East Timor, 27 November 1999, sec. 2.
62. SC Res. 1244, para. 11(c); SC Res. 1272, para. 8. Article 1.2 of the Constitution of BiH, drafted by European and US diplomats at the Dayton Conference in November 1995, explicitly defines BiH as a democratic state.
63. On the notion of a right to democratic governance, see Gregory H. Fox, 'The Right to Political Participation in International Law', *Yale Journal of International Law*, 17/2 (1992); Thomas M. Franck, 'The Emerging Right to Democratic Governance', *American Journal of International Law*, 86/1 (1992); GA Res. 50/185, 'Strengthening the Role of the United Nations in Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections and the Promotion of Democratization', 22 December 1995.
64. Gregory H. Fox, 'International Law and the Entitlement to Democracy after War', *Global Governance*, 9/2 (2003).
65. Report of the High-level Panel on Threats, Challenges and Change, 1 December 2004, para. 201.
66. The contested nature of democracy is reflected, for example, in the Outcome Document of the 2005 World Summit: 'We reaffirm that democracy is a universal value.... We also reaffirm that while democracies share common features, there is no single model of democracy, that it does not belong to any country or region, and reaffirm the necessity of due respect for sovereignty and the right of self-determination.' GA Res. 60/1 of 24 October 2005, para. 135.
67. SCOR, 54th year, 3989th Meeting, 24 March 1999, 16.
68. For a critical view on this, see Mohammed Ayoob, 'Humanitarian Intervention and State Sovereignty', *The International Journal of Human Rights*, 6/1 (2002).
69. For this list of *ius cogens* and *erga omnes* rules, see Michael Byers, 'Conceptualising the Relationship between Jus Cogens and Erga Omnes Rules', *Nordic Journal of International Law*, 66/2 (1997), 219; Antonio Cassese, *International Law* (Oxford: Oxford University Press, 2001), 141; Vera Gowland-Debbas, 'Judicial Insights into Fundamental Values and Interests of the International Community', in A. S. Muller, D. Raic, and J. M. Thuránszky (eds), *The International Court of Justice: Its*

Future Role after 50 Years (The Hague, the Netherlands: Martinus Nijhoff, 1997), 335–42. Both Cassese and Gowland Debbas also include the self-determination of peoples in *ius cogens*.

70. For an account of these divisions during the first year of the international involvement in BiH, see Carl Bildt, *Peace Journey: The Struggle for Peace in Bosnia* (London: Weidenfeld and Nicolson, 1999), 272–98.
71. European Stability Initiative (ESI), *Governance and Democracy in Bosnia and Hercegovina: Post-Industrial Society and the Authoritarian Temptation* (Berlin/Sarajevo: European Stability Initiative, 2004).
72. Peace Implementation Conference, 'Bosnia and Hercegovina 1998', art. XI.2.
73. For Kosovo, see SC Res. 1244, art. 11(b). For East Timor, see SC Res. 1272, art. 2(b).
74. UNMIK Regulation 1999/1; UNTAET Regulation 1999/1.
75. Robert H. Jackson, *Quasi-States: Sovereignty, International Relations and the Third World* (Cambridge: Cambridge University Press, 1990), 82–5; Henrik Spruyt, 'The End of Empire and the Extension of the Westphalian System: The Normative Basis of the Modern State Order', in James A. Caporaso (ed.), *Continuity and Change in the Westphalian Order* (Oxford: Blackwell, 2000).
76. On effectiveness as a source of authority, see Nicolas Rose, 'Governing Advanced Liberal Democracies', in Andrew Barry, Thomas Osborne, and Nicholas Rose (eds), *Foucault and Political Reason* (London: UCL Press, 1996).
77. Conflict Security and Development Group (CSDG), *A Review of Peace Operations: A Case for Change—East Timor Study* (London: King's College, 2003); CSDG, *A Review of Peace Operations: A Case for Change—Kosovo Study* (London: King's College, 2003); Klaus Rohland and Sarah Cliffe, *The East Timor Reconstruction Program: Successes, Problems, and Tradeoffs* (Washington, DC: The World Bank, 2002).
78. See Ch. 4 for a detailed discussion of the privatization in Kosovo.
79. See Ch. 5 for a detailed account of judicial reform in East Timor.
80. Gerald Knaus and Marcus Cox, 'Building Democracy after Conflict: The Helsinki Moment in Southeastern Europe', *Journal of Democracy*, 16/1 (2005), 50.
81. OHR, 'Opening Remarks by Principal Deputy HR Donald Hays at a Bosnia and Hercegovina Agricultural Conference', Sarajevo, 10 November 2005. Available at www.ohr.int (accessed 25 January 2006).
82. OHR, 'Agriculture and Profit', Sarajevo, 31 October 2003. Available at http://www.ohr.int/ohr-dept/rrtf/pics/agriculture-campaign (accessed 25 January 2006).
83. Simon Chesterman, *You, the People: The United Nations, Transitional Administration, and State-Building* (Oxford: Oxford University Press, 2004), 152.
84. Richard L. Sklar, 'Democracy and Constitutionalism', in Andreas Schedler, Larry Diamond, and Marc Plattner (eds), *The Self-Restraining State: Power and Accountability in New Democracies* (London: Lynne Rienner, 1999), 53.
85. For a discussion of the concepts of horizontal and vertical accountability, see Guillermo O'Donnell, 'Horizontal Accountability in New Democracies', in

Andreas Schedler, Larry Diamond, and Marc Plattner (eds) *The Self-Restraining State: Power and Accountability in New Democracies* (London: Lynne Rienner, 1999).

86. Hans Correll, 'The Role of the United Nations in Peacekeeping—Recent Developments from a Legal Perspective.' Address at the Conference 'National Security Law in a Changing World, the Tenth Annual Review in the Field', 1 December 2000. On file with the author.
87. Constitutional Court of Bosnia and Hercegovina, Decision No. U 9/00, 3 November 2000, sec. II.5. The Court argued that by imposing laws, the High Representative substitutes local authorities, and consequently the law it enacts has the character of national law, which is subject to review by the Constitutional Court. Decisions to dismiss an official, however, are not a substitution of local authority, and therefore not subject to review by the Court.
88. Parliamentary Assembly of the Council of Europe, Resolution 1384, 26 June 2004, art. 13
89. Parliamentary Assembly of the Council of Europe, 'Report of the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe', 4 June 2004, para. 102.
90. 'Financial Review Reveals Abuse, Corruption, Tax Evasion in SDS', OHR Press Release, 1 July 2004.
91. UNTAET established the office of an Ombudsperson, but no regulation for it was ever promulgated, leaving it without a clear mandate and instruments to hold UNTAET or local political institutions accountable. See Chesterman, *You, the People*, 149–50.
92. The establishment of 'Ombudspersons' with all peacekeeping operations was a recommendation of the UN Secretary-General, to ensure the compliance with international humanitarian and human rights standards in UN operations: Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict, 8 September 1999, Recommendation 31. Similarly, the Department for Peacekeeping Operations concluded after an assessment of UNOSOM I in Somalia, that '*For the United Nations to successfully promote respect for human rights and good governance in collapsed states, . . . , it must demonstrate a commitment to the principles of accountability and transparency in its own work. In UNOSOM, no independent oversight existed. . . . Without such a mechanism, the United Nations was perceived by many in Somalia to be "above the law", which undercut its efforts to promote human rights.*' See DPKO, *The Comprehensive Report on Lessons Learned from United Nations Operation in Somalia (UNOSOM)* (New York: Department of Peacekeeping Operations, 1995), para. 57.
93. Ombudsperson Institution in Kosovo, *Second Annual Report 2001–2002* (Pristina: Ombudsperson Institution in Kosovo, 2002).
94. Pierre Klein and Philippe Sands, *Bowett's Law of International Institutions*, 5th edn (London: Sweet & Maxwell, 2001), 513–14.
95. *Vienna Convention on Diplomatic Relations*, 16 April 1961, art. 29.
96. *Charter of the United Nations*, art. 105.

97. *Convention on the Privileges and Immunities of the United Nations*, 13 February 1946.
98. In Kosovo, military personnel enjoy absolute immunity, and are subject only to the jurisdiction of their home states. Senior UNMIK officials (the SRSG and his deputies) enjoy diplomatic immunity from prosecution and arrest for any civil or criminal act committed in Kosovo, while the remaining civilian UNMIK personnel enjoys functional immunity for all acts carried out in an official capacity. See UNMIK Regulation 2000/47, On the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo, 18 August 2000. In East Timor, UNTAET never promulgated a Regulation outlining the privileges and immunities of its staff, but stated that the Convention on Privileges and Immunities applies to fully to UNTAET staff. See Frederick Rawski, 'To Waive or Not to Waive? Immunity and Accountability in U.N. Peacekeeping Operations', *Connecticut Journal of International Law*, 18/1 (2002), 118. In BiH, the Dayton Peace Accords grant absolute immunity for all international military personnel, and diplomatic immunity under the Vienna Convention on Diplomatic Relations to all personnel of the OHR. See GFAP, Appendix A to Annex 1A, arts 7–8, and Annex 10, art. III.4.
99. Rawski, 'To Waive or Not to Waive?' 123–35.
100. Klein and Sands, *Law of International Institutions*, 518.
101. *Convention on the Privileges and Immunities of the United Nations*, sec. 29.
102. Rawski, 'To Waive or Not to Waive?' 118–23.

Part II

Case Studies

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3

Statebuilding in Bosnia and Hercegovina

The previous section provided the methodological and theoretical framework for the assessment of policymaking by the international community. This chapter contains the first of three case studies of international statebuilding by the OHR-led administration in BiH. It analyses the influence of sovereignty norms on three aspects of statebuilding: the establishment of political and administrative institutions, the interaction between local and international actors, and the timing and nature of the transition from international to local authority.

The chapter is divided into four sections. The first section outlines the political structures both of the international community in BiH, in particular of the OHR, and of the Bosnian state, to provide an overview of the international and domestic institutions involved in the policymaking process in BiH. There are three reasons why such a discussion of the relevant domestic and international political structures is important. The first two are methodological. The chosen methodology of 'thick narrative' asks for a detailed account of the process of decision-making, and of the environment in which decisions were taken. This requires knowledge of the political structures and their functioning. In addition, a detailed analysis of the international institutions in BiH reveals the structure of the international administration and provides evidence for the conception of the international community outlined earlier—as particular states and major international organizations acting on behalf of a broader 'international community'. The third—and most important—reason for this discussion of international and domestic institutions is that it shows to what extent BiH, Kosovo, and East Timor lack empirical statehood—pointing out the structural weaknesses of their political institutions, which have been central to the justifications put forward by international administrations for their authority.

Sections 2 and 3 of this chapter contain the detailed case studies of policymaking by the international administration in BiH, exploring the content of the international community's conception of sovereignty, and the extent to which policymaking is shaped by norms associated with sovereignty. Section 2 analyses a central piece of the economic reform agenda, the reform of the payments system. Section 3 discusses the development of the civil service

law, to establish a professional state-level civil service in BiH.[1] Both cases were prominent items on the international reform agenda for BiH,[2] and were demands of the March 2000 EU Road Map, a part of the EU's Stabilisation and Association process for BiH.

The analysis of the case studies illustrates the responsibilities that the new 'standard of civilization' outlined in Chapter 1 involves. Both the aims of the international community when pushing for these reforms, and the institutions created by the reforms demonstrate the influence of the liberal conception of sovereignty on the aims of the international community with respect to statebuilding. In addition, a detailed analysis of the policymaking process serves two more specific purposes. First, it contributes to an assessment of the conditions under which the international community intervenes into the policymaking process and assumes the substantive functions of statehood itself, when local politicians are unable or unwilling to execute these tasks. Second, it shows how the international community pursues its governance and development activities, and interacts with local political institutions.

The final section looks at the implications of the analysis for the broader debate about statebuilding by international administrations and the influence of the particular conception of sovereignty as responsibility on their policies.

BACKGROUND[3]

The International Community in BiH

The extensive civilian involvement in BiH beyond humanitarian assistance originated in the GFAP, or, as it is generally known, the Dayton Peace Accord of November 1995. This Agreement ended the four-year war in BiH, that had raged between the three principal ethnic groups (Bosnian Serbs, Bosnian Croats, and Bosniaks[4]) since the dissolution of Yugoslavia, often supported by Serbia and Croatia.[5] While the GFAP contains all the elements of a 'traditional' peace agreement, such as territorial arrangements, separation of forces, and verification mechanisms, its eleven Annexes also provide the outline, or, in the words of the former High Representative Carlos Westendorp, the 'blueprint'[6] for the statebuilding exercise in BiH. The Annexes to the GFAP not only include the Constitution of BiH (Annex 4), but also form the basis for the involvement of most international organizations in BiH and assign them roles in the peace-implementation and statebuilding processes: the establishment of an international military presence (Annex 1a and b), the organization and supervision of elections by the OSCE (Annex 3), the monitoring of

compliance with human rights by several international organizations (Annex 5), UNHCR-sponsored refugee return (Annex 7), the preservation of national monuments by UNESCO (Annex 8), and the UN-organized International Police Task Force (IPTF, Annex 11). In addition, Annex 10 of the GFAP establishes the post of the High Representative and his office,[7] the OHR, to coordinate the civilian efforts of the international community in BiH.[8]

Originally both the international military and civilian involvement in BiH were envisaged for one year only.[9] In Annex 3, the GFAP determined that elections should be held as early as possible, not later than nine months after the agreement's entry into force, to 'lay the foundations for representative government and ensure the progressive achievement of democratic goals throughout Bosnia and Hercegovina'.[10] After elections and the establishment of democratically legitimized government institutions, the international presence was supposed to wind down, as United Nations Transitional Administration in Cambodia (UNTAC) had in Cambodia in 1993.[11] After the overwhelming success of the three nationalist wartime parties,[12] campaigning with virtually unchanged personnel for the narrow nationalist interests of their respective ethnic communities in the first elections in September 1996, it became clear that neither the political nor the security situation would make an international withdrawal feasible without the resumption of fighting.[13] Both the military and civilian commitment was therefore extended, first for eighteen months until June 1998, and later indefinitely, with biannual reviews of the commitment, depending on the progress in terms of implementing the GFAP.[14]

The lack of progress in implementing the GFAP agenda during 1996 and 1997 not only prolonged the international military and civilian presence in BiH, but also triggered the expansion of power of the OHR, turning it into the lead agency of the international community in BiH. Annex 10 of the GFAP places the High Representative and his organization into the centre of the civilian efforts, by affording him '…the final authority in theater regarding the interpretation of [the GFAP] on the civilian implementation of the peace settlement.'[15] At the PIC meeting in Bonn in December 1997, the PIC endorsed the High Representative's interpretation of his prerogative as the final authority regarding the interpretation of the GFAP, stating that it included the right to make binding decisions on interim measures when the local parties were unable to reach agreement, as well as other measures to enhance the implementation of the agreement and the smooth running of the common institutions. These measures include the dismissal of officials who violate the terms of the GFAP or obstruct its implementation.[16] With these so-called 'Bonn-Powers' of the High Representative—the rights to review and amend legislation, to impose legislation, and to dismiss officials obstructing

the implementation of the GFAP—and the physical expansion of the OHR, the High Representative was given the necessary resources and the authority vis-à-vis local political institutions to become the lead agency in BiH for the statebuilding efforts.

The body that extended the High Representative's power was the PIC. The PIC provides the framework for the civilian efforts of implementing the GFAP, which distinguishes the international administration of BiH different from those in Kosovo and East Timor, where the UN has provided the framework. It was established at the first Peace Implementation Conference in London in December 1995, subsuming the former International Conference on the Former Yugoslavia (ICFY), the structure within which the international community attempted to address the issues arising from the dissolution of Yugoslavia after September 1992. The PIC is composed of 55 states and international organizations that attended the ICFY and have been involved in BiH since the outbreak of the war. It is to the PIC (see Fig. 3.1) that the High Representative is formally accountable in the review conferences, not to any Bosnian institution or the UN, although he is required to report regularly to the UN Secretary-General, and the appointment of all High Representatives is endorsed by the Security Council. Until 2000, the PIC met annually to review the progress made in implementing the GFAP, and give guidance to the High Representative for the implementation strategy for the next year. However, the full PIC has not met since 2000.

More important for policymaking than the PIC is its Steering Board (PICSB). The PICSB has 10–11 members: the G8 states—the USA, the UK, Germany, France, Italy, Canada, Japan, and Russia—the EC, the EU Presidency, and Turkey, representing the Organization of Islamic Countries (OIC). The Steering Board meets several times a year at the level of political directors under the chairmanship of the High Representative, to give him political guidance and to coordinate OHR policies with the interests and policies of the PICSB members. It also designates each new High Representative, who is then endorsed by the UN Security Council.[17] In addition to these high-level meetings, the PICSB meets weekly at the ambassadorial level, to discuss day-to-day issues with the High Representative, to coordinate the responses of the international community, and to give him political guidance on the discussed issues. As the full PIC has not met since 2000, the importance of the PICSB has increased even further, for now it is the only body that formally holds the OHR accountable.[18]

It is difficult to assess the influence of the PICSB over the OHR, as the meetings are not public, and the minutes are not published. Furthermore, it seems that the influence of the PICSB on international policymaking in BiH has fluctuated over the years. On the one hand, the OHR is in a strong

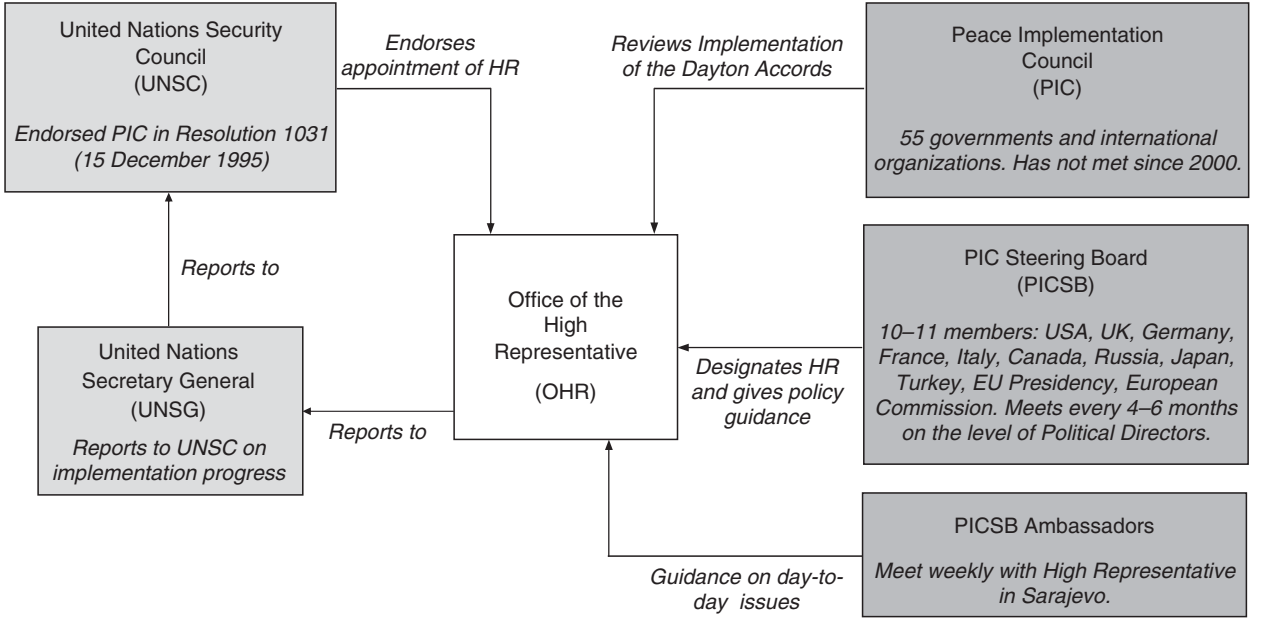

Figure 3.1. Accountability of the OHR to the international community (until 2002)

position vis-à-vis the PICSB members, as it sets the agenda of the meetings, and provides the information on the basis of which decisions are made. On the other hand, OHR policies that do not have the support of the PICSB ambassadors are not very credible to local politicians, as the case of the Civil Service Law discussed below demonstrates. Support from the PICSB is therefore essential for OHR initiatives to be successful. So even if the PICSB is sometimes seen as an ineffective decision-making body,[19] it is important for the OHR to gather support for its policies in the Steering Board capitals, to be credible vis-à-vis local politicians.

As the lead agency mandated with coordinating the international statebuilding efforts in BiH, the OHR is involved in almost all aspects of statebuilding. This is reflected in its structure (see Fig. 3.2). In 2002, it had eight departments (excluding its own administration and the press office), covering all major aspects of statebuilding: the Political Department, Economic Department, Human Rights/Rule of Law Department, Legal Department, Anti-Fraud Department, Media Development Department, Military Cell, and the OHR-led inter-agency Reconstruction and Return Task Force (RRTF).[20] The RRTF coordinated the activities of thirteen organizations and governments involved in refugee return,[21] and addressed issues such as reconstruction of housing and infrastructure and property law implementation in an integrated manner.[22] Within the RRTF, there existed more specialized inter-agency groups, such as the Property Law Implementation (PLIP) inter-agency group, to enforce the implementation of the property laws, enabling refugees to return to, or to sell their pre-war property.[23]

In addition to the RRTF, there have been several other inter-agency groups co-ordinating the efforts of the international community. The most important of these groups is the so-called 'Principals Meeting', where the heads of the major international organizations (OHR, OSCE, UNHCR, Stabilisation force (SFOR),[24] UNMIBH[25]) discuss and coordinate their efforts. Another key inter-agency body has been the Economic Task Force (ETF), chaired by the OHR economic department. The ETF, consisting of the OHR, World Bank, IMF, EC, USAID, and EU-sponsored Customs and Fiscal Assistance Office (CAFAO) has coordinated the international policies on economic reform and the disbursement of donor aid in BiH.[26] A similar coordination body existed within the field of human rights, the Human Rights Coordination Centre (HRCC), where all the agencies mandated to address human rights issues (OHR, OSCE, UNMIBH, UNHCR, OHCHR) were represented.[27] In addition to these permanent inter-agency groups and coordination mechanisms, there has been a changing number of ad hoc groups that deal with specific laws and reform projects, some of which will be discussed in detail in the case studies below.

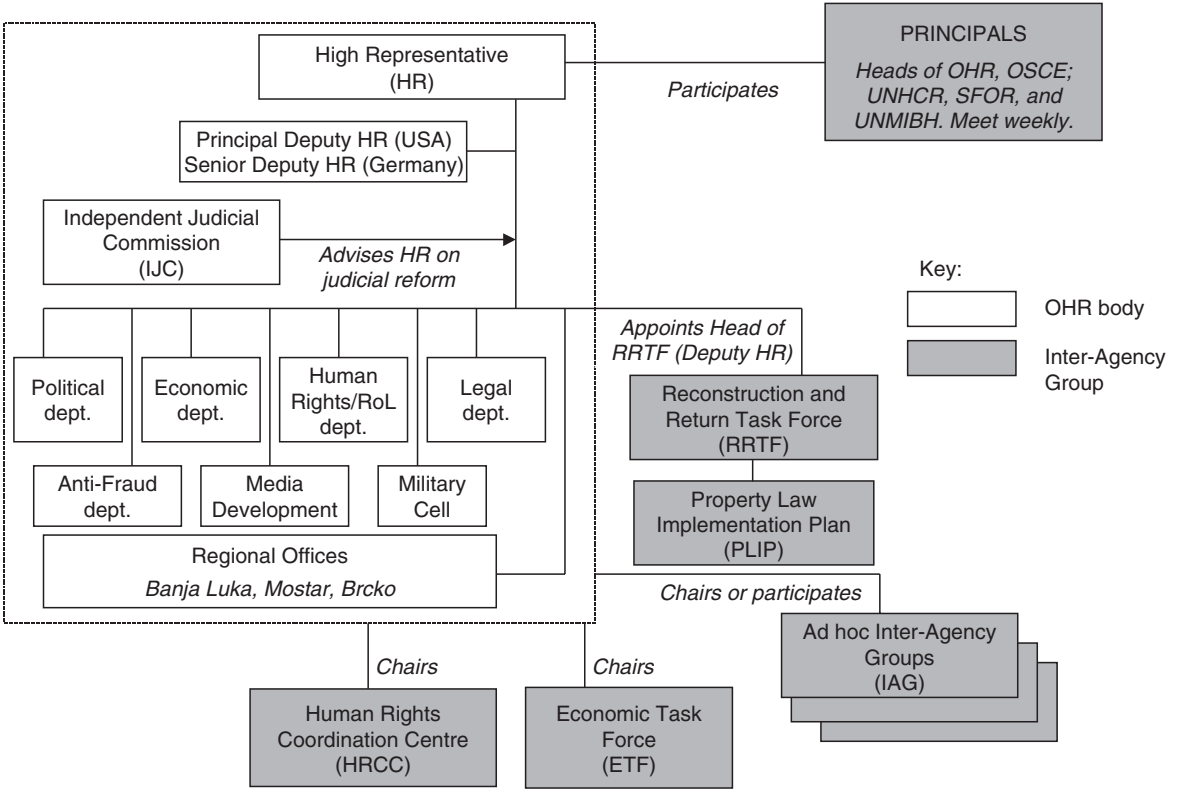

Figure 3.2. The OHR system (until 2002)

This brief analysis of the structure of the international community and the OHR in particular exposes two key characteristics of the international community that are important for policymaking. First, it demonstrates the high decentralization, if not fragmentation of the international community, that makes extensive coordination between the different agencies necessary. However, the lack of formal authority of the OHR over other international organizations participating in the statebuilding process has made this coordination more difficult. This absence of a central authority in the international administration of BiH has generally been considered as one of its weaknesses, and informed the decisions to establish more hierarchical structures in the international administrations in Kosovo and East Timor.

Second, it shows the strong influence of the West in the international institutional framework in BiH. This is reflected in the centrality of several key organizations—OHR, OSCE, and SFOR—the 'Principals', who are represented in most inter-agency groups, and of several states, in particular the US and the leading Western European states. If one looks at the international personnel of the Principals, one sees that it is recruited predominantly from North America and Western Europe—the Steering Board members. In the case of the OHR, for example, of the roughly 230 international members of staff in 2000, about 150 were seconded by PIC governments (predominantly from the USA and Western Europe), and about 80 were contracted,[28] again mainly from Western countries. By January 2004, this number was reduced to 108 internationals, 35 of whom were seconded, and 73 contractors.[29] The predominance of Western international officials is only one reason for the strong influence of the Steering Board members, especially the informal 'Quint Group' (France, Germany, Italy, UK, and USA). As shown above, these states also have a certain degree of control over the OHR's policies through the PICSB meetings. Furthermore, they have strong financial leverage as they are among the major donors,[30] as well as being the largest troop contributors to SFOR, and in command of the three Multinational Divisions that made up SFOR.

The international community in BiH is therefore not 'international' but rather 'Western', and not as representative of a society of all states as it implicitly claims, and whose moral authority it invokes. This raises important questions about the concept of sovereignty held by the international community in BiH. To what extent does the standard of civilization embodied in its concept of sovereignty reflect European or Western notions of what legitimizes the exercise of authority necessary for the possession of empirical statehood? If neither the actors representing the international community in BiH, nor the values they hold, are universal, what does this suggest about the authority of the OHR-led international administration in BiH?

Political Institutions of BiH

However, policy in BiH is not made by the international community alone, but also by local political institutions and through interaction with them. The institutional fragmentation along ethnic lines during the four-year war and the perceived necessity of building common institutions at the central state level, reconciling and uniting the three warring ethnic groups, left BiH with a highly complex context within which to build political institutions (see Fig. 3.3). The constitution, which is part of the Dayton Peace Agreement, defines BiH as consisting of two entities,[31] the Bosniak and Croat Federation of Bosnia and Hercegovina (FBiH) and the Serb RS, held together by a set of common central institutions. Since March 1999, a third entity has effectively been created by the international community with the arbitration decision over the contested territory around the strategically important town of Brcko in northern BiH, which established the District of Brcko, held in 'condominium' by both the RS and FBiH.[32] However, the district is not under the jurisdiction of either entity, but has independent political institutions under the final authority of an American, OHR-appointed Brcko Supervisor.

BiH's federal system has two striking characteristics. First, the Dayton constitution left political authority highly decentralized, with the common central institutions at the state level very weak vis-à-vis the entities. Second, this devolution is highly asymmetric, as authority in the FBiH is further devolved to ten Cantons, which in each case are mostly dominated by a single ethnic group, while in the RS authority is centralized in the entity government. The reasons for establishing federal systems in BiH and again at the lower level of the FBiH were the same—to avoid ethnic conflict, and to gain the support the three principal ethnic groups and warring parties for the Peace Agreement at the negotiations in Dayton in 1995.[33] From 1992 onwards the international community had seen the conflict in BiH as ethnically based, and thus supported a solution based on a power-sharing agreement in which territorial control was divided among the three principal ethnic groups.[34] This 'one-state' approach was reflected in all the peace plans preceding the Dayton negotiations, which suggested the division of BiH into separate cantons or regions each dominated by a single ethnic group,[35] as well as in the Washington Agreement establishing the Federation of BiH and its cantonal structure.[36] None of these peace plans ever questioned the territorial integrity and the external borders of BiH. This commitment to the territorial integrity of BiH was influenced by the decisions of the Badinter Commission in 1991–2 to declare Yugoslavia to be a state in dissolution[37] and to establish the borders of the former republics of Yugoslavia as international borders,[38] and by the commitment of the international community to the inviolability of borders as enshrined in the Helsinki Final Act.

As the German Foreign Minister Hans-Dietrich Genscher explained in a letter to the UN Secretary-General in December 1991:

> I may note that for Europe, after the Final Act of Helsinki and the Charter of Paris, the borders are inviolable and cannot be changed by force. The EC has therefore demanded respect for the inner and external boundaries of Yugoslavia.[39]

The formal distribution of authority under the GFAP has strongly favoured the entities over the common state institutions. The constitution assigns all responsibilities that are not explicitly mentioned as responsibilities of the common institutions to the entities.[40] The tasks of the common institutions were originally limited to foreign policy (excluding defence policy), foreign trade policy, customs policy, monetary policy, immigration and refugee matters, regulation of common and international communication facilities, international and inter-entity criminal law enforcement, regulation of inter-entity transportation, and air traffic control.[41] This left the entities with their own economic, cultural, and educational policies, their own social security and health care systems, different judicial systems, and control over their own police forces. Most striking, separate armies continued to exist in each entity: the Bosnian Serb army (VRS)[42] in the RS, and the Bosnian Croat army (HVO)[43] and the predominantly Muslim army (ABiH)[44] in the FBiH.[45] The existence of two armies in the FBiH—even though they are nominally under a joint command—hints at the mirroring of the institutional peculiarities and fragmentation, that characterize BiH as a whole, in the FBiH as well, where many of the government's tasks (such as educational policy, or control over the police) are devolved to the cantons. In addition to their limited responsibilities, the common central institutions have long been constrained even further by the inability to levy taxes, and an almost complete dependence on the entities for funding.[46]

The Structure of the Common Institutions

The common institutions were established to enable BiH to function as a single state. The state constitution created five common institutions: the two executive institutions of the Presidency and the Council of Ministers, bicameral Legislature, Constitutional Court, and Central Bank.[47] Both the Central Bank and the Constitutional Court have significant international participation. The first governor of the Central Bank was an international official appointed by the IMF.[48] The Constitutional Court consists of nine judges, two appointed by the RS National Assembly, four appointed by the Federation House of Representatives, and three international judges appointed by the President of the European Court of Human Rights.[49] The Court has been increasingly active in reviewing legislation. Since the decision on the

'functional duality' of the High Representative in November 2000, it has also asserted and exercised the right to review the constitutionality of laws imposed by the High Representative.[50]

Two decisions of the Constitutional Court have had major implications for statebuilding in BiH. First, on 14 August 1999, the Court found the dual chairmanship of the Council of Ministers (two chairmen and one deputy, each from a different ethnic group) to be unconstitutional, as the constitution only provides for a single Chair for the Council of Ministers.[51] As a result, a new law on the Council of Ministers was passed in April 2000, reforming the structure of the main executive institution, among other things by doubling the number of ministries from three to six.[52] Thus, for the first time the scope of the authority of the common institutions was expanded vis-à-vis the entities.

Second, in July 2000 the Court passed the 'Constituent Peoples' Decision' with the votes of the two Bosniak and the three international judges against the two Croat and two Serb judges. The decision held that everybody who was a citizen of BiH was also a citizen of both entities, and that no individual of any ethnic group should be prevented from exercising its rights in either entity.[53] The decision triggered far-reaching constitutional changes in the two entities with the aim of guaranteeing the representation of all ethnic groups in the political institutions of the entities. Two constitutional commissions were established by the High Representative and the entity parliaments to review the entity constitutions and to suggest and draft the necessary amendments.[54] While this decision could have been used to undermine the requirement for ethnic parity in BiH's political institutions, it instead extended the requirement for parity into institutions where it previously did not exist. Thus, the RS was asked create a second chamber of parliament in which all three ethnic groups would be represented on the basis of parity, and positions for directly elected vice presidents had to be established:[55] a Serb in the case of the FBiH, and both a Croat and a Bosniak in the case of the RS. As the entities, especially the RS, were at best reluctant to implement these commitments, the High Representative imposed a range of constitutional changes in 2002 and 2003.[56] Rather than using the opportunity to reduce the importance of ethnicity in the Bosnian institutions, the OHR's decision on implementing the Constitutional Court's ruling entrenched ethnicity even further.

The other three common institutions have no international membership. The three-member Presidency—one Bosniak and one Croat elected from the FBiH, and one Serb elected from the RS—is the highest institution of the state of BiH. The chair of the Presidency rotates between the three members. Any member of the Presidency has the right to veto any decision on the basis that it violates the vital interests of his or her entity, a vote which has to be sustained by a two-thirds majority in the RS parliament, if the Bosnian Serb Presidency

member vetoes a decision, or by a two-thirds majority of the Bosniak or Croat delegates in the House of People of the Federation, if the Bosniak or Croat member respectively vetoed it.[57] As nationalist parties dominated the Presidency as well as both parliamentary chambers until the 2000 elections and all vetoes were sustained, all decisions effectively had to be consensual. Consequently, very little legislation was passed until then.

Clearly subordinated to the Presidency in the constitution is the other executive institution, the Council of Ministers, the government of BiH.[58] Since the adoption of the Law on the Council of Ministers following the Constitutional Court decision of August 1999, the Council has six Ministries: the Treasury of the Institutions of BiH, Foreign Ministry, Ministry of Foreign Trade, Ministry for Human Rights and Refugees, Ministry of Communications and Civil Affairs, and Ministry for European Integration. Until the non-nationalist 'Alliance for Change' government took office in 2001, the chairmanship of the Council rotated among the six ministers every six months. After that, rotation was abandoned by the government. Independent of this, the governmental system remains characterized by the demands for ethnic parity. Each ethnic group has an equal number of ministers in the Council, and every minister has two deputies from the other ethnic groups. Decisions within the ministries are taken on a consensual basis, and if this is not possible, the issue is referred to the Council of Ministers.

The need for consensual decision-making that exists in these three common institutions, either formally (as in the Presidency or the Parliament), or informally (as in the Council of Ministers), means that the potential for obstruction is very high. Indeed, as long as the wartime parties were in power on the central state level until January 2001, the record of the institutions was less than impressive. Both chambers of Parliament spent most of their time debating their agenda, and very little legislation was passed. Furthermore, the Council of Ministers, in addition to the problems of ethnic division, lacked the administrative capacities to function effectively as a government and to ensure the passage of legislation through Parliament; for a long time it relied on extensive administrative support from the OHR.[59] As a result, most important laws have been prepared and often imposed by the High Representative.

The laws imposed by the High Representative included the creation of a common licence plate that does not betray the ethnicity of the driver—an essential reform to guarantee the fundamental right of freedom of movement;[60] the decision on the law on citizenship of BiH (establishing a citizenship of BiH rather than different citizenships of the entities),[61] and the establishment of the state-level border service.[62] Between November 1997 and December 2005, the High Representative made more than 500 decisions,

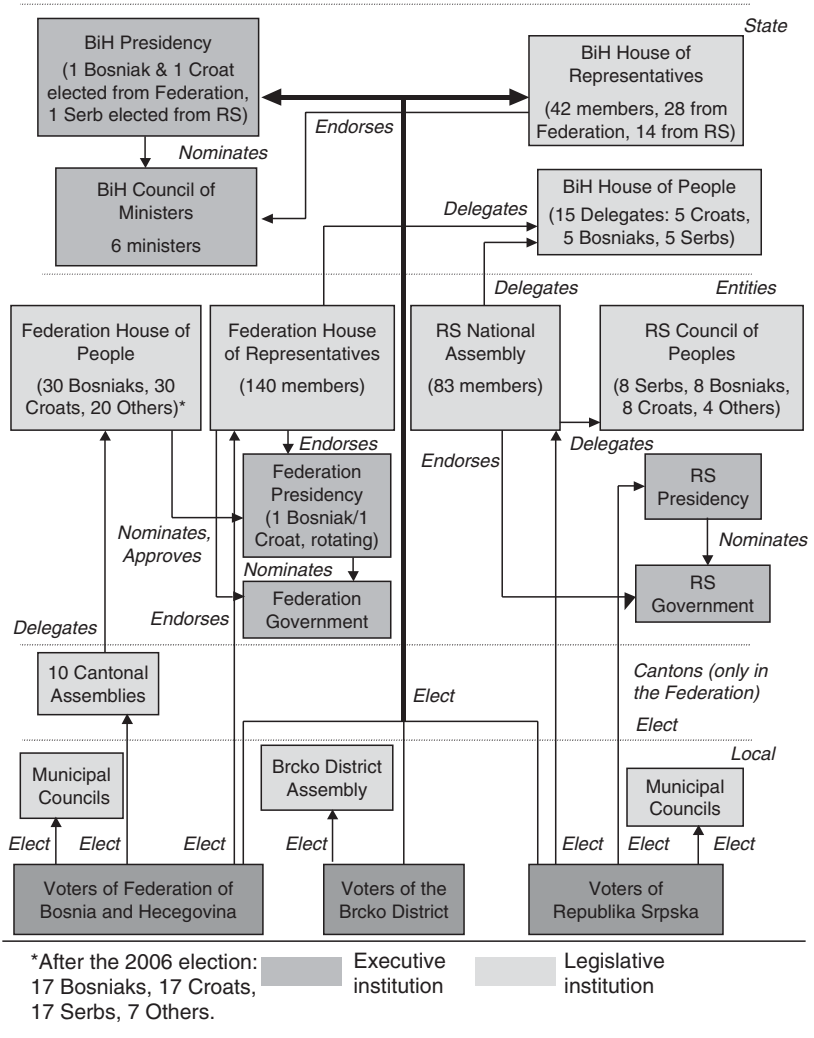

Figure 3.3. BiH legislative and executive structures

imposing laws and appointing officials to public bodies, covering issues such as economic reform, media development, property laws and refugee return, and judicial reform (see Fig. 3.4). During the same period, more than 180 officials and politicians were dismissed from office by the High Representative.

With the arrival of the Alliance for Change, the legislative record of the government improved and there were only a few impositions of laws in 2001, predominantly in the field of property legislation and refugee return issues,

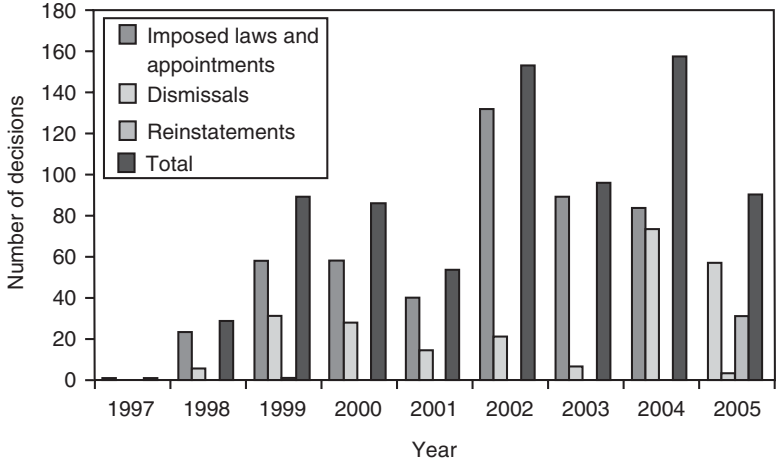

Figure 3.4. Decisions of the High Representative
Source: OHR

and none of them were major laws. In May 2002, however, just before the arrival of a new High Representative, Lord Ashdown, the former leader of the British Liberal Democrat Party, a large number of laws was imposed in order to lighten the burden for the new High Representative in the early months of his new term. As one can see in Figure 3.4, the imposition activity of the OHR remained high after May 2002. This reflects a more ambitious agenda of the international community to go beyond the Dayton Agreement provisions to create a single state in BiH, and a greater willingness to impose the necessary institutional framework.[63] In the words of Lord Ashdown,

> Dayton is vital. Without it there would be no peace. But Dayton is the floor, not the ceiling;[64]

and

> the choice is not *whether* to reform. But how *fast*, how *soon* and, above all, who will drive the process of reform—you or me. … The more you reform, the less I will have to do. The less you reform, the more I will have to.[65]

The Structure of the Entities

As already discussed, the extensive devolution of power to the entities has granted them authority over most policy areas. However, their institutional structure, and thus the distribution of authority within them, is highly asymmetric.[66]

In the RS, power is centralized in the entity government. The only administrative units existing below the government are the municipalities, and relations between the entity and local governments are heavily dominated by the entity.[67] The main political institutions in the RS are the directly elected President, the unicameral National Assembly with 83 deputies,[68] and the government headed by the Prime Minister, who is nominated by the President and accountable to the National Assembly. All three institutions are important for policymaking. Only the government can formally propose legislation to the National Assembly, which has to pass it, and which can amend it. The President can veto every law within seven days and refer it back to the National Assembly.[69]

In the FBiH, the institutional structure is more complex, as the entity has devolved power to ten cantons. That means that many of the tasks associated with the entity government in the RS are the responsibility of the cantons in the FBiH, such as control over the police forces, education, cultural policy, welfare policy, as well taxation to finance cantonal expenditure.[70] Depending on the policy, it is therefore not the entity that interacts with the international community, but the cantons. However, to limit the scope of the analysis and to prevent excessive complexity, the focus here is predominantly on state- and entity-level policymaking, not on the working of the cantons. The FBiH institutions mirror the structure of the common institutions on the state level, though only for two, not three ethnic groups. The FBiH Presidency has two members, a Bosniak and a Croat, and the chairmanship annually rotates between the two.[71] The government is headed by the prime minister, whose deputy is from the other ethnic group, and the same provision holds for all ministries in the government.[72] The legislature is also bicameral, with a directly elected 140-member House of Representatives, and an 80-member House of People (30 Bosniaks, 30 Croats, and 20 'Others') who are delegated by the cantonal assemblies.[73] Decisions of the legislature require a majority among both the Croat and the Bosniak members in each house, extending the need for consensual policymaking from the state level into the FBiH.

BiH's Empirical Sovereignty

The complexity of the political institutions in BiH, apparent from the above discussion, compromises the effectiveness and the accountability of political and administrative institutions. Three problems contribute to this. The first problem is one of weak regulatory structures, which have allowed politicians from different ethnic groups, or different parties within the ethnic groups,

to use their political power to enhance their own personal fortunes, exploit SOEs, and use such resources for patronage to strengthen their power.[74] This has posed a strong challenge to the implementation of the Dayton agenda, as it undermines the ability of all levels of government to develop and implement public policy, and results in the use of public resources without oversight and accountability.

The second problem is one of institutional fragmentation, resulting in competition for political authority and public resources, both between the central state-level institutions and the entities, and between the FBiH and its cantons. This has led to the existence of weak institutions, in particular on the FBiH level, which barely contribute to the governance of BiH, but which deprive other institutions, in particular the cantons, of scarce public finances.[75] Further strains on public funds are the consequence of the significantly higher wages of public employees compared to the average salary in BiH, in particular at the central state level.[76] BiH currently lacks the resources for such an expensive public sector, in particular in the light of declining donor support.[77] These governance problems are compounded by a lack of statistics and information necessary to develop and implement effective public policy. With the absence of even basic data like population figures, the capacity for making public policy is significantly limited.[78]

The third problem is the weakness of a civil society that can hold the different governments accountable. With the exception of war veterans and public officials, interest groups are weak, and have very little access to the political institutions. As a result, important social groups, in particular the poor and the rural population, have hardly any influence on the policymaking process. Government at all levels—the central state institutions, entities, and cantons—is unresponsive to the demands of citizens, and is consequently passive with regard to the development of public policy. If policy is initiated, it is mostly based on pressure from the international community, not domestic constituencies.[79]

In the first chapter, empirical sovereignty was defined as the effective control over, and administration of, a state's territory. Given the problems of continued division among the three principal ethnic groups, of institutional fragmentation, and the weakness of governance institutions, the state of BiH does not possess empirical statehood. As a result, political and economic reforms have stalled, personal and economic security cannot be guaranteed by domestic institutions, and public services are largely dysfunctional, compromising the legitimacy of the state.

On the one hand, the origins of these problems are structural. They include the institutional framework outlined above, with the opportunities for spoilers

that it offers. They also include structures that developed during the war following the dissolution of Yugoslavia, such as the parallel Croat Republic of Herceg Bosna,[80] or of the three different payment bureaux analysed below, which offered plenty of opportunity for patronage and corruption. Another structural problem is the displacement of people during the war and BiH's 'brain drain', affecting especially the availability of qualified administrative personnel.[81] Finally, the legacy of socialism, which has left BiH with obsolete, indebted industries, and an opaque system of social ownership and workers' self-management,[82] has undermined the ability of governments at all levels to pursue the regulatory reforms necessary to create an environment conducive to economic growth. This could alleviate the grave social problems that resulted from more than a decade of economic decline and four years of war.

On the other hand, these problems result from a lack of institutional capacity. As a result of the war and the ongoing transition, political and administrative institutions are weak, and lack the resources, both physical and human, to effectively develop and implement public policy. For example, officials lack training in modern administrative practices, and for a long time there was no adequate system for personnel management in the civil service. Both structural and capacity problems are used by the international community to justify the continued presence of the OHR-led international administration in BiH.

The following case studies critically assess the role of the international community in promoting reform of the political and administrative institutions in BiH to strengthen the country's sovereign authority, and analyse how the international community has responded to the problems of corruption, lack of administrative capacity, and ethnic division. Section 2 addresses the reform of the payment bureaux, which aimed at dismantling a unique Yugoslav financial institution (the payment bureaux) that had previously monopolized the whole payment system in the hands of the central government, and during and after the war in the hands of the three nationalist parties. The international community considered the payment bureaux to be a major source of patronage and corruption, preventing the development of free capital markets and a functioning banking system. Section 3 will discuss the civil service reform. This law addresses one of the core features of a modern state—the creation of a professional civil service—replacing a public administration at the central state level that has been characterized by ethnic division and a high degree of politicization. Both sections will explore the strategies chosen by the international community to address these failures of empirical statehood.

POLICYMAKING IN BOSNIA AND HERCEGOVINA I: THE REFORM OF THE PAYMENT SYSTEM AND THE DISMANTLING OF THE PAYMENT BUREAUX

In Chapter 1, empirical sovereignty was characterized as the effective exercise of authority over a territory and a population. Authority requires legitimacy, acquired through certain legitimizing procedures and social purposes. Both aspects of legitimacy can be traced in the reform of the payment bureaux. First, with respect to procedural legitimacy, the domestic legislative process was mainly used to implement the reform, with the international community, acting through the Bonn Powers of the High Representative, being used only as a last resort. Second, economic prosperity, an important social purpose legitimizing authority,[83] informed the main aim of the reform, the transition towards a free market economy. The international community identified the payment bureaux as a major obstacle to a functioning market economy in BiH, preventing the development of a private banking sector and an efficient payment system. Those two areas were also identified for reform because of the way they had been used by nationalist parties to exercise influence over economic activity. The reform of the payment bureaux thus aimed to strengthen the sovereign authority and empirical statehood of BiH by enhancing the legitimacy of the state in the long run, through the provision of a regulatory environment conducive to the development of a market economy and prosperity; and by it weakening actors that challenged the authority of state institutions by the role they continued to play after the war, namely the nationalist parties.

Initiation of the Reform of the Payment System

The importance of a functioning payment system for the transition to a market economy has for some time been recognized by international organizations involved in economic reform in emerging economies.[84] As Robert Lisfield and Fernando Montes-Negret have argued, an efficient payment system is essential to promote economic activity (in particular trade and commerce), reduces transaction costs, is crucial for the development of capital markets and sophisticated financial instruments, and contributes to the establishment of free-market structures.[85] In BiH, the payment system was run by the payment bureaux, the successor to the Social Bookkeeping Service of the former Yugoslavia. During the war, the Social Bookkeeping Service, run from Belgrade, split into three payment bureaux in BiH, one controlled by each of the three ethnic groups.[86]

The payment bureaux fulfilled six basic functions: (*i*) the operation of the payment system, (*ii*) tax collection and distribution, (*iii*) accounting services for business and government, (*iv*) cash management, (*v*) statistics collection, and (*vi*) lending functions.[87] These functions gave them a central role in controlling economic activity. All transactions larger than Konvertible Mark (KM) 99[88] for example had to be conducted through the payment bureaux. In addition, companies had to deposit all their cash with their payment bureau in the evening, process their payroll, taxes, and customs duties through it, and could only withdraw up to KM 1,000 per day.[89] The fee structure for transactions was very opaque,[90] and both local businesses and the international community suspected that the payment bureaux were used to channel money to the political parties who controlled them.[91] Furthermore, the inefficient payment system promoted illegal and underground economic activity, resulting in extensive revenue losses for the government. The total costs of the payment bureaux for the economy of BiH, including among other things excess labour costs for businesses, forgone economic growth, and forgone interest income, was estimated by USAID to be between KM 255 million and KM 311 million in 1997, between 5 per cent and 6 per cent of an estimated gross domestic product (GDP) of approximately KM 5.4 billion.[92]

For all these reasons, the Macroeconomic Assistance Programme started by USAID in 1998 identified the payment bureaux as the major obstacle to economic development, and as an effective tool for political control of businesses by political hardliners, lacking transparency and public accountability.[93] Consequently, USAID pushed for the dismantling of the payment bureaux and the reform of the payment system, and for this to be included in the Declaration of the 1998 PIC in Madrid. There, 31 December 2000 was set as the deadline for the reform.[94] Later, the dismantling of the payment bureaux was also included as a condition in the EU Road Map.

Drafting of the Legislation

The dismantling of the payment bureaux has been one of the largest economic reform projects the international community has addressed in BiH. In total, it included more than 30 laws regulating not only the new payment system, but also the transfer of the other functions from the payment bureaux to different institutions, and the creation of new institutions, such as the privatization agencies and treasuries on the state, entity, and cantonal level. Because of this complexity, the analysis will concentrate on two core aspects of the reform: (*a*) the two laws regulating the transfer of payment functions from the payment bureaux, the Laws on the Internal Payments System and the Laws on

Payment Transactions, and (*b*) the transfer of the payment bureaux' responsibilities to government institutions, using the transfer of taxation functions to the Federation Tax Administration as an example.

The international community started to work on the reform early in 1999, as mandated by the Madrid PIC. In February, the 'International Advisory Group for Payment Bureaus and Payment System Transformation' (IAG) was established to 'assist and advise authorities in both entities on the dismantlement [sic] and elimination of the PBs and to provide technical assistance to the institutions that will take over the functions currently performed by the PBs'.[95] The membership of the IAG included representatives from USAID, CAFAO,[96] OHR, the EC, the World Bank, the IMF, and six advisers from the US Treasury. The meetings of the IAG were chaired by USAID and co-chaired by the World Bank and the IMF. The IAG established eight working groups: tax, customs, statistics, payment systems, public revenues, privatization, legal, and coordination, addressing the different issues arising from the dismantling of the payment bureaux.[97] These working groups consisted of members of the IAG and representatives from the relevant entity ministries and institutions. The large number of working groups provides an indication of the broad range of issues to which the reform pertained.

The legal working group started drafting the necessary legislation early in 1999. In conjunction with this, the IAG initiated a functional analysis of the payment bureaux and developed a blueprint for the reform that was discussed with the Prime Minister of the RS, Miloran Dodik, and the Prime Minister of the FBiH, Edhem Bičakčić, on 19 and 22 February 1999 respectively.[98] The functional analysis was prepared jointly by members of USAID, CAFAO, and the World Bank under the leadership of USAID, and was presented to the IAG by May 1999.[99] Here, as in the earlier USAID Report *Payment Bureaus in Bosnia and Hercegovina: Obstacles to Development and a Strategy for Orderly Transformation*, a detailed strategy for the implementation of the necessary reforms was outlined, based on earlier analytical work conducted for and by the IMF and the World Bank.[100] Importantly, the report also outlined a schedule for drafting and passing the laws on Internal Payments Systems and the laws on Payments Transaction, and for the transfer of responsibilities to the Tax Administrations.[101]

The laws on the Internal Payments System for the RS and the FBiH regulate payment operations in the two entities. These laws determine which bodies are authorized to perform payment functions, such as banks and post offices, define the kind of accounts and payments these bodies can provide, and regulate which records and statistics the authorized payment organizations are required and allowed to collect. They were therefore crucial for the process of reforming the payments system. Not only did the laws outline the structure

of the new payment system, they also organized the transition towards it. To this end, the laws regulated the functions of the payment bureaux until they were fully dismantled, and established governing boards responsible for implementing the reform of the payment bureaux, thus enhancing the accountability and transparency of these institutions.[102] Adopting the laws aimed to end the monopoly position of the payment bureaux over domestic payments, and establish an accountable governance structure through the governing board. As the laws were key to the whole reform, the IAG wanted to address them immediately. The original USAID plan aimed at amending the FBiH law by March 1999, and the RS law by May 1999.[103] In its functional analysis of the payment bureaux, the IAG envisaged July 1999 to complete the legislation in both entities.[104] In the end, neither deadline was met.

In the RS in particular, resistance to the reform was very high, as politicians preferred to maintain political control over financial flows. The payment bureau had been part of the entity-owned RS development bank, and before it could be dismantled, it had to be separated from this bank. This was intended to be achieved by May 1999, but it was not until March 2000 that the RS government completed the separation.[105] Drafting of the RS law began in August 1999, and was mostly carried out by the US Treasury and the IAG legal working group, together with RS officials. The drafting process dragged on until October 2000, due to resistance to the reform by the RS government. When a final draft was produced in October 2000 and passed on to the government, the crushing defeat of the governing coalition in the RS in the elections on 11 November 2000 meant that there was no authoritative government in place to discuss the draft and pass it on to the RS National Assembly. As a result, the law was never adopted.

As the deadline for the payment system reform approached, the law was imposed by the High Representative on 20 December 2000.[106] Some important provisions, such as the creation of the governing board, had been fulfilled earlier by RS governmental decree in the absence of a law regulating it,[107] after the international community strongly pressured the RS government during frequent visits from international officials, who made it clear that no matter how much the government would try to delay the process, the payment bureaux would be dismantled by the end of 2000. The governing board was originally supposed to consist of three members, appointed by the RS government and the Banking Agency.[108] After June 1999, the membership was increased to five members, to bring the provisions for the board in line with those in the FBiH. The five members included one international official, namely the governor of the BiH Central Bank.[109]

In the FBiH, the amendments to the law had been prepared jointly by the BiH Central Bank, the US Treasury, and the IAG legal working group by

March 1999, and presented to the FBiH government for adoption.[110] Under international pressure, the government adopted them on 3 June 1999, and submitted the proposal to both houses of the FBiH parliament for urgent procedure.[111] The House of Representatives did pass the law on 1 July 1999, and the House of Peoples did so on 16 September 1999.[112] However, the appointment of members of the governing board, essential for the reform to proceed, dragged on after the law was adopted by the legislature. Of its five members, two were to be appointed by the Federation Prime Minister, two by the minister of finance (in both cases one Bosniak and one Croat), and the fifth member would be the international governor of the Central Bank. By the end of July, only one member had been appointed, and it took until September for the new board to be established.[113]

The other set of laws essential for the abolishment and dismantling of the payment bureaux were those on Payments Transactions in both entities, governing the performance of payments transactions, and defining the nature of different payment transactions and the roles of the participants in the payment process. The laws regulate the operations between the institutions carrying out payment transactions; without them, the previous, non-transparent practices of the payment bureaux, like the opaque fee structures, could have continued. According to the USAID plan and the time frame in the IAG Functional Analysis, the laws were to be passed by the entities by May 1999 or July 1999. In neither entity was this aim achieved. The IAG forwarded its draft law, written by the US Treasury team and the IAG legal working group, to the entity governments by June 1999.[114] In the RS, the government delayed the adoption of the law well into the spring of 2000, and finally passed it on to the RS National Assembly, where the secretariat of the Assembly approved the draft law on 21 July 2000.[115] The draft law was on the agenda of the 12th regular session of the National Assembly on 7 September 2000, but as an immediate successful vote of no-confidence in the government ended the session, the draft law was not discussed. As it was not discussed at any of the following sessions either, the High Representative imposed it on 20 December 2000.[116] In the FBiH, the draft law was adopted by the government on 20 July 2000, and forwarded to both Houses of the legislature for urgent procedure. It was passed by the House of Representatives unanimously in its 14th session on 26 July 2000, and by the House of People in an extraordinary session on 31 July 2000, with no votes against it, but several abstentions.

Three features characterized the policymaking process described above. First, the main concern of the two sets of laws discussed is the delineation of the authority of the apparatus of government: the laws attempt to reconcile the need for governance on the one hand, with the need to restrict

government on the other. They limit the rights of the state (and therefore of the groups controlling the state institutions) to interfere with economic life. In the decentralized, socially owned economy of the pre-war Yugoslavia, the payment bureaux were an essential instrument of state control to manage the economy.[117] Their dismantling reduced political control over financial flows and credit, and limited the state's involvement in the economy. However, the reform of the payment system also identified a role for the state in governing the economy, and therefore assigned certain functions to state institutions, such as the administration and collection of taxes, as analysed on pp. 104–106.

Second, while representatives of the international community frequently emphasized the importance of the reforms for the international community and for the development of a market economy in BiH,[118] the entity governments resisted the reform. In the eyes of the international community, this was mainly due to the fear of losing personal benefits through the reform,[119] and no attempt was made by the international community to find a compromise with the entity governments on this issue.

Third, even though local institutions had been involved in the drafting from the beginning, the process was almost completely driven by the political will of the international community against resistance from the Bosnian political class. The international community initiated the reforms after USAID had identified the payment bureaux in BiH as the major obstacle to economic development. It also provided the necessary analysis and financial verification for the legislation. Almost all of the drafting and redrafting work was conducted by the IAG, in particular by the US Treasury and the IAG Legal Team, with officials from the entity ministries, in particular the Ministries of Finance, participating in the working groups. The IAG was careful to harmonize the two entity laws as much as possible, often against resistance from local governments, and when the High Representative imposed the laws in the RS, they were identical to the ones adopted in the FBiH. The lack of local involvement not only undermined the successful implementation of the law, but also raises more general questions about the legitimacy and sustainability of governance institutions that lack local ownership.

These observations are important for the broader discussion of sovereignty. Sovereignty is a concept concerned with the organization of the domestic relationship between state and society, and the international relationship between political communities. The reform of the payment system provides one example of where the distinction between state and society is drawn. In the case of BiH, it was not the political community itself that decided on this delineation, instead the border between state and society, between public and private was drawn by the international community. The international community

established the limitations of governmental authority with the new laws, and implemented them despite the resistance of the local governments.

Implementation of the Reform

The passage of the two laws in the entities established the framework within which the payment bureaux could be dismantled and their assets and tasks transferred to other institutions. The plans for these transfers were drawn up in different IAG working groups, which analysed and determined requirements in terms of additional legislation, human resources, and technical support. This process ran in parallel to the passing of the core legal framework discussed above, especially once the passing of the legislation was delayed. The analysis of the transfer of functions to the FBiH Tax Administration (FTA), organized and carried out by the IAG Tax Working Group, illustrates this aspect of the process of dismantling the payment bureaux.

The envisaged time frame for transferring the relevant functions from the payment bureaux to the FTA stretched over one year, from December 1999 to December 2000.[120] It involved legislative changes, organizational changes, and the provision of equipment and training of personnel. The functions that had to be transferred to the FTA were predominantly tax payment functions: the calculation of payroll, enterprise, and turnover taxes; and the verification and control of payment of payroll taxes.[121] The task of transferring these functions involved: (*a*) the amendment of three laws (Wage Tax Law, Law on Contributions, Law on Tax Administration), (*b*) the amendment of the regulations for applying these laws, (*c*) provision of IT infrastructure and training, and (*d*) the establishment of procedures for cooperation between commercial banks and the FTA to ensure information and data flow, since the commercial banks would now hold the information about accounts previously held by the payment bureaux. Finally, new tax forms had to be designed.

The amendments to the Wage Tax Law and the Law on Contributions were drafted in December 1999 by the Tax Working Group, composed of two US Treasury members and a representative of the OHR,[122] while the amendments to the Law on Tax Administration were drafted by the FTA by June 2000. After the drafting procedure, the IAG Legal Survey Team, consisting of a representative of the US Treasury and two Bosnian lawyers employed by the USAID Macroeconomic Reform Project,[123] reviewed and coordinated the drafts, first with officials from the FTA, and then with the FBiH Ministry of Finance. The Ministry forwarded the drafts to the government.

These amendments were to be passed by 30 June 2000 according to the Tax Working Group action plan. Though the FTA and the IAG had agreed on a

draft and forwarded it to the FBiH Ministry of Finance by Spring 2000, the Ministry failed to discuss it with the Tax Working Group, and to pass it on to the government for discussion. As a result, both laws were imposed by the High Representative on 20 December 2000.[124]

The deadline set out within the action plan for the passing of the amendments to the Law on Tax Administration was 30 July 2000. The law was discussed and unanimously approved by the FBiH government on 20 July 2000,[125] and forwarded to both Houses of the legislature for urgent procedure. The law was part of a package of legislation on economic reform that the IMF and World Bank urged the FBiH government to pass, communicated in two letters to the government. It was reiterated by the representatives of the IMF and the World Bank during a meeting with FBiH Prime Minister Edhem Bičakčić on 28 July 2000.[126] Thus, under strong pressure from the international community, both informal and verbal in the meetings with the government, and formally through the conditionalities attached to a World Bank credit,[127] both the FBiH House of People and House of Representatives passed the law in extraordinary sessions on 31 July 2000 and 2 August 2000 respectively.[128] The other tasks associated with the process of transferring payment bureaux functions to the FTA, such as the drafting of internal regulations and providing IT support and training, were conducted within the time frame set out in the work plan, and were mostly concluded by December 2000.

The Madrid PIC declaration set 31 December 2000 as the deadline for the dismantling of the payment bureaux, the transfer of its functions to the appropriate agencies, and the establishment of the new payments system. The whole reform package was only completed in time because the High Representative imposed six laws on 20 December, several of which have already been discussed, so that they would be in effect on 1 January 2001.[129] The new payments system began to operate on 5 January 2001, and after a brief adjustment period led to major improvements in the financial sector in particular in the FBiH, where implementation has been more consistent, and where several well-established foreign banks quickly entered the market introducing new financial services, like ATMs and credit cards. In the RS, where implementation of the laws by the entity government was half-hearted at best, such changes came much more slowly.[130]

Unlike the laws on the Internal Payments System and the laws on Payment Transactions, the transfer of certain functions from the payment bureaux to government authorities was not concerned with the limitation of public authority, but with enhancing the ability of the state to act effectively within its designated domain. It is clear from the analysis that in both cases it was the international community which made the decision on where to limit and where to enhance public authority. This raises questions about the criteria

used in these decisions—an issue that will be taken up in the final section of this chapter.

Implications—Reforming the Payment System in BiH

While the reform of the payment bureaux did not transform the BiH economy overnight, it can be regarded as a success on two accounts. First, the reform led to improvements in particular in the financial sector, especially by attracting West European banks, providing new financial services. Second, it was successful from the perspective of weakening parallel structures controlling and exploiting institutions of economic governance for their own benefit.

Three factors in particular contributed to the success of the reform of the payment system. First, the reform did not just establish new institutions, but also provided resources for equipment and training, to strengthen their capacity. Second, the international community closely coordinated its efforts through the IAG. As a result, it could effectively draw on the resources and expertise of the different agencies involved, and could coordinate its responses to the FBiH and RS governments. Third, the international community used a range of elements of its political authority to promote the reform. It provided expert advice, put pressure on the governments informally through visits and conversations, and formally through conditionalities attached to further aid, and ultimately used the Bonn Powers to impose the legislation. However, with the exception of the Wage Tax Law and the Law on Contributions, the impositions only occurred after the parliamentary crisis and the looming elections made it unlikely that the law would be passed in time for the reforms to finish within the deadline set by the PIC.

However, the payment system reform also reveals some of the problems of policymaking faced by the international community in BiH. Thus, even though the FBiH and RS administrations were involved in the drafting process from an early stage, the whole process was predominantly driven by the international community, which conducted the majority of the drafting work, and did not accept substantial changes to the draft. Thus, despite local participation, there was little local ownership of the reform process. Such lack of local ownership is indicative of an approach to policymaking by international administrations that perceives many of the problems of statebuilding as technical, rather than political. As technical issues, they can best be addressed by experts, provided by the international community, and do not require political consultation or debate, as the ends of the policy are not in question. As the case studies of Kosovo and East Timor in the following chapters show, this perception of many problems of statebuilding as being technical permeated

the policymaking of the other international administrations as well. The problems this poses for their statebuilding efforts are discussed in more detail in the concluding chapter.

POLICYMAKING IN BOSNIA AND HERCEGOVINA II: THE REFORM OF THE STATE-LEVEL CIVIL SERVICE

Effective governance of a modern state without a functioning bureaucracy is unthinkable, a sentiment endorsed by the international community when it initiated the civil service reform in BiH 'to establish real state capacities, and to encourage the government to take on its responsibilities'.[131] Through these reforms, the international community aimed to enhance BiH's ability to effectively govern the country (its empirical sovereignty) in two ways. First, the reform sought to create a professional, meritocratic civil service, and aimed at enhancing the authority of the central state institutions by increasing the professionalism, expertise, and effectiveness of the civil service.[132] Second, the reform sought to strengthen the central government vis-à-vis other actors in the state, in particular the entities or the political parties, by improving its ability to develop and implement public policy. The reform of the civil service thus offers an excellent opportunity to explore the influence of ideas about sovereignty and statehood on the international community's statebuilding activities.

The case study also demonstrates how the relationship between the international community and the BiH government changed with the formation of the moderate Alliance for Change government that had been openly committed to the GFAP and a united BiH. This relationship, often referred to as a 'partnership' by both sides, gives another indication about how conceptions of sovereignty influence the behaviour of the international community: once the international community considers the state committed to fulfilling its obligations under the standard of civilization, it is less likely to assume the authority of the state institutions. However, the case of the reform of the civil service also demonstrates that this claim has to be qualified. In the end, the international community put its aim of having the law in place before its goal of local ownership of the decision, and imposed the law.

Initiating the Civil Service Reform

During the 18-month period after the first post-war elections in BiH in September 1996, the OHR and the PICSB lamented the slow and cumbersome

establishment of the administrative structures at the central state level, and their inability to support the work of the government and implement the provisions of the Dayton Agreement.[133] Not only was there no adequate legal framework to regulate the work of civil servants on the state level,[134] but the small bureaucracy of about 500 people supporting the Council of Ministers was highly fragmented and politicized, as appointments had been made on the basis of ethnic or political affiliation rather than merit.[135]

Strengthening the central state institutions was an important aspect of the international community's agenda, and the need for a professional civil service and a civil service law on the central state level crystallized both in discussions among international officials in BiH and among the political directors of the PICSB Foreign Ministries during 1997 and 1998.[136] As a result of these discussions, the final declaration of the 1998 Madrid PIC conference demanded the passing of a civil service law, asking the BiH government to 'adopt a BiH law on the State Civil Service providing for the selection, management, career progression, compensation and social benefits of public employees in a such a way as to foster professionalism and political independence'.[137] The law was later made an EU Road Map condition, and therefore part of the Stabilisation and Association Process of the EU in BiH.

Drafting the Civil Service Law

The analytical work on the substantive issues of the law was initiated almost immediately after the Madrid meeting. The legal department of the OHR contracted SIGMA, an EU/OECD established initiative supporting public sector reform, to produce a proposal for the establishment of a civil service system in BiH. In July 1999, SIGMA submitted its final proposal to the OHR, which was to form the basis for the civil service reform.[138] SIGMA found that the existing legal framework in BiH was insufficient to ensure 'minimally acceptable standards of professionalism', and that it was not fully implemented because of a lack of agreement among the representatives of the three ethnic groups.[139]

The aim of the reform was to constitute a merit-based, professional civil service, displaying 'acceptable levels of reliability'.[140] This general commitment was outlined in more detail in September 1999, when SIGMA specified seven goals of the reform: (*a*) professionalism as the basis for recruitment and promotion, (*b*) job stability (as a condition for professionalism), (*c*) integrity of the civil service system, regulating conflicts of interest of civil servants and limiting their economic activities, (*d*) impartiality, (*e*) accountability, (*f*) transparency, and (*g*) a public administration representative of the different

ethnic groups in BiH, as required by the BiH constitution.[141] The OHR recognized that an ethnic formula was potentially incompatible with a merit-based, professional civil service; and considered in particular a 'hard' formula of strict quotas as a constraint on building a professional civil service, and reinforcing the underlying ethnic divisions. While a 'soft' formula of approximate ethnic representation to be achieved gradually through affirmative action programmes was seen as no major challenge to a merit-based civil service, all international actors involved in the reform considered hard quotas as undesirable.

In its proposal, SIGMA outlined a process for the drafting of the law. A task force would be set up comprised of international experts and national political representatives of the three ethnic groups, with SIGMA and experts from the EC–PHARE programme supporting the drafting. The task force would hold five to six working sessions, organized around the four chapters of the proposed law,[142] would then submit the draft to the BiH Council of Ministers, and after approval by the government, to the House of Peoples, and the House of Representatives of BiH. Before the government decided on the draft law, SIGMA would provide seminars in which the politicians could be informed about civil service development in the EU and in transition countries. The time frame for the whole process was estimated to be six months.[143]

While there were few, if any, objections raised by the OHR concerning the substantive issues of the law, some aspects of the working methodology were questioned, in particular the composition of the task force. The OHR doubted that the working sessions would lead to any definitive conclusions if the task force consisted predominantly of representatives of the three ethnic groups, as it feared that these officials would never achieve a consensus. It therefore amended the strategy, to have a working group with a 'technical' composition without any local input, consisting only of representatives from the OHR legal department, PHARE, and SIGMA. These international officials would write a first draft and then negotiate it with the local parties.

This newly configured working group, made up exclusively of internationals, began meeting in October 1999 and presented a draft law to the BiH Ministry of Communications and Civil Affairs in March 2000. For six months, until September 2000, an extended working group met almost weekly to negotiate the draft law on the basis of the OHR and PHARE proposal. In addition to the original international members, the working group now included representatives from all ministries at the central state level, the Legal Service of the Council of Ministers, and the Secretariat of the Parliamentary Assembly. Close cooperation developed between its international and local members.[144] In total, the working group spent more than 180 hours negotiating the provisions of the draft law.[145]

The draft law agreed on in the working group established a legal framework for a professional civil service in BiH. It regulated the scope of the civil service, defined the rights and duties of civil servants, and outlined provisions for recruitment and promotion, performance evaluation, working conditions, and civil service management.[146] Several provisions stand out. First, there was no strict ethnic quota in the draft law. Instead, article 2.2 simply stated that: 'The structure of the civil service shall generally reflect the ethnic structure of the population of Bosnia and Hercegovina in accordance with the last census.' Second, the provisions for recruitment, evaluation, and promotion of civil servants also applied to the top levels of the civil service (the assistant ministers), establishing a very clear dividing line between politics and administration. Though guided by EU standards and 'best European practice', these provisions went beyond what is common and would be deemed acceptable in many Western countries, where senior officials are frequently political appointees.[147] Third, the law established a strong, independent Civil Service Agency responsible for its management, including recruitment and promotion. To underline the independence of the Agency, the draft law included a provision that the High Representative could appoint the first head of the Agency for a period of two years, and that the head could be an international (art. 69), who would be less prone to pressure from local politicians.

Negotiating the Civil Service Law

In September 2000, the draft law was sent to the Minister of Communication and Civil Affairs who proposed it to the Council of Ministers in October 2000. The Council objected to four provisions of the law: (*a*) the strong and independent Civil Service Agency, (*b*) the appointment of senior civil servants by the Civil Service Agency rather than the minister, (*c*) the absence of ethnic quotas, and (*d*) the review of contracts of existing staff.[148] The objections addressed one issue in particular—the control of politicians over the administration. The independence of the Civil Service Agency, especially if it had an international director, would minimize the political influence of ministers over the civil service, as recruitment, promotion, and disciplinary matters would be the responsibility of the Civil Service Agency, not the ministries. The inability of ministers to appoint senior civil servants was considered to have the same effect. Unsurprisingly, the Council pushed for ethnic quotas given its political affiliations with the nationalist parties, the forthcoming elections only weeks later, and the perennial concern of the Bosnian Croats and Serbs in particular with ethnic proportionality.

After the elections on 11 November 2000, the role of the old Council of Ministers was reduced to that of a caretaker government until January 2001,

when a new government (the so-called Alliance for Change), made up of non-ethnic parties, was formed with strong international support. The international community announced that it would work in partnership with the Alliance. Three months later, the extended working group on the Civil Service Law began meeting again.

The new government discussed the Civil Service Law for the first time on 7 June 2001. It became evident that it was not satisfied with the draft and opposed it for the same reason that the previous Council of Ministers had asserted: the lack of political control over the civil service. Senior members of the OHR met several times with the government, especially with the new chairman of the Council, Zlatko Lagumdžija, to ensure the adoption of the law. As the government rejected the OHR proposals, the OHR began to involve first the PICSB ambassadors and later also the PICSB political directors, to increase pressure on the government. However, some ambassadors urged a more cautious approach, not wishing to pressure the new government too much, a position taken in particular by the British ambassador, who had played a major role in supporting the formation of the Alliance for Change government.[149] The OHR insisted that its conflict with the government was about the substantive issues of the law, and argued that only if the law was put in place as it was drafted could the civil service be professionalized and the central government be enabled to effectively implement public policy. At the same time, some PICSB ambassadors (especially from the USA and the UK), who had previously advocated the removal of nationalist politicians such as the Croat presidency member Ante Jelavič, were anxious to portray the new government as a clear break with the past and emphasized the cooperation between the BiH government and the international community. The Council of Ministers tried to use this rift between members of the international community to push for its weaker version of the law.

In contrast to the ambassadors, the PICSB political directors accepted the OHR's argument. Once the PICSB and OHR pushed for the same position, the Council adopted a revised text on 20 August 2001. Parts of this draft, however, were still rejected by the OHR, as among other things it moved the right to appoint the first head of the Civil Service Agency away from the High Representative to the Council of Ministers. After further negotiations about these contested points between the OHR, Steering Board members and representatives of the government, the draft law was adopted by the Council of Ministers in September 2001. In the end, the OHR conceded on several issues, such as the political appointment of senior civil servants, mainly to keep the High Representative's right to appoint the first head of the Civil Service Agency.

The divisions within the international community show how its statebuilding practices are not solely determined by conceptions of sovereignty and the

standard of civilization, but by broader political concerns as well, and show that the international community at times has been a highly political actor in BiH. Thus, the desire to portray the new government as a clear departure from BiH's previous administration, and as a partner of the international community meant that some ambassadors were willing to compromise on substantive issues of the OHR's statebuilding agenda. Furthermore, an open division between the international community and the BiH government questioned the rhetoric of partnership—and the efforts of the British ambassador, who had played such a central role in establishing the new government. The division between OHR and some of the PICSB ambassadors could also be used by the BiH government to strengthen its position in the negotiations about the Civil Service Law, which forced the OHR to make significant concessions, for example on the appointment of senior civil servants. This underlines that statebuilding is as much a political project as a technical process.

The draft was passed on to parliament, where it was strongly amended in the committee phase in both Houses. These amendments made the head of the Civil Service Agency again an appointee of the Council of Ministers and introduced hard ethnic quotas, according to the wishes of the Croat nationalist (Croation Democratic Union).[150] This reintroduction of ethnic quotas into the draft law was strongly criticized by the international community because of its negative implications for a professional civil service.[151] Yet, the legislation was passed despite criticism by the COE's Venice Commission, to which the BiH delegation to the COE had submitted the draft law for review, and which had determined that hard ethnic quotas in the amended draft were in violation of Council of Europe standards of non-discrimination.[152]

A harmonization commission formed by both Houses failed to produce a single new draft, and on 23 May 2002 the High Representative imposed the law as it had been agreed on by the OHR and the government in September 2001, before it was passed to parliament.[153] After consultation with the Council of Ministers, the High Representative appointed Jacob Finci, leader of the Jewish community in Sarajevo and former executive director of the Bosnian Open Society Institute, as the first head of the Civil Service Agency.

Implications—Reforming the Civil Service in BiH

An interesting aspect of the process of civil service reform is the differential treatment of the two BiH governments by the international administration. When the law was presented to a government consisting of members of

the nationalist parties, the international administration adamantly rejected government objections and refused to compromise on any of the substantive provisions. This position was easy to argue vis-à-vis the PIC members and the population of BiH, as the nationalist parties had been consistently depicted by the international administration throughout the last years as an obstacle to reform, prosperity, and democracy.[154] In 2001, the international community suddenly found itself dealing with a supposedly friendly government, the creation of which had been actively supported by members of the international community, and which it officially described as a partner. This raised the question of how to treat the new government if it did not comply with the international reform agenda, as was the case with the Civil Service Law. Imposing the law would constitute open recognition that even a friendly government was not as ideal a partner as imagined, while not imposing it would lead to delays in the statebuilding process or the watering down of the international community's implementation goals. Not imposing the law and accepting the amendments of the parliament would potentially compromise the establishment of sovereign authority in BiH, as the amendments would have undermined the establishment of an effective, merit-based civil service. By imposing the law, the High Representative acted in accordance with the international community's conception of sovereignty as responsibility, but compromised the authority of the political institutions that it had established, by denying them the right to amend legislation according to their conception of legitimacy, based on ethnic representation rather than merit and institutional effectiveness as endorsed by the international community.

The lawmaking process for the Civil Service Law reveals similar characteristics as the process of dismantling the payment bureaux. First, it was predominantly driven by the international community, who pushed for a stronger version of the law. Second, the resistance of both governments involved in the negotiations of the law to certain provisions of the draft led to a significant delay in passing the law on to the House of Representatives and House of People. In both Houses, its passage was delayed further by objections to the law by parliamentarians, most notably to the absence of hard ethnic quotas. In the end, this delay led to the imposition of the law. Third, although both consecutive governments objected to the same provisions of the law, their treatment by the international community was very different. The international community was willing to accept more changes to accommodate the Alliance for Change government before it imposed the law in May 2002. This could not be observed in the case of the payment bureaux reforms, as the Alliance government had not been in power when the reforms were concluded.

SOVEREIGNTY AND STATEBUILDING IN BiH

The international community considered it '…*inappropriate* to have payments system, Central Bank, private-sector banking, and possibly statistics and information functions under the control of the [Ministry of Finance]',[155] and thus aimed at limiting public authority in these functions. The international community also aimed to establish a civil service 'in accordance with European standards',[156] and thus wanted to dismantle a civil service characterized by ethnic quotas and political appointments. What is the 'standard of appropriateness' employed by the international community in these cases, and what does it consider to be 'according to its standards'?

In its analysis of the payments system, USAID and the IAG compared the structure in BiH with West European payment systems,[157] and aimed for the institutions established in BiH to be consistent with EU standards. To some extent this standard is technical and had a functional objective: the monetary system of BiH is linked to the Euro through a currency board,[158] and the integration of BiH into the EU through the Road Map and the Stabilisation and Association Process is a declared objective of the international community. However, the case study suggests that the standard of appropriateness goes beyond technical aspects of the payment system, and includes more substantive criteria associated with a market economy. As the analysis has shown, the international community initiated the reform to remove a major obstacle to the development of a market economy, and to reduce the control of political parties opposed to the GFAP over the economy, making the payment system more transparent and accountable. This standard of appropriateness emphasizes the importance of markets as the legitimate method of organizing economic life, and the importance of transparency and accountability, essential elements of a liberal conception of the rule of law. The case study therefore confirms the importance of market economies and the rule of law for the new standard of civilization, and shows how they have informed the particular policies of the international community.

The analysis of the Civil Service Law suggests that the international administration and local politicians have different conceptions of the relationship between the state of BiH and its three principle ethnic groups, and of what legitimizes state authority—differences that crystallized in the conflicts over ethnic quotas and the political control over the civil service. The insistence of Bosnian politicians on ethnic quotas reflects their particular understanding of legitimacy, one that derives from the protection and reflection of the different ethnic groups, which make up the constituent peoples or nations of BiH. This understanding of the relationship between the state and its constituent nations is not confined to post-Dayton BiH, but shaped the constitutional order of

Yugoslavia after 1945 until its break up, and was reflected in particular in the constitutional changes in the late 1960s and 1974, when many state functions were devolved to the republics and national quotas for federal employees were introduced.[159]

In contrast to this, the international administration has emphasized administrative effectiveness and selection by merit as sources of legitimacy, identifying the use of ethnic quotas as undermining the legitimacy of the civil service, as it compromised merit-based recruitment. The emphasis of BiH politicians on ethnic quotas and on political control over the civil service also suggests that rather than viewing the civil service as an instrument for the effective implementation of policy as the OHR and SIGMA did, politicians in BiH viewed it as an instrument through which they could protect interests and identities of their national groups.

Contrary to the dismantling of the payment bureaux, the reform of the civil service aimed not at establishing the limits of state authority, but at establishing 'real state capacities',[160] giving the central state institutions in BiH the ability to govern effectively. Another aim was the strengthening of the rule of law, by making the public administration more accountable and transparent, and by limiting the influence of political interests over the civil service. Both these aims reflect a broader social purpose legitimizing the exercise of power. This case study therefore highlights the importance of effective government and the rule of law for the standard.

The analysis of the Civil Service Law shows that this standard is based on the norms and practices found in Western and particularly European states. All preparatory documents for the law make it explicit that the reform has been inspired by West European administrative structures, and that it aims to achieve the professionalism and acceptable levels of reliability[161] present in West European public administrations. The draft law prepared by the international community and the BiH government, was judged to '... meet the objective of establishing a professional and merit-based Civil Service in Bosnia and Hercegovina in accordance with European standards'[162] by the COE's Venice Commission. Again, to some extent this emphasis on European 'best practices' is functional, in order to pave the way for BiH's accession to the EU. However, there is also a strong normative element entailed by 'European standards', such as the rule of law, or human rights, the only European standards explicitly mentioned in the Venice Commission opinion cited earlier,[163] and which feature prominently in the Copenhagen Criteria for EU membership.[164]

The international community intervened and compromised aspects of BiH sovereignty in order to promote particular social purposes that would enhance the sovereign authority of BiH's political institutions. However, the

way in which it pursued both the reforms of the payment bureaux and the civil service, compromised its own authority as well as the authority of the local institutions it professed to strengthen. In the first place, by imposing laws, the international administration compromised the legislative process and undermined the authority of the democratically elected political institutions of BiH. Through imposition, the High Representative replaced the normal process of lawmaking with an alternative that is quicker, but hardly transparent and not accountable. As argued in the previous chapter, such a lack of transparency and accountability can undermine the authority of the international administration. Furthermore, bypassing the formal political institutions of BiH weakens these institutions, as they are seen as inconsequential for policymaking. The imposition of legislation can therefore undermine the broader statebuilding goals of the international community.

One might argue that the High Representative has used the power to impose legislation only as a last resort, when legislation was stalled in the parliament or because there was no government in place to discuss the law and forward it to the legislature, as in the case of the RS Law on Internal Payment Systems. However, this ignores the fact that the international community was very reluctant to make substantive changes to the laws once they were drafted, expecting the relevant legislatures to effectively rubberstamp the legislation, thus denying a role for politics and the emergence of a compromise through the political process, which all sides could accept. Imposition is indicative of a lack of local support for the laws, without which their implementation can be difficult—as the problems the reform of the payment system faced in the RS suggest.

Secondly, by marginalizing local officials during the drafting of legislation, local ownership of, and support for the laws has been severely limited. Furthermore, excluding local officials from the drafting process does not help to build local capacity to develop and implement public policy. Thus, it undermines the broader goal of the international administration to enhance the effectiveness of government in BiH.

With the arrival of the Alliance for Change government, the number of impositions dramatically decreased, as the international community emphasized its partnership with the BiH government. Rather than being unwilling to reform, for a long time the government was seen as lacking capacity to take policy initiatives. As a capacity problem, it could not be addressed by the international community in the long term through imposing laws, but only by establishing the conditions for effective policymaking, as the Civil Service Law aimed to do. The recognition of partnership changed the way the international community violated the Westphalian sovereignty of BiH, moving away from being *in* authority to being *an* authority, invoking its governance

expertise rather than imposing solutions. However, this approach collapsed in May 2002, and the imposition of laws increased as the establishment of the institutional framework deemed necessary for effective and legitimate governance, if necessary by imposition, was given priority over local ownership and participation in the policymaking process.

As discussed earlier, the international community in BiH has broadened its statebuilding agenda, increasingly going beyond the provisions of the Dayton Agreement and strengthening the central state vis-à-vis the entities. However, going beyond the Dayton Agreement also means that there is no longer a clear limit to its mandate anymore, and no clear benchmarks for when the international community has fulfilled that mandate. While the OHR will be replaced by an EU mission to support BiH's accession to the EU, it remains unclear whether there is a benchmark (other than future EU membership) at which the international presence will end. Unlike in Kosovo and East Timor, exit cannot be linked to the change of the political status of the territory, as this has already been determined with the recognition of BiH as a state in 1992.

The standard of civilization thus informs the international community's institution-building efforts in BiH, but it does not determine its exit strategy. Unlike in Kosovo or East Timor, there has been little pressure from the local population for the international administration to leave, possibly because of continuing mistrust between the three ethnic groups, whose security dilemma is resolved by the international military presence. In the absence of such pressure, there have been few indications that the international community will renounce the use of the Bonn Powers soon, thus denying self-determination to BiH. However, as argued in Chapter 2, the authority of international administrations is ultimately limited by the norm of self-determination, requiring that governance over a territory is ultimately self-governance. In the absence of inter-ethnic violence, the denial of self-governance that the use of the Bonn Powers constitutes is increasingly difficult to justify, and undermines the legitimacy of the international administration of BiH. The lack of accountability adds to the legitimacy problems of the international community in BiH. The final chapter will come back to this issue, and to opportunities of addressing these legitimacy problems, exploring to what extent these problems arise in the statebuilding missions in Kosovo and East Timor as well.

NOTES

1. 'State-level' describes the central political institutions of the state of BiH, rather than the institutions of the two entities, the cantons, or the municipalities. The federal structure of BiH is discussed on pp. 89–95.

2. Peace Implementation Council: 'Declaration of the Peace Implementation Council', Madrid, 16 September 1998; Peace Implementation Council, 'Declaration of the Peace Implementation Council', Brussels, 23–24 May 2000.
3. The following description of the international and domestic political structures in BiH represents the developments until the summer of 2002. With the appointment of Lord Ashdown as the High Representative in May 2002, further organizational changes were made, but they have not affected the mandate and powers of the OHR, and are not relevant for the two reforms discussed in this chapter.
4. 'Bosniak' is the self-descriptive term chosen by Bosnian Muslims.
5. On the war in BiH, see Steven L. Burg and Paul S. Shoup, *The War in Bosnia and Hercegovina: Ethnic Conflict and International Intervention* (Armonk, NY: M.E. Sharpe, 1999); Laura Silber and Allan Little, *The Death of Yugoslavia*, rev. edn (London: Penguin, 1996); Susan Woodward, *Balkan Tragedy: Chaos and Dissolution after the Cold War* (Washington, DC: Brookings Institution Press, 1995).
6. OHR, *Bosnia and Hercegovina—Essential Texts*, 2nd edn (Sarajevo: OHR, 1998), 11.
7. All High Representatives to date have been men: Carl Bildt from 1996–7, Carlos Westendorp from 1997–9, Wolfgang Petritsch from 1999–2002, and Lord Paddy Ashdown from 2002–6. Christian Schwarz-Schilling was appointed as High Representative in January 2006.
8. *General Framework Agreement for Peace in Bosnia and Hercegovina (GFAP)*, 14 December 1995.
9. Carl Bildt, *Peace Journey: The Struggle for Peace in Bosnia* (London: Weidenfeld and Nicolson, 1999), 306–8.
10. *GFAP*, Annex 3 (Preamble).
11. Michael W. Doyle, Ian Johnstone, and Robert Orr (eds), *Keeping the Peace: Multidimensional UN Operations in Cambodia and El Salvador* (Cambridge: Cambridge University Press, 1997), 82–106.
12. The Bosniak (Muslim) SDA (Stranka Demokratske Akcije (Party for Democratic Action)), the Serb SDS (Srpska Demokratska Stranka (Serb Democratic Party)), and the Croat HDZ (Hrvatsaka Demokratska Zajednica (Croatian Democratic Union)).
13. In the first post-war elections to the BiH House of Representatives in September 1996, the SDS took more than 55% of the Serb vote, the SDA achieved more than 54% of the Federation vote (so its share among Bosniaks was even higher), and the HDZ got almost 80% of the Croat vote. Furthermore, the three Presidency members were all from the three wartime parties. See International Crisis Group (ICG), *Elections in Bosnia and Hercegovina* (Sarajevo: ICG, 1996).
14. SC Res. 1088 of 12 December 1996, art. 18.
15. *GFAP*, Annex 10, art. V. See also Peace Implementation Council, 'Ministerial Meeting of the Steering Board and the Presidency of BiH', Paris, 14 November 1996, art. 6, para 6; Peace Implementation Council, 'Bosnia and Hercegovina 1997—Making Peace Work', London, 4–5 December 1996, sec. 11.

16. Peace Implementation Conference 'Bosnia and Hercegovina 1998: Self-sustaining Structures', Bonn, 9–10 December 1997, art. XI.2.
17. SC Res. 1031 of 15 December 1995; SC Res. 1112 of 12 June 1997; SC Res. 1256 of 3 August 1999; and SC Res. 1396 of 5 March 2002. The appointment of the most recent High Representative, Christian Schwarz-Schilling, has not been endorsed by a Security Council Resolution, reflecting the extent to which the international responsibility for BiH has passed to the EU.
18. Since the appointment of Lord Paddy Ashdown as High Representative in May 2002, the High Representative is also the European Union Special Representative (EUSR) to BiH, and in this function oversees in particular rule of law activities, including the European Police Mission in BiH. As EUSR, he reports to the European Parliament. See Peace Implementation Council, 'Communiqué by the PIC Steering Board', Brussels, 28 February 2002.
19. Author's interview with an OHR official, Sarajevo, 28 September 2001.
20. See www.ohr.int for organizational changes in the OHR since 2002.
21. OHR, UNHCR, OSCE, Commission for Real Property Claims (CRPC), German Government, US Government, International Organization for Migration (IOM), SFOR, UNMIBH, World Bank, EC, the International Management Group (IMG), and UNDP.
22. See European Stability Initiative (ESI), *Interim Evaluation of Reconstruction and Return Task Force (RRTF): Minority Returns Programmes in 1999* (Sarajevo: European Stability Initiative, 1999).
23. OHR, PLIP Inter-Agency Framework Document, Sarajevo, 15 October 2000. The PLIP consists of 5 agencies: OHR, OSCE, UNHCR, UNMIBH, and the CRPC.
24. SFOR was replaced by the European EUFOR (Mission Althea) in December 2004. SC Res. 1575 of 22 November 2004.
25. UNMIBH was terminated in December 2002, and the UN International Police Task Force (IPTF) replaced by an EU Police Mission.
26. Susan Woodward, Zlatko Hertic, and Amela Sapcamin, 'Bosnia and Hercegovina', in Shepard Forman and Steward Patrick (eds), *Good Intentions: Pledges of Aid for Postconflict Recovery* (Boulder, CO: Lynne Rienner, 2000), 339–42.
27. Human Rights Coordination Centre (HRCC), *Co-ordination of International Human Rights Related Activities in Bosnia* (Sarajevo: HRCC, 2000).
28. According to the OHR web-page, at http://www.ohr.int/ohr-info/gen-info/, accessed on 22.11.2001.
29. Ibid., accessed on 5 October 2004.
30. Together with Japan, the Scandinavian Countries, the Netherlands, and the EC, the Quint States have been the major donors for BiH. World Bank, *Bosnia and Hercegovina: 1996–1998 Lessons and Accomplishments: Review of the Priority Reconstruction and Recovery Program and Looking Ahead towards Sustainable Economic Development* (Washington, DC: World Bank, 1999), Annex 1a.
31. *Constitution of BiH*, art. I.3.
32. OHR, Brcko Final Arbitration Award, Sarajevo, 5 March 1999.

33. For accounts of the Dayton negotiations, where constitutional issues were discussed, see Carl Bildt, *Peace Journey: The Struggle for Peace in Bosnia* (London: Weidenfeld and Nicolson, 1999), 120–61; Richard Holbrooke, *To End a War* (New York: Random House, 1998), 231–88. Auswärtiges Amt, *Deutsche Außenpolitik 1995—Auf dem Weg zu einer Friedensregelung für Bosnien und Hercegovina: 53 Telegramme aus Dayton* (Bonn: Auswärtiges Amt, 1998).
34. Woodward, *Balkan Tragedy*, 281.
35. Ibid., 302–16. On the Contact Group plans preceding the Dayton negotiations, not included in Woodward's account, see Bildt, *Peace Journey: The Struggle for Peace in Bosnia*, 22–40; Burg and Shoup, *The War in Bosnia*, 189–314.
36. *Framework Agreement for the Federation of Bosnia and Hercegovina (Washington Agreement)*, 1 March 1994, art. I.
37. Conference on Yugoslavia Arbitration Commission, Opinion No. 1, 29 November 1991, *International Legal Materials*, 31 (1992), 1494.
38. Conference on Yugoslavia Arbitration Commission, Opinion No. 3, 11 January 1992, *International Legal Materials*, 31 (1992), 1499.
39. Cited in Burg and Shoup, *The War in Bosnia*, 94–5.
40. *Constitution of BiH*, art. III.3(a).
41. *Constitution of BiH*, art. III.1.
42. Vojska Republike Srpske.
43. Hrvatsko Vijecé Obrane.
44. Armija Bosne i Hercegovine.
45. In November 2003, the BiH Parliamentary Assembly and both entity legislatures enacted a new BiH law on defence, establishing a state-level command of the armed forces. See 25th Report of the High Representative for Implementation of the Peace Agreement to the Secretary-General of the United Nations, Sarajevo, 3 March 2004, para. 8. In December 2005, the Ministries of Defence in the RS and the FBiH were dissolved and their competencies transferred to a single, state-level Ministry of Defence. See Report to the European Parliament by the OHR and EU Special Representative for BiH, June–December 2005, Sarajevo, 28 January 2006.
46. *Constitution of BiH*, art. VIII.3. Since 2005, some of the proceeds from the state-level indirect taxation system go directly to the central state institutions. See IMF, 'Bosnia and Hercegovina: Selected Economic Issues', Washington, DC, June 2005, 79. On the problems of fiscal federalism in BiH, see William Fox and Christine Wallich, *Fiscal Federalism in Bosnia-Hercegovina: The Dayton Challenge* (Washington, DC: World Bank, 1997).
47. *Constitution of BiH*, arts IV–VII.
48. *Constitution of BiH*, art. VII.2.
49. *Constitution of BiH*, art. VI.1(a).
50. Constitutional Court of Bosnia and Hercegovina, Decision No. U 9/00, 3 November 2000. By 'functional duality', the court characterized the High Representative as an entity established under international law (the GFAP), that intervenes into the domestic law of BiH, and whose decisions are part of both legal systems. As they are part of the BiH legal system, the Constitutional Court established the right to review laws imposed by the High Representative.

51. Constitution of BiH, art. V.4.
52. 16th Report of the High Representative for Implementation of the Bosnian Peace Agreement to the General Secretary of the United Nations, Sarajevo, 3 May 2000, para. 5.
53. Constitutional Court of BiH, 'Constituent Peoples' Decision of the Constitutional Court of Bosnia and Hercegovina', in OHR (ed.), *Bosnia and Hercegovina: Essential Texts*, 3rd revised and updated edition (Sarajevo: OHR, 2000).
54. OHR, 'Decision establishing interim procedures to protect vital interests of Constituent Peoples and Others, including freedom from discrimination', Sarajevo, 11 January 2001.
55. OHR, 'Agreement on the Implementation of the Constituent Peoples' Decision of the Constitutional Court of Bosnia and Hercegovina', Sarajevo, 27 March 2002.
56. On the history of the 'Constituent People' decision and on the negotiation of the constitutional changes, see ICG, *Implementing Equality: The 'Constituent Peoples' Decision in Bosnia and Hercegovina* (Brussels/Sarajevo: ICG, 2002).
57. *Constitution of BiH*, art. V.2(d).
58. *Constitution of BiH*, art. V.4. Unlike the other institutions, the Council of Ministers does not have an own article in the Constitution, but is submerged in the article on the Presidency.
59. 5th Report of the High Representative to the Secretary-General of the United Nations, Sarajevo, 16 April 1997, para. 24; 10th Report of the High Representative to the Secretary-General of the United Nations, Sarajevo, 14 July 1998, para. 21.
60. Richard Caplan, *A New Trusteeship? The International Administration of War-torn Territories*, Adelphi Paper 341 (Oxford: Oxford University Press, 2002), 39.
61. OHR, 'Decision Imposing the Law on Citizenship of BiH', Sarajevo, 16 December 1997.
62. OHR, 'The High Representative's Decision on the Law on State Border Service', Sarajevo, 13 January 1999.
63. For a review and criticism of this approach, see Gerald Knaus and Felix Martin, 'Lessons from Bosnia and Hercegovina: Travails of the European Raj', *Journal of Democracy*, 14/3 (2003).
64. Paddy Ashdown, 'Inaugural Speech by the New High Representative for Bosnia and Hercegovina', Sarajevo, 27 May 2002. On file with the author, emphasis added.
65. Paddy Ashdown, 'Speech by the High Representative for Bosnia and Hercegovina to the BiH House of Representatives', Sarajevo, 17 December 2002. On file with the author.
66. The political structure in place until May 2002 is the one relevant for the understanding of the environment in which the reforms took place. The constitutional changes briefly addressed earlier are therefore not considered in this discussion of the institutional structures, as they were not in effect during the time the reforms analysed below were initiated and implemented.
67. OSCE, *Analysis of the Draft Law on Local Self Government for the Republika Srpska of Bosnia and Hercegovina* (OSCE: Sarajevo, 2000).

68. With the 2002 constitutional changes, a second chamber was established, in which all three ethnic groups are represented. See Fig. 3.3.
69. *Constitution of Republika Srpska*, arts 69–97.
70. *Constitution of the Federation of Bosnia and Hercegovina*, Ch. III.
71. Ibid., Ch. IV (b), art. 2.
72. Ibid., Ch. IV (b), art. 4.
73. Ibid., Ch. IV (a).
74. For a discussion of these problems, see Caplan, *A New Trusteeship?*, 39; ESI, *Reshaping International Priorities in Bosnia and Hercegovina, Part I: Bosnian Power Structures* (Berlin: European Stability Initiative, 1999); ICG, *Is Dayton Failing? Bosnia Four Years after the Peace Agreement* (Sarajevo: International Crisis Group, 1999); ICG, *The Wages of Sin: Confronting Bosnia's Republika Srpska* (Sarajevo: ICG, 2001).
75. ESI, *Making Federalism Work—A Radical Proposal for Practical Reform* (Berlin: European Stability Initiative, 2004), 3–4.
76. Salaries in the administration exceed average salaries by between 35% (in the FBiH) and 67% (in the Brcko district). ESI, *Governance and Democracy in Bosnia and Hercegovina: Post-Industrial Society and the Authoritarian Temptation* (Berlin/Sarajevo: European Stability Initiative, 2004), 18–19.
77. IMF, 'Selected Economic Issues (2005)', 89–94.
78. Population estimates for BiH range from 3.385 million to 4.272 million, a difference of more than 20%. See ESI, *Governance and Democracy in Bosnia and Hercegovina*, 28.
79. For an analysis of the effect of this weakness of civil society on governance in BiH, see ESI, *Governance and Democracy in Bosnia and Hercegovina*, 28.
80. ESI, *Bosnian Power Structures*, 7–9.
81. According to a survey by local NGOs, up to 62% of Bosnians between 18 and 25 want to leave the country. See Institute for War and Peace Reporting, 'Bosnia: Youthful Politicians Call for Change', *Balkan Crisis Report*, No. 309, 16 January 2002.
82. The characteristics of social ownership and worker self-management are discussed in more detail in Ch. 4, in the context of the privatization in Kosovo.
83. David Williams, 'Aid and Sovereignty: Quasi-states and the International Financial Institutions', *Review of International Studies*, 24/4 (2000), 557.
84. For example David B. Humphrey, *Payment Systems: Principles, Practice, and Improvements* (Washington, DC: World Bank, 1995); Robert Lisfield and Fernando Montes-Negret, *Modernising Payment Systems in Emerging Economies* (Washington, DC: World Bank, 1994).
85. Lisfield and Montes-Negret, *Modernising Payment Systems*, 7–8. See also David B. Humphrey and Setsuya Sato, *Transforming Payment Systems: Meeting the Needs of Emerging Market Economies* (Washington, DC: World Bank, 1995).
86. ESI, *Bosnian Power Structures*, 5; ICG, *Why will no one invest in Bosnia and Hercegovina? An Overview of Impediments to Investment and Self-Sustaining Growth in the Post-Dayton Era* (Sarajevo: ICG, 1999), 10. The payment bureaux

were known as ZPP in the Bosniak, ZAP in the Croat, and SPP in the Serb areas.

87. USAID, *Payment Bureaus in Bosnia and Hercegovina: Obstacles to Development and a Strategy for Orderly Transformation* (Sarajevo: USAID, 1999), 8–14.
88. KM = Konvertibilna Marka, the currency of BiH. 1 KM = ca. € 0.5.
89. USAID, *Payment Bureaus in Bosnia and Hercegovina*, 30–1.
90. Ibid., 40.
91. ICG, *Why will no one Invest in Bosnia and Hercegovina?*, 10; Michael Pugh, 'Postwar Political Economy in Bosnia and Hercegovina: The Spoils of Peace', *Global Governance*, 8/4 (2002), 471; USAID, *Payment Bureaus in Bosnia and Hercegovina*, 43. Interview with OHR official, Sarajevo, 25 September 2001.
92. USAID, *Payment Bureaus in Bosnia and Hercegovina*, 57–8. For GDP estimates, see IMF, 'Bosnia and Hercegovina: Selected Issues and Statistical Appendix', Washington, DC, August 2000, 7.
93. USAID, *Payment Bureaus in Bosnia and Hercegovina*, 20. Author's interview with USAID official, Sarajevo, 28 September 2001.
94. Peace Implementation Council, 'Declaration of the Madrid Peace Implementation Council', art. IV. 18.
95. OHR, *Economic Newsletter*, 2/2, Sarajevo, March 1999.
96. CAFAO is the EC-funded Customs and Fiscal Assistance Office.
97. USAID, *BiH Economic Update 2000—3rd Quarter* (Sarajevo: USAID, 2000), p. 37.
98. OHR, *Economic Newsletter*, 2/2.
99. USAID, *Transformation of Payment Bureaus in Bosnia and Hercegovina: Functional Analysis and Strategic Implementation Plan* (Sarajevo: USAID, 1999).
100. USAID, *Payment Bureaus in Bosnia and Hercegovina*, 4.
101. Ibid., 61–2; USAID, *Functional Analysis and Strategic Implementation Plan*, 45–51.
102. The Law on Internal Payments System is identical in both entities. For the provisions of the law, see OHR, 'Decision Imposing the Law on Internal Payments System of the Republika Srpska', Sarajevo, 20 December 2000.
103. USAID, *Payment Bureaus in Bosnia and Hercegovina*, 61.
104. USAID, *Functional Analysis and Strategic Implementation Plan*, 50.
105. USAID, *BiH Economic Update*, 36–7.
106. Author's interview with an OHR official, Sarajevo, 25 September 2001, and further conversation on 13 December 2001. See also OHR, 'Decision Imposing the Law on Internal Payments System of the Republika Srpska'.
107. OHR, *Economic Newsletter*, 2/5, Sarajevo, June 1999.
108. OHR, *Economic Newsletter*, 2/3, Sarajevo, April 1999.
109. OHR, *Economic Newsletter*, 2/5. See also OHR, 'Decision Imposing the Law on Internal Payments System of the Republika Srpska', art. 30.
110. OHR, *Economic Newsletter*, 2/3.
111. OHR, *Economic Newsletter*, 2/5. Under urgent procedure, which has to be approved by the Houses, laws skip the drafting stage in parliamentary committees.

112. OHR, *Economic Newsletter*, 2/6, Sarajevo, July 1999; OHR, *Economic Newsletter*, 2/7, Sarajevo, August 1999; OHR, *Economic Newsletter*, 2/8, Sarajevo, September 1999.
113. OHR, *Economic Newsletter*, 2/7.
114. OHR, *Economic Newsletter*, 2/4, Sarajevo, May 1999.
115. OHR, 'Decision on the Law on Payment Transactions of the Republika Srpska', Sarajevo, 20 December 2000, 1.
116. Ibid.
117. For a discussion of the Yugoslav socialist economy, see Deborah D. Milenkovich, *Plan and Market in Yugoslav Economic Thought* (New Haven, CT: Yale University Press, 1971); Susan L. Woodward, *Socialist Unemployment: The Political Economy of Yugoslavia 1945–1990* (Princeton, NJ: Princeton University Press, 1995).
118. See, for example, Chris Patten, 'Speech to the Peace Implementation Council', Brussels, 23 May 2000; Wolfgang Petritsch, 'Address by the High Representative for BiH to the OSCE Permanent Council', Vienna, 19 November 2000; Wolfgang Petritsch, 'Chatham House Speech', London, 18 February 2000; Wolfgang Petritsch, 'Speech to the Club of Three', Brussels, 29 June 2000; Peace Implementation Council, 'Declaration of the Brussels Peace Implementation Council'; Peace Implementation Council, 'Communiqué by the PIC Steering Board', Brussels, 8 February 2000; Carlos Westendorp, 'Speech at the Fifth Donors' Pledging Conference for Bosnia and Hercegovina', Brussels, 20 May 1999.
119. Author's interview with OHR official, Sarajevo, 25 September 2001; author's interview with World Bank official, Sarajevo, 24 September 2001. USAID, *Payment Bureaus in Bosnia and Hercegovina*, 10.
120. IAG Tax Working Group, 'Work Plan for Transferring Functions from the Payment Bureaus to the Federation Tax Administration', undated document provided by USAID, Sarajevo, 28 September 2001.
121. USAID, *Functional Analysis and Strategic Implementation Plan*, 19–24.
122. Communication with USAID official (email), 19 December 2001.
123. Ibid.
124. OHR, 'Decision Amending the Law on Wage Tax', Sarajevo, 20 December 2000; OHR, 'Second Decision Amending the Law on Contributions', Sarajevo, 20 December 2000.
125. Minutes of the 49th session of the FBiH government, 20 July 2000. On file with the author.
126. ONASA, 'E. Bicakcic Meeting with US Ambassador, Heads of IMF, WB', Sarajevo, 28 July 2000.
127. The World Bank, *Memorandum of the President of the International Development Association to the Executive Directors on a Country Assistance Strategy Progress Report of the World Bank Group for Bosnia and Hercegovina* (Washington, DC: World Bank, 2001), para. 17.
128. ONASA, 'Extraordinary Session of FBiH Parliamentary House of Peoples', Sarajevo, 31 July 2000; ONASA, 'Federation House of Reps Passes Law on Labor', Sarajevo, 2 August 2000.

129. In addition to the laws discussed, the Law on Financial Operations in the Republika Srpska was imposed by the High Representative on 20 December 2000.
130. ICG, *Bosnia's Precarious Economy: Still Not Open For Business* (Sarajevo: International Crisis Group, 2001), 27–35; OHR, *Economic Newsletter*, Vol. 4/2, Sarajevo, April 2001; European Commission, 'Economic Reform Monitor—Supplement C: Economic Situation and Economic Reform in Central and Eastern Europe', No.3, Brussels, October 2001, 10.
131. SIGMA, 'Bosnia and Hercegovina: Draft Proposal for Establishing a Civil Service System, May 1999', in SIGMA, *Notes for Preparing a Civil Service in Bosnia and Hercegovina* (Paris: SIGMA, 1999), 12.
132. On the relationship between professionalism and the legitimacy of state institutions, see Nicolas Rose, 'Governing Advanced Liberal Democracies', in Andrew Barry, Thomas Osborne, and Nicholas Rose (eds), *Foucault and Political Reason* (London: UCL Press, 1996), 39–41.
133. See for example the 5th Report of the High Representative, para. 26; 6th Report of the High Representative for Implementation of the Bosnian Peace Agreement to the Secretary-General of the United Nations, Sarajevo, 11 July 1997, para. 24; 8th Report of the High Representative for Implementation of the Bosnian Peace Agreement to the Secretary-General of the United Nations, Sarajevo, 16 January 1998, para. 19.
134. ICG, *Rule of Law in Public Administration: Confusion and Discrimination in a Post-Communist Bureaucracy* (Sarajevo: ICG, 1999), 5.
135. Phone interview with EU Consultant, Sarajevo, 13 December 2001.
136. Author's interview with OHR official, 26 September 2001.
137. Peace Implementation Council 'Declaration of the Madrid Peace Implementation Council', para. III.3.
138. SIGMA, *Notes for Preparing a Civil Service in Bosnia and Hercegovina* (Paris: SIGMA, 1999).
139. SIGMA, 'Draft Proposal for Establishing a Civil Service System', 12. See also 5th Report of the High Representative, para. 26; 6th Report of the High Representative, para. 18; 9th Report of the High Representative for Implementation of the Bosnian Peace Agreement to the Secretary General of the United Nations, Sarajevo, 9 April 1998, para. 18.
140. SIGMA, 'Draft Proposal for Establishing a Civil Service System', 12.
141. SIGMA, *Notes for Preparing a Civil Service*.
142. These chapters include (*a*) Constitutional and Administrative Principles, (*b*) Structure and the Civil Service Cycle, (*c*) Rights and Duties of Civil Servants, (*d*) Management of the Civil Service. The remaining sessions were to be used for study visits to EU countries.
143. SIGMA, 'Draft Proposal for Establishing a Civil Service System', 13–15.
144. Interview with OHR official, Sarajevo, 28 September 2001.
145. Phone interview with OHR official, Mostar, 22 October 2001.
146. OHR, 'Law on Civil Service in Governmental Institutions in BiH—Consolidated Draft', Sarajevo, September 2001. On file with the author.

147. See, for example, Richard L. Cole and David A. Caputo, 'Presidential Control of the Senior Civil Service: Assessing the Strategies of the Nixon Years', *The American Political Science Review*, 73/2 (1979); Ezra Suleiman, *Politics, Power, and Bureaucracy in France: The Administrative Elite* (Princeton, NJ: Princeton University Press, 1974).
148. Phone interview with OHR official, Mostar, 22 October 2000.
149. Interview with a member of a Steering Board embassy, Sarajevo, 25 September 2001; interview with OHR official, Sarajevo, 28 September 2001.
150. Constitutional and Legal Commission of the House of Representatives Parliament of BiH, 'Report on the Proposed Law on Civil Service in the BiH Institutions', Sarajevo, 21 November 2001.
151. Phone interview with OHR official, OHR Sarajevo, 14 March 2002.
152. European Commission for Democracy through Law (Venice Commission), 'Draft Law on Civil Service in Governmental Institutions of Bosnia and Hercegovina, Comments by Mr Kaarlo Tuori (Member Finland)', Strasbourg, 11 February 2002.
153. OHR, 'Decision Imposing the Law on the Civil Service in the Institutions of Bosnia and Hercegovina', Sarajevo, 23 May 2002.
154. A good example of this is the High Representative's widely publicized New Year's messages of 1999 and 2000. See the New Year's Letter by the High Representative to the Citizens of BiH: 'Can Bosnia and Hercegovina and Europe work as one?' Sarajevo, 31 December 1999; and the 'High Representative's New Year's Message to the Citizens of Bosnia and Hercegovina', Sarajevo, 29 December 2000.
155. USAID, *Payment Bureaus in Bosnia and Hercegovina*, 27. (Emphasis added.)
156. Venice Commission, 'Draft Law on Civil Service in Governmental Institutions of Bosnia and Hercegovina'.
157. USAID, *Payment Bureaus in Bosnia and Hercegovina*, 22.
158. Ibid., 64.
159. Woodward, *Balkan Tragedy*, 29–41; Burg and Shoup, *The War in Bosnia*, 40–5. On the issue of nationalism and legitimacy in Yugoslavia, see Ivo Banac, *The National Question in Yugoslavia: Origins, History, Politics* (Ithaca, NJ: Cornell University Press, 1984).
160. SIGMA, 'Draft Proposal for Establishing a Civil Service System', 12.
161. Ibid., 12–13.
162. Venice Commission, 'Draft Law on Civil Service in Governmental Institutions of Bosnia and Hercegovina'.
163. Ibid.
164. The Copenhagen Criteria are (*a*) stability of institutions guaranteeing democracy, the rule of law, human rights, and respect for and protection of minorities, (*b*) the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union, (*c*) the ability to take on the obligations of membership including adherence to the aims of political, economic, and monetary union.

4

Statebuilding in Kosovo

Analysing statebuilding in Kosovo[1] presents the unique problem that Kosovo has not been recognized as a state, and its future juridical status remains uncertain. Its final status, which was contested when the United Nations Administration Mission in Kosovo (UNMIK) was established in June 1999, remained in limbo for the whole period analysed here (June 1999–April 2006).[2] However, even if Kosovo has not been recognized as a state, it constitutes and has been recognized as a single political community with its own political and administrative institutions. UNMIK's efforts to establish and strengthen these institutions can best be described as statebuilding.

Statebuilding without statehood raises some unique issues with regard to the concept of sovereignty. First, unlike in the other cases of statebuilding analysed here, the determination of the future status and the nature of Kosovo's statehood are formally made conditional on the fulfilment of the 'standard of civilization'. UNMIK's 'standards before status' policy, outlined in more detail later, conditioned the resolution of Kosovo's status on meeting a set of internationally determined benchmarks, and the Security Council initiated talks to resolve the status issue after an evaluation of the fulfilment of these standards in October 2005.[3] Second, the absence of statehood in Kosovo, and the resulting uncertainty over competing sovereignty claims between Kosovar institutions, UNMIK, and Serbia raises the question of the limits of the authority of international administrations, in particular with regard to questions of legal title and property rights. This uncertainty underlines the importance of sovereignty as an organizing principle of political authority. Third, the cases of international statebuilding discussed in this chapter show not only how the concept of sovereignty informs the statebuilding aims of the international community in Kosovo, but also how it severely limits the statebuilding practices of the international agencies involved. As long as the question of legal sovereignty, and the rights it allocates to a political community, is not resolved, statebuilding always remains incomplete, and cannot address important issues, such as property rights and the full transfer of political authority to democratic institutions.

The chapter is divided into four sections. The first provides the historical background leading to the establishment of UNMIK, and outlines the development of international and local political structures from 1999 to 2006, in order to provide an overview of the institutions involved in the policymaking in the two case studies. Compared to the representatives of the international community in BiH, UNMIK's structure and authority have been very different, creating a different context for policymaking. In particular, until the first Kosovo-wide elections in November 2001, UNMIK exercised direct political authority over Kosovo, and did not need to formally share power or negotiate policies with a local government. Sections 2 and 3 contain the case studies of policymaking by UNMIK in Kosovo. The second section discusses the reform of the judicial system, examining the influence of human rights and of rule of law norms that infuse the international community's understanding of sovereignty on UNMIK's policies. The different context for policymaking is reflected in the methodology used to analyse the reform of the judicial system, with the emphasis on the implementation of policy rather than on the policy formation. Thus this section looks at the policies pursued by UNMIK to enhance the legitimacy of judicial institutions, which include its efforts to enhance and protect their independence, to ensure their impartiality, and to increase their effectiveness. The third section, on the other hand, which analyses the development of the privatization legislation, uses a methodology similar to that employed in the previous chapter, as here the debate between the different parts of UNMIK, in particular the EU and the major donors responsible for economic reform on the one hand, and the UNMIK and UN legal advisers on the other, sheds light on the importance of ideas about sovereignty for the international community's statebuilding policies. The emphasis is therefore once again on policy formation; implementation is only a secondary focus of the analysis. The final section looks at the implications of the two case studies for broader debates about the role of conceptions of sovereignty on statebuilding in Kosovo.

BACKGROUND

Kosovo before International Administration

Despite claims by Albanians that Kosovo has been an autonomous entity since 'ancient times',[4] Kosovo did not have a well-defined political identity until the twentieth century. Although an Ottoman *vilayet* of Kosovo was established for the first time in 1877, its borders bore no resemblance with those of today's

Kosovo, which emerged in its current shape only after the Second World War as a part of Serbia in Tito's Yugoslavia.

On the basis of the classification of Albanians as a 'nationality' rather than a 'nation' under the Yugoslav constitution,[5] the predominantly Albanian Kosovo was not constituted as a republic in the Socialist Federal Republic of Yugoslavia (SFRY), but merely as a province within Serbia. The six republics[6] were considered to be the repositories of the constituent nations' right to self-determination.[7] They had extensive budgetary and administrative autonomy, and even—under some interpretations—the right to secede, though this remained a controversial proposition.[8] While not promoting Kosovo's status to that of a republic, the 1974 constitution granted it substantial autonomy and self-governance, de facto the same rights the republics had.[9] Incited by economic mismanagement, political grievances, and dissatisfaction with the political leadership in Kosovo, wide-ranging unrest broke out in 1981, during which demands for a republic, and even independence, were voiced by the protesters. The riots marked the beginning of increasingly polarized relations between Serbs and Albanians,[10] culminating in Slobodan Milošović's infamous utterance to Kosovar Serbs that 'no-one should dare to beat you', establishing his credentials as a champion of the Serb nationalist cause.[11]

In the spring of 1989, Milošović orchestrated the termination of Kosovo's autonomy, imposing direct rule from Belgrade.[12] Increasingly, the Albanian majority was excluded from all institutions of political and social life—workers were dismissed from factories, teachers and university professors had to leave schools and universities, Albanian language television programmes were suspended, and the major Albanian newspapers closed. Albanians had to receive special permission from the authorities to buy property from Serbs. Police violence against Albanians was rife, and arbitrary arrests and house searches common.[13] In response, the Kosovo Albanian leadership, predominantly committed to peaceful resistance, declared the independence of the 'Republic of Kosova' in September 1991, and started to organize a parallel state, financed by taxes on Albanians in Kosovo and in the diaspora.[14] The writer and literary critic Ibrahim Rugova was elected President in semi-clandestine elections of this unrecognized 'state'. However, while this strategy of peaceful resistance limited violence and prevented a humanitarian crisis in Kosovo, it also kept Kosovo off the international agenda, with attention focused predominantly on the wars in BiH and Croatia instead. During most of the 1990s, the international attitude towards Kosovo can best be described as one of (deliberate) neglect, reinforced by the unwillingness both to address Kosovar demands for statehood, and to alienate Milošović, considered by the international community to have delivered peace in BiH in 1995.[15]

Only in 1998, after the heavy-handed response of the Serb police against increased attacks by the Kosovo Liberation Army (KLA) had led to the displacement of more than 200,000 Albanians, Kosovo moved towards the centre of the international stage again.[16] The growth of the KLA had been fuelled by the growing dissatisfaction among Kosovo Albanians with Rugova's policy of non-violent resistance and by the wide availability of small arms in the wake of the looting of military installations and depots in Albania in 1997. In March 1998, the Contact Group[17] published a list of proposed measures against the FRY to respond to the increasing violence and instability in the region, including an arms embargo and the dispatch of a diplomatic monitoring mission.[18] The measures were endorsed by the UN Security Council, which passed Resolution 1160, initiating an arms embargo against FRY. While it called for 'an enhanced status of Kosovo which would include a substantially greater degree of autonomy and meaningful self-administration', it explicitly confirmed the territorial integrity of Yugoslavia.[19]

As violence continued in the province unabated by the presence of international observers,[20] NATO issued an ultimatum on 24 September 1998, threatening air strikes if Yugoslav troops and police would not stop their attacks and withdraw into their barracks. The troops withdrew, the KLA announced a ceasefire, and US envoy Richard Holbrooke negotiated the establishment of the unarmed OSCE-led Kosovo Verification Mission (KVM), to verify the ceasefire, calm the situation on the ground and provide the opportunity to negotiate a political settlement under international mediation.[21] By January, the presence of the mission had failed to improve the security situation, and the drafts for a settlement on the basis of enhanced autonomy for Kosovo, prepared by the international negotiators, had been rejected by both sides. Thus, the Contact Group increased the pressure on both parties, summoning them to Rambouillet near Paris, to start negotiations on the political future of Kosovo, threatening the use of military force to implement its demands: in particular that both sides cease their attacks, and accept the international proposal of a settlement.[22]

At Rambouillet, the spectre of an international administration in Kosovo emerged for the first time. Chapter V of the Rambouillet Accords called for the establishment of an 'Implementation Mission' constituted by the OSCE and the EU, mandated to supervise and direct all of the civilian aspects of the implementation of the Accords, and which would have been the 'final authority' regarding their interpretation.[23] The scope of this 'final authority', which the Accords would have granted to the mission, is unclear from the text of the document. However, the precedent of the High Representative in BiH, who based his 'Bonn Powers' on the prerogative of this final authority of interpretation, suggests that they would have been far reaching.[24]

Milošović's refusal to sign the accords in March 1999 precipitated the NATO bombing campaign against Yugoslavia, which started on 24 March 1999. The search for a political solution to the conflict continued throughout the war, and at their summit in Bonn on 6 May 1999, the G8 countries agreed on a set of principles on which any solution should be based,[25] which was taken to the Yugoslav government by the international mediators Victor Chernomyrdin and Martti Ahtisaari. The proposals included the 'establishment of an interim administration for Kosovo as part of the international civil presence. . . .' This interim administration was 'to provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants in Kosovo'.[26] Milošović's acceptance of these principles paved the way for ending the war and the establishment of UNMIK through Resolution 1244, passed by the Security Council on 10 June 1999.[27]

Establishing International Authority in Kosovo

Resolution 1244 mandated the Secretary-General under Chapter VII of the Charter to:

> establish an interim civil presence in Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions.[28]

Resolution 1244 was designed to end the bombing rather than to provide a blueprint for statebuilding in Kosovo, and was drafted within the tight political constraints that prevailed in the wake of the Kosovo war. Kosovo's future status was left unresolved as the Western powers were unwilling to concede independence to Kosovo as a result of a war fought to address a humanitarian crisis, not to advance secession. In addition, the two permanent Security Council members who had objected to the war from the outset, Russia and China, would have vetoed any resolution that had not asserted Yugoslavia's sovereignty over Kosovo.[29] The question of final status was postponed to the indefinite future, in the hope that time and developments in Kosovo and Serbia would bring a solution. Therefore, although the resolution provides a clear mandate for the building of political institutions, it does not determine the scope of authority these institutions could eventually have. UNMIK was effectively tasked to engage in statebuilding without statehood.

The UN's leadership of the international administration in Kosovo was the result of a compromise between the G8 states, preparing the way for

Resolution 1244. Leadership by the OSCE or by the EU, both of which had been foreseen in the Rambouillet Accord, were rejected by Russia in case of the OSCE, and the USA in case of the EU.[30] Thus, the UN emerged as the lead organization, despite reservations of key member states in the light of its poor performance during the war in BiH, and the dismay of the UN Secretariat about having to assume such a large mission without prior consultation or sufficient resources for the mandate.[31]

In Resolution 1244, the Security Council broadly outlined the mandate of UNMIK as building democratic institutions of self-governance and transferring responsibility to them, reconstructing Kosovo's infrastructure, coordinating humanitarian aid, maintaining law and order, protecting human rights, and working towards a political settlement in Kosovo.[32] However, it neither specified the scope of UNMIK's authority—whether it would exercise sole authority or share it with local institutions—and the degree to which it would assume sovereign responsibilities in Kosovo, nor the structure the mission would have.[33] Officials involved in the planning have suggested that UNMIK was originally conceived as an assistance, rather than governance mission.[34]

The Secretary-General's first report on Kosovo, whose brevity reflects the limited planning for Kosovo conducted by the UN Department for Peacekeeping Operations (DPKO) until June 1999, was published two days after Resolution 1244 was passed, and already suggests relatively broad powers for UNMIK.[35] It is the second report, however, published one month later on 12 July 1999 and incorporating the findings of the UN advance team sent to Kosovo, which makes it clear that UNMIK was to have supreme executive and legislative authority, and would fully take over the governance of Kosovo.[36] This was the consequence of the advance team's realization that with the collapse of the public administration in Kosovo and the absence of even basic services after the departure of the Serb authorities, UNMIK needed to be a government rather than an assistance mission.[37] The report foresaw that UNMIK would exercise 'all executive and legislative powers, including the administration of the judiciary'.[38] This interpretation of UNMIK's authority was explicitly confirmed by the first Regulation issued by UNMIK in Kosovo on 25 July 1999, which defined the authority of the interim administration.[39]

The two reports also outline UNMIK's structure of four 'Pillars' reporting to one single head of the mission, the SRSG (see Fig. 4.1).[40] As the head of the international administration, the SRSG exercises the supreme executive and legislative authority vested in UNMIK. He is assisted by a Principal Deputy SRSG and supported by an executive office, advising him on political, legal, economic, and human rights matters.[41] All legislation passed by UNMIK in the form of Regulations is reviewed by the legal adviser in Kosovo, as well as

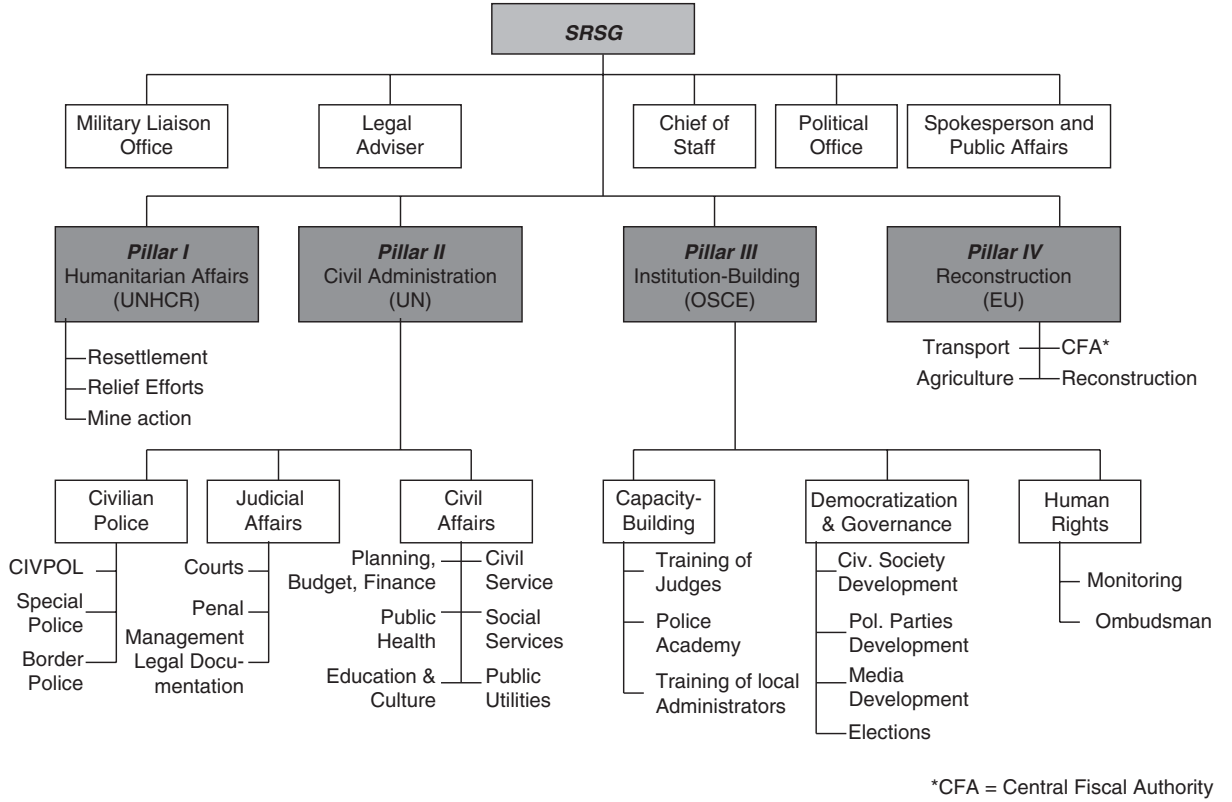

Figure 4.1. UNMIK structure, 1999

by the Office of the Legal Adviser (OLA) at the UN in New York, before it is signed and promulgated by the SRSG.

Each of the pillars is headed by a Deputy SRSG (DSRSG). Originally Pillar I, led by the UNHCR, was responsible for humanitarian affairs, in particular the coordination of emergency aid and the 'winterization' of accommodation for Kosovar families returning to their destroyed homes.[42] The UNHCR left the pillar structure in June 2000 after many of its competencies were gradually transferred to Pillar II and emerging local institutions, though it continued to maintain a presence in Kosovo. Pillar II, headed by the UN, has been responsible for the day-to-day running of the civil administration, the police, and the justice system.[43] The OSCE was put in charge of Pillar III, responsible for democratization and institution building. Finally, Pillar IV, dealing with reconstruction and economic development, was headed by the EU.

The working of the different pillars was formally coordinated by an Executive Committee (EXCOM) consisting of the SRSG, the Principal DSRSG, the heads of the Pillars, and the KFOR Commander (COMKFOR), which met daily. Below this level, however, the four pillars have worked very independently, with their own bureaucratic cultures, separate reporting mechanisms, independent structures in the regions and municipalities, and only limited cooperation between them.[44] Thus, even if the international community had learned the lesson from Bosnia and aimed to create a more integrated structure,[45] it only partially succeeded in its aim.

In its pre-mission planning, the UN envisaged a three-phased strategy for Kosovo. In the first phase, UNMIK would exercise direct rule and build up and manage administrative structures in Kosovo, delegating some managerial and administrative responsibilities to local institutions towards the end of this phase. The second phase would see elections to a transitional authority, and the UNMIK-supported establishment of local provisional institutions of self-government. Over time, responsibilities would be transferred from UNMIK to the provisional institutions. The third phase would see a political settlement and the final transfer of responsibilities to the new institutions, whatever form they might take, be it in an independent Kosovo, or a territory that formed part of Yugoslavia.[46] This highlighted the technocratic approach taken by UNMIK to the transfer of responsibilities to local institutions; an approach informed by concerns about the ability of existing institutions to deliver services to Kosovar society, and the capacity of Kosovars to run these institutions effectively. It suggests an understanding of sovereignty that predominantly considers the effective delivery of certain services by the state, ranging from protection to public services, rather than the existence of an ethnically or territorially defined political community and its right to self-determination as the major source of sovereign authority, though at

least parts of UNMIK's leadership were concerned about the involvement of Kosovars in government, to enhance the legitimacy of the statebuilding project.

From Direct Rule to Local Self-governance

Even though UNMIK originally concentrated all political authority in its hands to establish and manage administrative structures, it immediately established mechanisms for consulting local political leaders. It convened the Kosovo Transitional Council (KTC), which aimed to bring together all major local political parties and representatives of ethnic groups.[47] The establishment of the KTC confirms that UNMIK was concerned about self-determination, but given the purely consultative role of the KTC, prioritized achieving administrative effectiveness over Kosovar self-determination.

However, as UNMIK had been slow in deploying its administrators beyond the capital in the municipalities, it faced major problems in establishing direct rule over Kosovo. By September 1999, UNMIK staff was deployed to only eighteen of Kosovo's twenty-nine municipalities, and in just nine of them did UNMIK officials chair the local administration.[48] The existing power vacuum had instead been filled by the unrecognized, KLA-led 'Provisional Government of Kosova', that appointed mayors and established a parallel governmental structure reporting to its Minister of Local Government, not to UNMIK.[49] Depending on the municipality, these mayors collected taxes, issued licence plates, and in particular appointed managers of SOEs in the municipalities, all of which were intended to be prerogatives of UNMIK.[50] In addition, Ibrahim Rugova's parallel institutions of the 'Republic of Kosova' from the 1990s demanded recognition as the official government of Kosovo, and pending this were unwilling to participate in the KTC. Only at the end of October 1999 did UNMIK firmly try to establish its presence in the municipalities, adopting a regulation appointing municipal and regional administrators, and outlining their authority vis-à-vis the parallel structures.[51] Its delayed presence on the ground made it difficult for UNMIK to govern against the existing governance structures, and the established consultation mechanisms like the KTC or sectoral 'joint civilian commissions' failed to effectively replace or co-opt them.[52]

In exchange for dismantling the parallel structures, the SRSG heeded to the request of leading Albanian politicians to increase local participation in the administration of Kosovo. On 15 December 1999, he signed the 'Agreement on a Kosovo–UNMIK Joint Interim Administrative Structure', which was formalized into law through a regulation one month later.[53] This increasing

'Kosovarization' of the administration, which also seems to have been influenced by the SRSG's unease about limited Kosovar participation,[54] fell well short of establishing institutions of self-governance, but was UNMIK's only viable strategy to establish control over Kosovo. Exercising full control over Kosovo was necessary to provide public services and administration effectively, highlighting the importance of effective governance, the ability to develop and implement public policy, as a source of international authority. Contrary to the UN's original three-step plan, this transition was no longer driven primarily by the fulfilment of certain benchmarks of local administrative capacity, but by local political pressures for self-government that appealed to powerful international norms of self-determination. UNMIK's originally technocratic conception of statebuilding was increasingly abandoned.

Central to this new Joint Interim Administrative Structure (JIAS) (Fig. 4.2) was the Interim Administrative Council (IAC), an advisory body consisting of the Principal DSRSG, the heads of Pillar II, III, and IV, three leading Albanian politicians, and a representative of the Serb minority.[55] While officially the IAC was only a consultation body for the SRSG, it developed into a quasi-legislature that discussed and amended draft regulations and endorsed them, normally unanimously.[56] In addition, an enlarged KTC including representatives of civil society was established, but it was never involved in the legislative or administrative work of UNMIK and JIAS.[57]

The JIAS agreement also 'Kosovarized' the central administrative departments and the municipalities, by establishing a 'double-desk' structure of international and local co-heads.[58] The input Kosovars gave in the running of departments, however, varied, depending on the international co-head of the respective department. While in some cases the international and local co-heads cooperated closely, in other departments the Kosovars were marginalized.[59] Departments reported to the Pillars which were responsible for them and not to the IAC. This limited the authority of the IAC, and therefore of Kosovars, over the administration. The establishment of JIAS was not so much a transfer of power to local institutions as the co-opting of Kosovars into international direct rule, necessitated by UNMIK's failure to establish full political control over Kosovo, and local demands for self-government.

The first democratically legitimized institutions of self-governance were established after the elections for municipal assemblies in October 2000. The municipal administrations started to take over some of the responsibilities previously under the direct control of the international administrators.[60] However, international monitoring of the municipal assemblies and administrations continued, and the international administrators maintained the right to intervene in political decisions if they considered it necessary to implement Resolution 1244.[61]

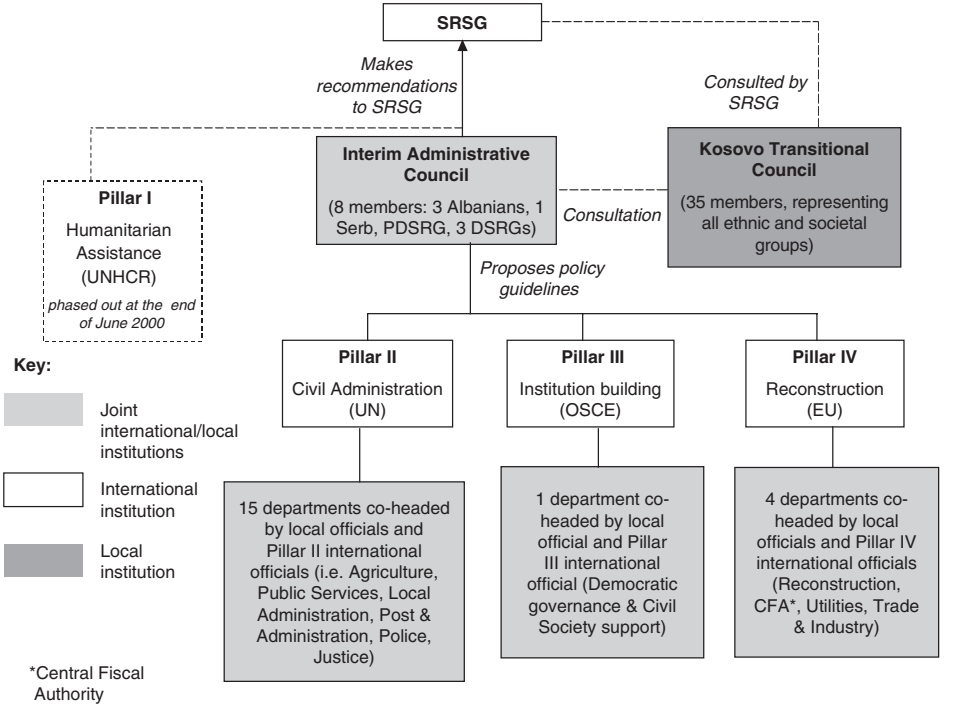

Figure 4.2. UNMIK joint interim administrative structure (January 2000)

Source: Adapted version of Figure 1.1 from Richard Caplan, *International Governance of War-Torn Territories; Rule and Reconstruction* (Oxford: Oxford University Press, 2005), 38. By permission of Oxford University Press.

Like the establishment of JIAS, the transfer of responsibilities to the municipal level was part of a broader strategy of launching self-government pursued by UNMIK to maintain some political leverage over the Albanians, who grew increasingly disenchanted with UNMIK and demanded the establishment of domestic political institutions and their legitimization through elections.[62] In addition, many within UNMIK, including the SRSG Bernard Kouchner, felt uneasy about the concentration of powers by an international authority unaccountable to anyone in Kosovo,[63] fearing that UNMIK had become 'too isolated from the people in Kosovo'.[64]

In response to increasing pressure from Albanians for general elections and a Kosovo constitution, a group of international officials and members of the COE's Venice Commission started to draft a constitutional document in January 2001. They drew on plans for a legal framework for Kosovo's institutions discussed during 2000 by the Contact Group.[65] Their draft was adopted by the Quint states[66] and endorsed by the UN Secretariat in late February, and was discussed in a working group made up of seven members from Kosovo (five Albanians, one Serb, and one Bosniak) and six internationals for the first time on 5 March 2001.[67] A draft constitution prepared by Albanians at the same time was dismissed by UNMIK as being outside Kosovar authority under Resolution 1244, and going beyond the provision of the Resolution, with regard to statehood for Kosovo.[68] After extensive and heated negotiations between the international and local members of the working group, with international officials rejecting Albanian demands for a constitutional court that could hold the SRSG accountable and for a referendum on independence for Kosovo,[69] the SRSG signed the Regulation containing the Constitutional Framework for Provisional Self-Governance on 15 May 2001.[70]

The framework outlines the structure of the Provisional Institutions of Self-Governance (PISG) in Kosovo. It transfers a large degree of responsibility from UNMIK to the PISG, but UNMIK remains the ultimate authority as established in Regulation 1999/1. Three new political institutions are at the centre of the PISG: the elected Kosovo Assembly; the President of Kosovo, who is elected by the Assembly members; and the government, which is proposed by the President and endorsed by the Assembly (Fig. 4.3).[71] The new ministries of the Kosovo government are headed by Kosovar ministers, while the status of the former international co-heads has been reduced to an advisory capacity.

However, not all functions have been transferred to the PISG. The constitutional framework identifies a range of reserved powers, which are still under direct control of UNMIK and the SRSG (Fig. 4.4).[72] These cover all external relations and military issues, control over the police and judiciary, and control over SOEs and their privatization and regulation. Thus, key features of statehood, such as the monopoly on legitimate violence, remain under UNMIK

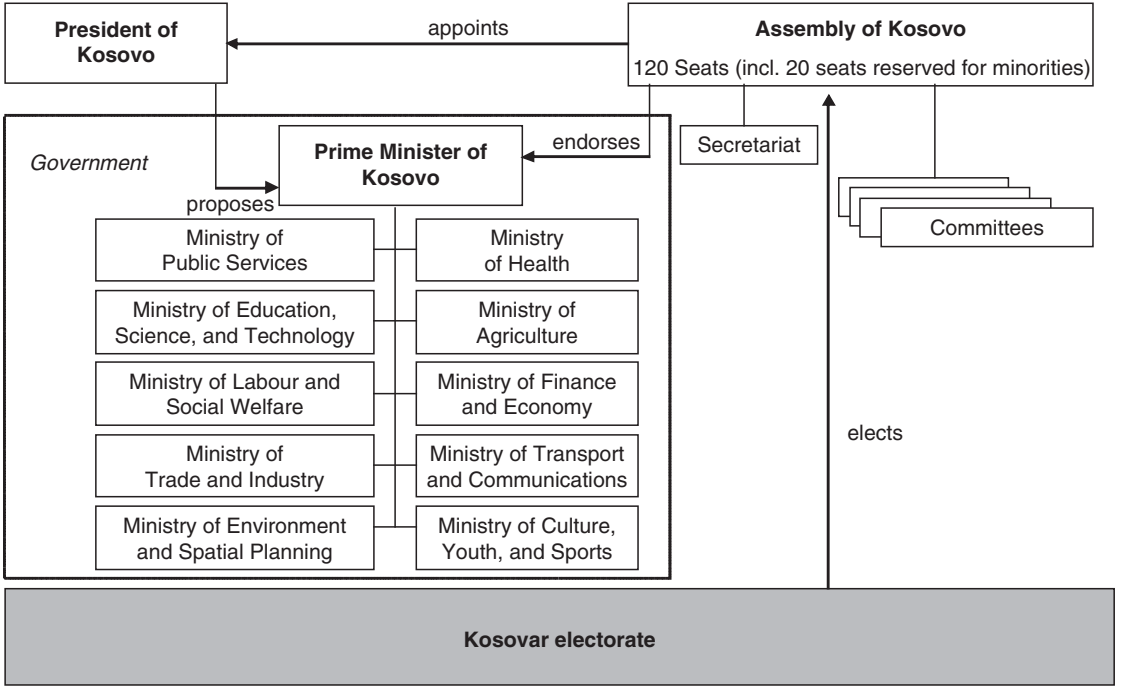

Figure 4.3. The constitutional framework—responsibilities transferred to the PISG (May 2001)

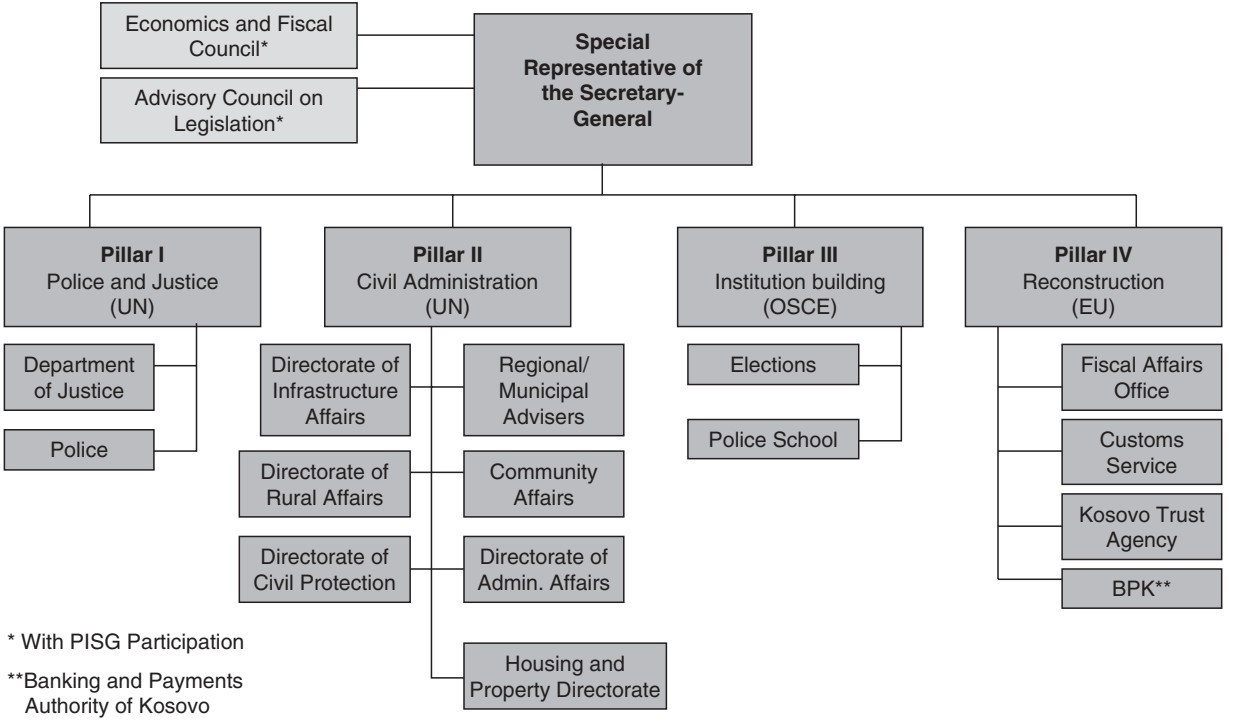

Figure 4.4. The constitutional framework—reserved powers of UNMIK (May 2001)

authority.[73] The largest section of the reserved powers, police and justice, was moved from Pillar II to a new Police and Justice Pillar, which became the new 'Pillar I'.[74] In addition, the SRSG still has to sign and promulgate any law passed by the assembly on issues for which the PISG are responsible.

The establishment of the PISG has resulted in two different law-making processes, one for reserved powers, and one for the devolved powers. In the case of reserved powers, regulations are drafted in the responsible Pillars, and reviewed by the UNMIK legal adviser and the UN legal adviser in New York, to ensure that the legislation complies with Resolution 1244. After this, they are signed and promulgated by the SRSG. In the case of the PISG, the initiative for a law can come from a ministry, the Office of the Prime Minister, or the Assembly. Laws are voted on in the assembly and signed by the President, but also need to be approved by the SRSG, who therefore remains the ultimate authority and is responsible for any legal changes in Kosovo.

Kosovo's Empirical Sovereignty

With Kosovo's status unresolved, the nature of Kosovo's sovereignty is complex and contested. While legally a part of Serbia and Montenegro, ultimate political authority in Kosovo remains with UNMIK, even after a range of responsibilities has been devolved to local institutions since the establishment of the PISG.

Kosovo's empirical sovereignty—the ability of its political institutions to exercise authority over the territory—is limited by four factors. First, under Resolution 1244 and the Constitutional Framework, a range of reserved powers is still exercised by UNMIK. Only with the resolution of Kosovo's status, and thus the clarification of its juridical sovereignty, can all of these powers be transferred to the appropriate local institutions.

Second, parallel institutions within both the Serb and Albanian community constrain the effective exercise of control of the PISG over Kosovo's territory. In Serb municipalities, the government in Belgrade still pays wages to most officials, runs the administration and services like the university and the hospital in Mitrovica, and has long kept an informal police presence.[75] Among Kosovars, informal authority structures continued to exist even after the JIAS agreement that was supposed to lead to their dismantling. In addition, former KLA fighters have been considered to be involved in organized crime, which has limited the ability of the government to exercise sovereign control.[76] Thus, the killing of Rexhep Luci in September 2000, who was the head of the Urban Planning Department in Pristina Municipality and sought to demolish illegal constructions throughout the municipality, effectively stopped the demolition

of more than 3,250 structures illegally raised in Pristina between June 1999 and January 2001.[77] While the full extent of the political influence of such war-time networks is unclear, there are certainly concerns about close links to former KLA fighters who have entered Kosovo politics.[78]

Third, the ability of Kosovo's government to exercise authority is undermined by internal divisions. Not only are Serbs and Albanians deeply divided, leading to the regular boycott by Serbs of Kosovo's political institutions,[79] but equally Albanians are divided among themselves. Cooperation between the Albanian parties has proven difficult, and the two major parties, PDK and LDK, have been accused of maintaining their own intelligence services and being involved in assassination attempts on political opponents, such as the bomb attack on the late President Rugova's motorcade in Pristina in March 2005.[80]

Finally, the ability to develop and implement public policy is constrained by the lack of reliable data and institutional capacity. The civil service on both the central and municipal level often lacks the capacity to effectively implement policies, and has become increasingly politicized.[81] Furthermore, in the absence of a census and systematic collection of data by ministries and municipalities, there is no reliable information on basic issues like population numbers, birth rates, employment, or GDP. This last problem, however, has not only compromised the effectiveness of the Kosovar political institutions, but also UNMIK's public policymaking capacity.[82] This raises the question to what extent the lack of effectiveness compromises the authority of the international administration. This will be discussed in more detail in the context of privatization pp. 153–166.

Empirical sovereignty has been tied to Kosovo's status and thus its juridical sovereignty through the 'standards before status' policy initiated by SRSG Michael Steiner in 2002.[83] Originally, Steiner and his advisers conceived of the 'standards' as a political tool to bring the status issue onto the agenda of the international community, which had been unwilling to deal with it, and to reassure the Kosovo Albanians that the status of the province would be addressed. While originally reluctant, Western governments, in particular the USA, took on the proposal and increasingly turned it into a technical 'checklist'. This checklist linked the political talks about status to the fulfilment of a set of standards with respect to human rights, the development of democratic institutions, the establishment of a free market economy, and the promotion of the rule of law by the Kosovars.[84] In December 2003, UNMIK adopted the same approach to the standards.[85] This 'standards before status' policy explicitly invokes the standard of civilization as outlined in Chapter 1. Notably, though, this policy does not link the nature of Kosovo's future status—whether it will be independent, remain part of Serbia, be

divided, or remain under international administration—to the fulfilment of the standards. The implementation of the standards was reviewed by Kai Eide, special envoy of the UN Secretary-General, in Autumn 2005. His report noted progress in the implementation, and recommended—despite important shortcomings in the implementation, in particular with regard to the protection of ethnic minorities—that talks about Kosovo's future should begin before the international community in Kosovo becomes too weak to be able to shape the process.[86] The Security Council endorsed the recommendation, and supported the Secretary-General's plan to appoint another special envoy for the status negotiations.[87] Former Finnish president, Marthi Arthisaari, was appointed and started the negotiations in December 2005. At the time of writing, the status talks are ongoing, and the outcome is widely expected to be some form of 'conditional sovereignty', with an independent Kosovo where the international community maintains a significant presence and reserved powers to protect human and minority rights.[88]

The international community's 'standard of civilization' has had little effect on the speed and nature of the transition away from international administration to local governance. The handover of political authority has not been determined by the fulfilment of specific criteria by local institutions displaying their ability to exercise governance functions, but rather by UNMIK's inability to govern without local cooperation and its willingness to honour local demands for self-government. This contest between the international community's predominantly technocratic approach to transferring responsibilities and the demand of Kosovars for self-governance has not only been a political competition for power between the two sides, but also a contestation about different norms: the norms associated with the standard of civilization on the one hand, and the norm of self-determination on the other.

Even if it has had little influence on the transition of authority, the standard of civilization has shaped UNMIK's statebuilding agenda, as the emphasis on democratic legitimization of local political institutions suggests. The case studies below will further explore the influence of other elements of the international community's conception of sovereignty. Section two analyses the influence of human rights and notions of the rule of law on the reform of the judicial system in Kosovo. Rule of law reform has been one of UNMIK's priorities in Kosovo, and the case study shows how the failure of Kosovar judicial institutions to provide the rule of law has caused UNMIK to assume control over the judicial system in order to achieve the standards of the international community. Section 3 looks at the privatization process in Kosovo. Property law issues have been closely linked to juridical sovereignty, and have proven to be particularly intractable. The privatization of SOEs has been a keystone economic policy of the international

community, and its attempts to devise a process for privatization show the centrality of establishing a free market economy to the statebuilding project in Kosovo.

POLICYMAKING IN KOSOVO I: HUMAN RIGHTS AND THE REFORM OF THE JUDICIAL SYSTEM

The legal order is a constitutive element of modern states,[89] and an essential condition for the exercise of authority. It defines the locus and scope of authority; without it, the scope of the state's authority vis-à-vis its citizens is unclear, and government is characterized by arbitrariness and lack of accountability. Hence, a functioning legal order is necessary for the establishment of sovereign authority. The legitimacy of a legal system depends on its reflection of the goals and purposes of a society (a society's ownership of the legal system); on its ability to promote these goals (effectiveness); and on the way in which it promotes these goals, in particular in an independent and impartial fashion (procedural legitimacy). Establishing the legal order and reforming and strengthening the judiciary have been central to most post-conflict statebuilding missions since the end of the cold war. The importance that has been attached to this for the work of international administrations is underlined by its prominence in the Brahimi Report, where issues pertaining to legal order constitute the bulk of the recommendations regarding international administrations.[90]

In its reform efforts in Kosovo, the international community aimed to enhance the legitimacy of the legal order in two ways. First, UNMIK endeavoured to clarify the applicable law, and ensure that it complied with international human rights standards. Regulation 1999/1 stated that the applicable law in Kosovo was the law applicable prior to the 24th of March 1999—the day that NATO initiated its attacks on Yugoslavia—as long as it was not in contradiction to international human rights standards and UNMIK's mandate according to Resolution 1244.[91] However, Albanian judges and prosecutors refused to apply Serb laws from the 1990s, which they viewed as instruments of oppression, and applied the law as it had been in place in 1989—before the revocation of Kosovo's autonomy.[92] Given that the laws from the 1990s did not differ substantially in content, and were, as some observers noted, superior to the old laws in some respects (in particular if amended by international human rights standards),[93] the judges' resistance was one of political symbolism, emphasizing that Kosovo was no longer under Serb authority. In December 1999, UNMIK gave in and retroactively declared the law in force on 22 March 1989 as applicable.[94] The problems this created for the

establishment of the rule of law in Kosovo will be discussed in more detail below.

Second, UNMIK embarked on rebuilding the judiciary, which had all but collapsed with the Serb withdrawal, to establish an 'independent and multi-ethnic judicial system' providing 'genuine rule of law in Kosovo'.[95] While the clarification of the applicable law aimed at addressing the issue of ownership of the legal order, reflecting the social goals and purposes of Kosovar society, the reform of the judiciary addressed the effectiveness of the system and two elements of procedural legitimacy—independence and impartiality.

Procedural Legitimacy—Independence of the Judiciary

The establishment of an independent and impartial judiciary is a requirement for governments under international law,[96] and is essential for the legitimacy of any judicial system. If a judiciary is not protected from the influence of the politically powerful, there is unlikely to be equality before the law, and it risks becoming an instrument of control over individuals, rather than in institution protecting their rights. In Kosovo, the reforms to promote judicial independence have focused on three measures to shield the judiciary from political influence: the independence of the appointment process, the independence of the disciplinary process, and security of tenure for judges.

Already at Rambouillet, human rights NGOs had demanded that an independent commission for the appointment of judges and prosecutors in Kosovo be established.[97] When UNMIK arrived, Kosovo's judicial system had all but dissolved with the departure of the Serb authorities after the war: there were no judges and prosecutors, no defence lawyers, and no jailers left in the province; and the retreating Serb forces had looted and destroyed the physical infrastructure of the justice system.[98] One of the first decisions of UNMIK therefore concerned the establishment of an independent commission to recommend appointments to an emergency judiciary, the Joint Advisory Council on Judicial Appointments (JAC).[99] The JAC had seven members: four local lawyers (two Albanians, one Serb, one Bosniak) and three international lawyers, who were mandated to identify qualified legal personnel that could be appointed to the judiciary by the SRSG.[100] UNMIK's decision to give a majority presence to local lawyers was designed to enhance the feeling of local ownership of the judiciary. However, this decision also raised problems for the JAC, given that many of those who had legal experience in Kosovo were also likely to have worked with Serbian officials prior to 1999. The criticism by the KLA of the local JAC members for being collaborators with the Serb

regime underlined the importance of shielding the nascent judiciary from the pressures of political groups in Kosovo.[101]

In September 1999, the emergency mechanism of the JAC was replaced with the Advisory Judicial Commission (AJC), which had broader responsibilities for both judicial appointments and disciplinary matters.[102] Its membership was expanded to eight local and five international members, appointed by the SRSG according to professional expertise. Regulation 1999/7, which established the AJC, outlined the selection criteria for judicial personnel that contained, in addition to professional criteria, a strong provision for preventing the politicization of the judiciary: judges and prosecutors were not allowed to be registered with any political party or be otherwise engaged in political activities.[103] This provision was later weakened, no longer explicitly banning them from party membership, but still limiting political activities.[104] Even these strong provisions, however, could not prevent the Albanian members of the commission from appointing individuals on the basis of their 'political fitness', and prevented the appointment of qualified staff viewed as 'disloyal' to the cause of independence.[105]

In addition to advising judicial appointments, the AJC was supposed to serve as a disciplinary body, investigating misconduct of judges and prosecutors, and recommending disciplinary measures such as removals, to the SRSG.[106] However, despite evidence of misconduct of judges, the Council failed to initiate any investigations in 1999 and 2000. As a disciplinary body, the AJC was thus, in the words of an UNMIK official, 'a complete disaster',[107] and was dissolved by the SRSG in October 2000. It was replaced six months later with the Kosovo Judicial and Prosecutorial Council (KJPC), with a smaller membership, and the mandate to propose appointments, investigate misconduct and disciplinary measures, and advise the SRSG on judicial affairs.[108] Of its nine members, five were internationals and only four local. The KJPC thus represented a clear policy shift towards greater international oversight and control over the judiciary, resulting from the poor performance of the previous institutions dominated by locals. In addition, a Judicial Investigation Unit was established in the Administrative Department of Justice to investigate complaints against members of the judiciary.[109] In September 2001, the first disciplinary hearings against local judges and prosecutors took place.[110] The abolition of the AJC revealed the tension between the commitment to local ownership on the one hand, and judicial independence in Kosovo on the other. With the establishment of the KJPC, UNMIK prioritized judicial independence.

Finally, judicial independence has been promoted through guarding the security of tenure of legal personnel. When judges and prosecutors were first appointed in 1999, they only received three-month contracts, which

granted UNMIK a degree of control over them that potentially compromised their independence. Since January 2002, all local legal personnel have been appointed until the end of UNMIK's mission.[111]

Judicial independence has thus been protected relatively successfully from Kosovo politics, but not from UNMIK. On the contrary, as the account above shows, UNMIK increased its control over the judiciary after 1999, on the basis of three justifications: its claim that as an international body, it has been politically neutral and disinterested; by its commitment to maintaining human rights standards; and its effectiveness in providing the rule of law. With the establishment of the new Police and Justice Pillar (Pillar I) in May 2001, the whole justice system was declared a reserved power and came under international control, for fear of political influence over the justice system. Thus, there was no Kosovar Ministry of Justice in the PISG until December 2005[112]—a good example of how self-governance has been compromised to establish sovereign authority.

In fact, UNMIK has not necessarily behaved neutrally vis-à-vis the judiciary, thereby calling into question one of the justifications for its authority. In 2000, Hasim Thaci, former KLA commander and leader of the PDK,[113] complained about being harassed by UNMIK police who, according to him, had 'raided his party premises, targeted his family members for police inspections and created a general impression of personal prosecution'. The SRSG apologized to him for these actions, and instructed UNMIK police not to engage in intrusive investigations of public figures.[114] This created the impression that certain political leaders were above the law, undermining the credibility of the judicial system. In the case of Afrim Zeqiri, who was accused of killing a Serbian boy in the village of Cernica in 1999, the SRSG overruled the decision of the local prosecutor and the international judge to release Zeqiri by executive order and extended his detention, in the face of intense criticism from the OSCE and human rights groups, on the basis of 'security reasons', but without any detailed justification for his decision.[115]

Furthermore, the international judges who form part of the judiciary (see pp. 148–150) are institutionally and functionally reliant on UNMIK's Pillar I. They are institutionally reliant, as they are selected and hired by Pillar I. As UNMIK civil employees, they have the usual six-month contracts, and in the absence of a disciplinary procedure for international judges in Kosovo, not renewing the contract is the only sanctioning mechanism available. However, the decision on renewal is made by the Pillar, and is not an independent mechanism. International judges are functionally reliant on UNMIK as the cases they work on are assigned by the Department of Justice to specific judges, not randomly. Furthermore, senior UNMIK officials have occasionally intervened in the work of the judges, directing the judges to conduct their work

in particular ways.[116] The distinction between the executive and an important part of the judiciary has thus been blurred, as has been pointed out regularly by the OSCE.[117]

More generally, the increasing international control over the judicial system questions both Kosovar's ownership of the legal system, as well as the independence of the judiciary. Rather than being subject to Kosovar political pressures, from which the judiciary has been relatively successfully shielded, it is now subject to influence from UNMIK. To fully understand why UNMIK has proceeded this way, however, it is necessary to look at the other element of procedural legitimacy, impartiality, and at the effectiveness of the legal system.

Procedural Legitimacy—Impartiality of the Judiciary

During the first few months of the operation of the justice system, it quickly emerged that the Albanian judges and prosecutors who had been appointed displayed a strong bias in favour of Albanians and against Kosovo's minorities. Former KLA fighters and powerful Albanians could act almost with impunity and often walk free after a short time of detention, even if they had been caught committing serious crimes.[118] Minorities on the other hand found it very difficult to get a fair trial, and faced long detention for minor charges, sometimes without indictments.[119] The ethnic bias was particularly pronounced—and particularly problematic—in the case of alleged war crimes.

While this partiality towards ethnic Albanians was partly the result of the polarization of Kosovo's society after ten years of apartheid and massive human rights violations, judges and prosecutors were also subjected to strong pressure and intimidation from former KLA fighters.[120] This undermined the legitimacy of the judiciary in particular in the eyes of minorities, who feared that they could not get a fair trial in Kosovo.

The release by the court of an Albanian in February 2000, who had shot at a French KFOR soldier during riots in Mitrovica, prompted sharp protests from the French KFOR general and the quick passage of Regulation 2000/6, introducing an international judge and prosecutor to the district court in Mitrovica.[121] Their presence was supposed to redress the ethnic bias that the court had displayed. Over the following months, international judges were placed in all five district courts in Kosovo. International participation in the judiciary, though eschewed by the UN during the planning of UNMIK, had been promoted in particular by the OSCE since May 1999. UNMIK had rejected such a move for two reasons: first, it was feared that it would undermine Kosovar ownership of the judicial system; and second, because of the

difficulty of finding the necessary number of international judges and training them in the applicable law in Kosovo: the domestic law of Yugoslavia.[122]

Their presence, however, failed to fully redress the partiality of the courts. According to the applicable law, the Yugoslav Criminal Procedure Code (art. 23), panels on district courts consist of two professional and three lay judges, with majority verdicts and an equal vote for all judges. International judges were regularly outvoted by their Albanian colleagues, while their presence on the bench created the perception of increased legitimacy of biased judgments. Consequently, in December 2000, UNMIK issued Regulation 2000/64, granting prosecutors, defence counsels, and the accused the right to petition UNMIK's Department of Judicial Affairs (DJA) to assign international judges and prosecutors to the case, or change the venue of the proceedings, to ensure the independence and impartiality of the judiciary.[123] The Regulation allows the DJA to establish '64 panels' consisting of three judges, at least two of which are internationals. Cases are transferred to a '64 panel' according to four main criteria: the existence of threats and intimidation of the local judiciary; significant public demand for a judicial decision; ethnic or political diversity among defendants, victims, and witnesses; and the severity of the offence.[124] The establishment of these panels was accompanied by a regulation allowing the international prosecutors to re-open cases that have been closed by local prosecutors,[125] bolstering the international control over the justice system.

These measures helped to address the perception of bias in Kosovo's judiciary. None of the OSCE's reports on Kosovo's judiciary written after 2001 has identified it as a problem, a complete reversal of the situation before Regulation 2000/64 was passed. However, the price of attaining impartiality and the non-discriminatory application of justice was the denial of local ownership of an important part of the legal system. This lack of local ownership was cemented further by the establishment of the KJPC and Pillar I. It has resulted in fierce attacks on the justice system by parts of the Albanian political elite (in particular from politicians close to the former KLA), who have considered the judiciary as an instrument to pursue their broader political goals, in particular independence for Kosovo. Examples of this are comments from the government during the *Llapi* trial in 2003, where four KLA members were sentenced to prison terms between five and seventeen years long, for participation in the detention, torture, and murder of civilians in a KLA detention centre. After their arrest by the police, the Kosovo government issued a press release, accusing UNMIK of taking 'political prisoners'.[126] After the judgment was announced in the summer of 2003, the acting Prime Minister Krasniqi claimed that the judgment was fabricated by people who used to work for the Serb regime, and accused the court of being 'detrimental for the future of

Kosovo'.[127] The distinct lack of respect for an independent, impartial judiciary in Kosovo suggested by comments like this has been the main reason for UNMIK's insistence that international control over the judiciary is essential to maintain the rule of law and to protect human rights, in particular of minorities, in Kosovo.

Effectiveness of the Judiciary

The effectiveness of a judiciary describes the extent to which courts are able to conduct trials speedily in a procedurally appropriate manner, observing international rule of law standards. Thus, effectiveness is not only concerned with the outcome (i.e. the number of cases successfully addressed), but also with judicial procedure, and is consequently linked to the issues of judicial independence and impartiality already discussed. The effectiveness of the judiciary is important for the protection of the human rights of detainees, such as the right to be tried within a reasonable time, which is a requirement under international law.[128] The collapse of the justice system in Kosovo led to a huge backlog of cases that the nascent judiciary was ill-prepared to deal with.[129] Even after the emergency judicial system was replaced with more institutionalized structures at the end of 1999, this backlog remained, and compromised the right of detainees to be tried without undue delay.[130]

Judicial effectiveness was limited further by the destruction of the physical court infrastructure and the lack of well-trained legal practitioners in Kosovo. Ten years of exclusion from the justice system and the exclusion of Albanian students from the law faculty meant that the training of many of them was insufficient or outdated, in particular with regard to international human rights law. In the absence of a full review of the applicable Yugoslav law and its compliance with international human rights standards, it was up to these judges to decide on the law in each case, which led to confusion about the applicable laws.

UNMIK tried to address the problems of effectiveness and capacity in three ways: (*a*) internationalization of the judiciary; (*b*) reorganization of the judiciary; and (*c*) legal training for judges, prosecutors, and defence lawyers. The internationalization of the judiciary and the organizational reform through the establishment of Pillar I have already been discussed, and only a few additional comments are needed here. As well as concerns about the ethnic bias displayed by Albanian judges, the increasing backlog of sensitive cases involving war crimes and ethnic crimes contributed to the review of UNMIK's position on employing international legal personnel.[131] By October 2003, their

number had increased to 14 judges and 12 prosecutors.[132] The organizational reform of the judiciary, placing it completely under the new Pillar I, aimed to increase the effectiveness of the justice system, in particular by improving the coordination between police and judiciary, and to increase focus on the establishment of the rule of law.[133] With the establishment of Pillar I, more funding for the international side of the of the justice system was made available by donors, resulting in an increase in the number of international judges and prosecutors, and the establishment of better administrative support structures for them. As a result, international judges could take on a higher caseload and start to reduce the existing backlog.[134]

The third method of improving the effectiveness of the judiciary has been through training and capacity-building. Already in July 1999, the UN Secretary-General noted in his report the need for legal training to establish a functioning judiciary in Kosovo.[135] Within UNMIK, it was the OSCE Pillar III, responsible for institution-building, which took on this task. In August 1999, the OSCE's Human Rights and Rule of Law Department established the Judicial Training Section, to provide training in particular with regard to international human rights provisions to the judges and prosecutors of the emergency system. In February 2000, this was renamed the Kosovo Judicial Institute (KJI), and has expanded its training on applicable law and legal procedure for judges and prosecutors since then. In 2003, the KJI for the first time developed a systematic training programme and offered a set curriculum, moving away from reactive, ad hoc training in new legislation.[136] To complement these efforts, the Kosovo Criminal Defence Resource Centre was opened in September 2001 to strengthen the capacity of defence lawyers through training and case-specific assistance.

All three measures have improved the effectiveness of the judicial system in Kosovo, both by improving the physical ability of the system to investigate cases and conduct trials, and by improving the ability of the judiciary to do so in a procedurally correct manner. By the end of 2003, an increasing number of sensitive cases was tried by panels with a majority of local judges, not the '64 panels',[137] suggesting that the Kosovo judiciary has been moving towards a condition where local ownership can be increased without compromising human rights and rule of law standards. However, the effectiveness of Kosovo's judicial institutions remains severely constrained, in particular in municipal courts, which have not been assigned international judges, and which have been understaffed and unable to deal with an increasing load of cases, especially in urban areas.[138] Despite their progress, Kosovo's judicial institutions remain fragile, and can only live up to the human rights and rule of law requirements, in particular with regard to minorities, with continued international support and involvement.

Implications—Establishing the Judicial System in Kosovo

Human rights and rule of law standards are reflected in the requirements for an independent, impartial, and effective judiciary. The preceding analysis thus highlights how the emphasis on these norms has heavily influenced the institution-building activities of UNMIK in Kosovo's justice sector. UNMIK has compromised Kosovar self-governance and ownership to enhance the effectiveness of the courts, and as a response to the failure of Kosovar judicial institutions to uphold human rights and the rule of law, in particular the impartiality and independence of the judiciary. However, as the case illustrates, UNMIK has not always succeeded in its aims: judicial independence has not always been protected, and the effectiveness of the judicial system continues to be undermined by the small number of judges and an increasing case load, despite greater internationalization of the judiciary.

In the justice sector, UNMIK has faced the dilemma of what Joel Beauvais (commenting on East Timor) has described as the 'double mandate' of statebuilding missions.[139] On the one hand, UNMIK's mandate as outlined in Resolution 1244 is one of administration: 'performing basic civilian administrative functions where and as long as required'.[140] To provide this quickly and effectively, authority was centralized in the hands of UNMIK and the SRSG. On the other hand, UNMIK is mandated to build institutions and promote self-governance: 'Organizing and overseeing the development of provisional institutions for democratic and autonomous self-government . . . , [and] [t]ransferring, as these institutions are established, its administrative responsibilities'.[141] The reform of the justice system reflects the tension between these two mandates. The international community's desire to maintain rule of law and human rights standards, reflecting the understanding of sovereignty as responsibility, resulted in the prioritization of administration over self-governance. Self-governance, however, remains essential for the ultimate completion of the mandate.

Through the 'standards before status' policy, UNMIK has tried to reconcile the elements of the dual mandate. The rule of law standard it demands is

> a sound legal framework and effective law enforcement, compliant with European standards. Police, judicial and penal systems act impartially and fully respect human rights. There is equal access to justice and no one is above the law: there is no impunity for violators.[142]

The 88 different actions stipulated under the standard outlined in the Kosovo Standards Implementation Plan do not challenge the international control over the judicial system, and thus the impartiality of the judiciary and its

independence from the Kosovo government. The actions both aim to foster an institutional and legal framework that strengthens judicial independence and impartiality and increases the system's effectiveness, and envisage capacity-building and the transfer of functional, but not managerial or political responsibilities.[143] To what extent this approach will help to reconcile the tensions between administration and self-governance, and re-establish a locally run judiciary in Kosovo that lives up to the requirements of the standard of civilization, remains to be seen.

POLICYMAKING IN KOSOVO II: PROPERTY RIGHTS AND PRIVATIZATION

The transition to a free market economy has been a core element of UNMIK's statebuilding activities.[144] The promotion of economic prosperity through liberalization contributes to the legitimacy of a government's political authority. Central to economic liberalization has been the policy of privatizing socially owned commercial assets, as clear property rights are seen as a fundamental condition for the effective functioning of any economic system, and contribute to a market-based regulatory framework for economic development. Privatization, however, has highlighted an important sovereignty problem in Kosovo. The complex property rights of the former Yugoslavia, compounded by Kosovo's undetermined status, raised the question of who has the property right to SOEs—Serbia, Kosovo, the municipalities in which they are based, creditors, or the workers of the affected enterprises; and who has the authority to privatize them.

Analysing the privatization process in Kosovo is helpful for assessing the influence of conceptions of sovereignty on statebuilding for two reasons. First, the privatization experience highlights the influence of two elements of the standard of civilization on the statebuilding practices of UNMIK: the establishment of a free market economy, and of the rule of law. The international community in Kosovo attached great importance to the transition from a socialist command economy to a free market economy, as it has considered the latter the best way for organizing economic life to ensure economic efficiency, growth, and prosperity,[145] and for clearly delineating the boundary between public and private. As one of the key differences between a socialist and a market economy is the nature of property rights, privatization has been a central element of this transition. Furthermore, by creating clear property rights, UNMIK sought to enhance the rule of law. The absence of clear property rights encouraged theft and corruption, and resulted in the resort to intimidation and violence to gain control over commercial assets.[146]

Second, the analysis of the privatization process underlines the problem of engaging in statebuilding without statehood. With the unresolved status, the question of who ultimately has the right to change the ownership structure of socially owned property remained also unresolved and contested. The case study thus highlights the constraints on statebuilding that the absence of juridical sovereignty and statehood imposes on international administrations, and marks the limits of their authority.

Property Law in Kosovo

Unlike most other socialist command economies, the former Yugoslav system was characterized by a high degree of decentralization, worker self-management, and social, rather than state ownership of property.[147] Social ownership meant that no particular individual or institution had property rights over the social means of production,[148] but society as a whole owned these resources. The entity that exercised ownership rights on behalf of society was the state, and in particular the respective municipalities, who had the original right to allocate land and assets under social ownership for use.[149] The property rights of SOEs[150] were derivative of the municipalities' rights, and meant that enterprises had no full property rights to their land or buildings, but only the right to use socially owned capital and to appropriate its product.[151] Most importantly, enterprises had no right to transfer socially owned property to other legal subjects. Only municipalities could, under certain conditions, transfer assets from social to private use.[152]

Social ownership was complemented by wide-ranging self-management rights of the enterprises, creating the (wrong) impression among many workers that they actually owned the companies they worked for. When Yugoslavia passed two laws in 1988 and 1990 to enable the privatization of SOEs,[153] it allowed SOEs to be turned into joint stock companies, and employees and pension funds could purchase shares at substantial discounts, reinforcing the impression that workers owned the company.[154]

Two developments added further uncertainty about property rights to the already existing complexity of the system: first, were the legal changes in the FRY and Serbia in the 1990s; and the second was UNMIK's decision that the law in force before March 1989 should be the applicable law in Kosovo. In 1992, the FRY passed a new constitution, article 73 of which stated that all natural resources and certain real estate properties would henceforth be state owned. Most notably, article 73 did not mention social ownership at all. On the basis of this change, Muharremi has argued that under the 1992 constitution, the category of social property ceased to exist.[155] Subsequent

Serbian privatization legislation, however, has revived the distinction between social and state ownership, to allow for the sale of SOE shares to workers, pensioners, and others by public tender.[156] Throughout the 1990s, enterprises in Kosovo were privatized under Yugoslav and Serbian legislation and sold to international investors,[157] bought out by workers, or merged with Serbian companies.[158] Under the discriminatory legal regime in Kosovo after 1989, these mergers were often involuntary, and the Kosovar companies effectively became wholly owned subsidiaries of Serbian companies. As a result, their assets and working capital were frequently siphoned-off to Serbia.[159]

UNMIK's decision in December 1999 to change the applicable law in Kosovo to the law applied prior to 23 March 1989 had major implications for the property rights situation in Kosovo. The decision effectively declared the provisions of the 1992 constitution and the later privatization laws invalid. As a consequence, UNMIK unequivocally reintroduced the concept of social ownership, and opened the debate about who should receive the proceeds from sales—workers, the municipalities, the Kosovar government, or Belgrade. Furthermore, UNMIK's decision raised the question whether any property transactions conducted under the old laws were retroactively invalidated, exacerbating the uncertainty about property rights in Kosovo. This situation formed the backdrop to the privatization process in Kosovo.

Initiating Privatization

Very soon after its establishment, Pillar IV (the EU Pillar), responsible for economic reconstruction and development, identified privatization as a key policy to promote the growth and development of a market economy in Kosovo. Already in September 1999, a paper by Joly Dixon, the DSRSG heading Pillar IV, recommended the initiation of privatization through an auction of small and medium enterprises. This quick sale was to be followed by the privatization of larger enterprises through tenders to strategic investors, though it was thought that such a programme would require public support, and would therefore have to await elections in Kosovo.[160]

In November 1999, a joint report by the EC and the World Bank elaborated on the tentative plans in Dixon's paper. The report envisaged the sale of 50–55 small- and medium-sized companies in sectors with quick growth potential, such as construction, where the property rights were relatively clear, and little external investment would be needed.[161] Unlike the September paper, the report acknowledged the unclear property situation in Kosovo, a problem that was subsequently enhanced by UNMIK's decision to change the applicable law. Consequently, the report emphasized the need to establish a mechanism

to resolve competing property claims.[162] The broader plans for the development of the private sector, including privatization, were taken up as UNMIK policy and presented in the Secretary-General's Report to the Security Council in December 1999.[163]

However, privatization as envisaged by Pillar IV and the World Bank was rejected by UNMIK's OLA and the UN legal adviser in New York (OLA/NY). They believed that the permanent change of property rights that was entailed by privatization went beyond the 'interim administration' mandate established in Resolution 1244,[164] and beyond section 6 of Regulation 1999/1 on UNMIK's authority. The latter stated that UNMIK had the right to *administer* state property,[165] but said nothing about the *transformation* of ownership rights. This resistance to a wide interpretation of Resolution 1244 was apparently shared by several Security Council members, in particular Russia, who considered it a violation of Serbia's rights and interests.[166]

In the light of the uncertain legal situation and the resistance to privatization from the OLA as it would involve a change in property rights, the UNMIK/JIAS Department for Trade and Industry (DTI), together with the Department of Local Administration, embarked on a so-called commercialization programme, leasing out certain SOEs to private companies for ten years, obliging the companies to retain the workforce and make capital investments in the companies. The first commercialization agreement was signed in June 2000 with a Swiss company for the cement producer Sharr, and a total of twelve more SOEs followed until February 2002. The commercialization policy was intended as a stop-gap measure, but it failed to attract much interest for the companies, and was riddled with procurement and tendering problems: by June 2002, UNMIK had collected less than € 138,000 of the € 1,800,000 it was owed in concession fees from the enterprises.[167] The DTI was ill-equipped to effectively administer Kosovo's SOEs, as it not only lacked a strong representation in the municipalities outside Pristina, but also information about basic issues such as the number of SOEs in Kosovo and their assets.[168]

Privatization did not get back onto UNMIK's agenda until the end of 2000. In addition to the objection of the OLA, the DTI, whose brief included privatization, was institutionally weak and understaffed throughout most of 2000: the department was only formally established in December 2000, and before that only five to six international officials had been working on the issues assigned to the Department.[169] During the autumn of 2000, a USAID-contracted lawyer at the DTI was researching the Yugoslav privatization laws of 1988–90 (the 'Marković laws'), and noticed that some companies in the Gjakova region of Kosovo had been privatized under these laws in the early 1990s, through buyouts from the workers and the management. He floated

the idea that the DTI could push for privatization on the basis of these laws, perhaps incorporating them into an UNMIK Regulation to confirm their validity. The basic argument underpinning the proposal was that the enterprises were effectively owned by the workers, not the state, and that the ownership problem that the OLA had cited no longer applied.[170]

On 13 December 2000, the DTI sent a memorandum to Andy Bearpark, the new DSRSG heading Pillar IV, recommending a change in policy with regards to SOEs from commercialization to privatization under the Marković laws.[171] Though the DTI realized that the claim of worker ownership was disputable, and that the OLA was probably right with its legal assessment of SOE ownership, it wanted to use the Marković laws to get SOEs into private hands as quickly as possible, arguing that this would increase investment in these enterprises and make them more competitive.[172] The moment the memorandum was circulated in UNMIK, the OLA confirmed its strong objections to the policy, which it considered to be outside the mandate of Resolution 1244, and which it feared might lead to liability claims by creditors and possible owners against the UN.[173] Despite these objections, Bearpark decided to move forward with privatization and try to overcome OLA's resistance.

Privatization Legislation I: the Kosovo Trust Agency Regulation

The first proposal for privatization legislation was written by DTI with the support of USAID. The latter was strongly in favour of quick privatization and at the time funded most of the officials working for DTI's privatization department, giving it a central role in the development of the DTI's policies. The proposal, which was presented to Pillar IV on 25 February 2001, suggested that SOEs should be transformed into joint stock companies, with 60 per cent of the shares distributed to the workers, and 40 per cent given to a 'Kosovo Development Fund'. Senior officials in the Pillar criticized the proposal on the basis of the difficulty of identifying the workers that should receive shares after the dismissal of Albanians in the 1990s, and Serbs after 1999. These officials also feared that the proposal would encounter resistance from the OLA.[174] As an alternative approach, a 'spin-off' procedure was suggested, which would involve the sale of a company's assets without changing the underlying ownership rights. Under this approach, SOEs would transfer some or all of their assets to a subsidiary company, which could then be sold. The proceeds of the sale would become the major asset of the old SOE, which could simply continue to exist pending the resolution of ownership claims. The spin-off concept was very similar to that of commercialization, as both separated commercial issues from ownership issues. However,

rather than leasing a company's assets, investors would buy them, which DTI hoped would attract more investment than the commercialization policy had.[175]

Based on these proposals, Pillar IV officially presented a three-pronged strategy for privatization, incorporating the DTI approach, spin-offs, and liquidation. By March 2001, all major donors had expressed their support for privatization on this basis. Only the OLA/NY objected, on the grounds that it was outside UNMIK's mandate.[176] During the debate that ensued over the following months, Pillar IV increasingly backed away from the original DTI approach and focused on spin-offs, as it could not win over the OLA, whose agreement was required for the necessary regulations to be passed. This led to disputes between Pillar IV and USAID, as the latter did not want to surrender the DTI approach, culminating in the withdrawal by USAID of its privatization advisers in May 2001.[177]

Amid continued debates between Pillar IV, Pillar II, and the OLA, Pillar IV in the second half of 2001 drafted and redrafted the law about the establishment of the KOSOVO Trust Agency (KTA), which would have the right to initiate privatization through spin-offs. The land used by SOEs, in many cases their only valuable asset, was originally included among the assets that would be spun off. However, the land ownership issue was later deliberately taken out of the draft regulation, as it was thought that its omission would allow for greater support for the spin-off procedure, and through this to gain momentum to address the land issue.[178]

A draft of the KTA Regulation was passed to the UNMIK Pillars, and for the first time to the OLA in New York, on 27 October 2001. According to the Draft Regulation, the KTA would administer and privatize SOEs and publicly owned enterprises (POEs): utility companies and municipal service providers, postal and telecommunications services, railways, and the airport.[179] Privatization would be conducted through spin-off and liquidation, and the proceeds would be held in trust by the KTA for owners and creditors. To limit the risk of UNMIK and UN liability for claims by owners and creditors, the KTA was to be established as an entity separate from UNMIK, with full juridical personality.

OLA/NY commented on the draft by the end of November 2001, supporting the KTA's mandate to administer SOEs and POEs, but objecting to its right to initiate spin-offs and liquidations. In response to the objections, a revised Regulation was drafted in January 2002 and sent to New York. To induce OLA/NY support for the privatization programme, the new draft excluded POEs from the spin-off programme, and foresaw a judicial review mechanism to adjudicate property claims. With these concessions, New York no longer objected to the idea of privatization as being outside the UNMIK mandate.

However, the fear of UN liability for claims by creditors and owners led the OLA/NY to reject the Draft Regulation.[180] The argument that developed between the OLA and OLA/NY on the one hand, and parts of Pillar IV and the immediate office of the SRSG on the other, focused predominantly on different conceptions of trusteeship regarding the socially owned assets: towards whom does UNMIK, as a trustee, have responsibilities: the owners of SOEs,[181] or the population of Kosovo? The OLA and OLA/NY, on the one hand, were predominantly concerned about liability claims against the UN that could arise from lawsuits by owners of SOEs that had been privatized or merged with Serbian companies in the 1990s. They therefore insisted that the administration mandate of UNMIK meant that it was the trustee for SOE owners, and thus had a responsibility not to sell assets to which they had a right. In the view of the legal adviser, UNMIK's role as trustee was irreconcilable with the privatization of Kosovo's socially owned assets.

Pillar IV, on the other hand, espoused a broader notion of trusteeship, conceiving of UNMIK as a trustee for Kosovar *society* and its assets. It argued that without privatization the value of the enterprises would deteriorate further because of lack of investment, asset stripping by employees, and the use of socially owned assets for the private benefit of workers and managers of SOEs.[182] As a result, the assets of Kosovar society would depreciate because of inaction by UNMIK, thus violating its trusteeship mandate. Privatization was therefore necessary to fulfil UNMIK's role as a trustee. This argument was first made at the end of 2001 by the Lessons Learned and Analysis Unit of Pillar IV (LLA). The LLA insisted that the only way for UNMIK to live up to its role as a trustee was to create a functioning property system, in which assets would be protected by the rule of law. It argued that the loss that would result from UNMIK inaction and the continued abuse of socially owned assets was much greater than any eventual privatization proceeds that would come from the limited number of viable going concerns in Kosovo.[183]

These two different conceptions of trusteeship regarding socially owned assets can be characterized as a legal conception and a political conception of trusteeship, though it is important to notice that neither side ever explicitly framed them in this way. The OLA's view of trusteeship in this debate echoes the legal conception that a trustee is 'one who, having legal title to property, holds it in trust for the benefit of another and owes fiduciary duty to that beneficiary'.[184] This definition is a narrow definition, referring explicitly to the administration of property, which might explain its popularity with the UN's lawyers in New York and Pristina. However, in the context of the UN administration in Kosovo, it poses a major problem: the unresolved status of Kosovo means that it is unclear who the beneficiary is supposed to be. This uncertainty resulted in the OLA's preoccupation with possible liabilities of the UN.

The broader understanding of trusteeship on the other hand reflects a political understanding of trusteeship as applied to colonial territories in the nineteenth and twentieth centuries. In the words of William Bain,

> [t]he idea of trusteeship in international society presupposes a relationship in which a natural person or legal person is responsible for the *general welfare* of a group of people who are incapable—perhaps through no fault of their own—of directing their own affairs.[185]

Such a conception of trusteeship is less concerned with the administration of property than with legitimizing the denial of self-determination of a people, and therefore closely fits the situation in Kosovo. It leaves no doubt about who the beneficiaries of the exercise of authority need to be: those over whom authority is exercised. It therefore questions the authority of the trustee if s/he fails to exercise this authority to enhance the well-being of the affected people. Two very different concerns arise from these diverging conceptions of trusteeship. For those wedded to the legal conception, failure as a trustee involves the danger of liability; while for those espousing the political conception, failure to live up to trusteeship risks the danger of losing legitimacy.

No progress had been made in this debate by the time UNMIK's new SRSG, Michael Steiner, assumed office. Steiner, who endorsed Pillar IV's position, made privatization one of his policy priorities.[186] In March 2002, representatives from Pillar IV and the OLA went to New York to discuss the Draft Regulation on privatization with OLA/NY. At these meetings, OLA/NY accepted the Pillar IV position, and a compromise was found which did not significantly change the privatization provisions of the previous draft, but which did change the composition of the KTA board and the role of the chairman. In particular, the role of the SRSG was to be reduced so as to distance him—and the UN—as much as possible from the KTA to protect both from liability claims.[187]

The draft was passed on to the Kosovar government for comments on 17 April 2002.[188] For the first time, members of the PISG were officially consulted on the privatization process, which remained a reserved power under UNMIK authority. Despite criticism of the draft from Kosovar economists and politicians, the PISG supported it and made a range of suggestions and comments on the draft. Several of these were incorporated by UNMIK, in particular the appointment of a further local director representing the trade unions to the Board of Directors, changing the overall composition to four international and four local members.[189] In a letter to UN Secretary-General Kofi Annan, and later his first address as SRSG to the Security Council, Steiner emphasized the importance of passing the privatization legislation for

Kosovo's economic development,[190] and took the absence of any objection in the Council as tacit approval for the policy.[191]

On 13 June, following the approval of OLA/NY, the SRSG signed Regulations 2002/12 and 2002/13, establishing the KTA and a special chamber in the Kosovo Supreme Court to resolve ownership disputes arising from privatization.[192] The establishment of the Special Chamber was the *sine qua non* for the OLA/NY to approve of the privatization process. The Special Chamber would offer a legal remedy for potential owners and creditors, to receive compensation for their loss of property from the privatization. This would fulfil UNMIK's obligations under the Convention on Privileges and Immunities to offer an appropriate dispute resolution mechanism for liability claims arising from its actions.[193] The Special Chamber was therefore necessary to protect the UN against politically—and financially—damaging liability claims in courts outside Kosovo.

Privatization Legislation II: the Land Use Regulation

At the New York meeting in March 2002, it was agreed between the parties that a regulation addressing the issue of land ownership had to be in place before privatization could start.[194] The debate about the scope of trusteeship, which had dominated the discussions about the KTA regulation since January 2002, thus continued throughout the eight months of debate about the Land Use Regulation. Again, OLA/NY was wedded to a legal notion of trusteeship, and was predominantly concerned about limiting UN liability, while parts of Pillar IV and Steiner's office espoused a broader political interpretation of trusteeship. The latter pushed for the use of part of the proceeds for economic development and the inclusion of the municipalities into this development process, reflecting a concern with the effectiveness and legitimacy of international authority.

After discussions between Pillar IV, the KTA, and the OLA, but without the participation of the local institutions, a draft Regulation was circulated on 8 October 2002, which foresaw the transformation of non-tradable use rights of SOEs into tradable 99-year leases.[195] While the concept of 99-year leases was uncontroversial, a debate ensued about the use of the proceeds from the land sales. According to the draft, the share of the privatization proceeds presumed to be from the land sale would be held in trust for creditors and the owners. This policy did not match that of the other former Yugoslav Republics, where part of the proceeds went into development and pension funds.[196]

Objections were raised against the draft on grounds that the proceeds in the trust account would be blocked for years until the yet-to-be established

Special Chamber resolved property claims.[197] In an opinion to the head of Pillar IV, the LLA argued for singling out the proceeds of the land sales from the privatization, putting them into a separate trust fund used for the development of public infrastructure, and giving the municipalities the right to allocate some of the land for social and public projects in the future. The LLA also suggested including the municipalities into the planning of how to use the money. The idea of giving part of the proceeds to the municipalities was taken up, and a second draft, published on 2 December 2002, introduced an administrative conveyance fee of 30 per cent of the land value (15% of the proceeds of the sale of the enterprise), which would be passed on from the KTA to the municipalities.[198]

Over the following three months, the debate about the content of trusteeship was revived, with the OLA, OLA/NY, and the KTA leadership on the one side, arguing that UNMIK's trusteeship responsibilities extended primarily to creditors; and the SRSG's immediate office and parts of Pillar IV on the other side, arguing that UNMIK's trusteeship role should extend to the whole of Kosovar society. The OLA in New York continued to express concerns about charges by creditors against the UN if they were deprived of a judicial remedy to all of the sales proceeds. Its desire to minimize the risk of litigation led it to assume a very restrictive view on UNMIK's trusteeship responsibilities, holding as much of the proceeds as possible in trust for creditors. Though both the OLA and the KTA acknowledged that municipalities might have residual ownership rights, they argued that this interpretation had little support in Yugoslav law,[199] a position that is hard to sustain in the light of the municipalities' right to decide on the allocation of socially owned land (as already discussed).

Based on the DTI's negative experience of managing the SOEs against the resistance of the municipalities, the SRSG's immediate office argued that it was impossible to implement the privatization policy against the will of the municipalities, who considered the SOEs to be 'their' property.[200] The SRSG's office argued that on the basis of applicable Yugoslav law, the municipalities were the legal holder of land use rights of SOEs, and not only enjoyed strong preferential treatment whenever socially owned land was transferred, but also were entitled to land that was not integral to an SOE's functions. In other words, these lands would revert back to the municipalities for allocation or use in the public interest.[201] On both legal and pragmatic grounds, the SRSG's immediate office suggested that part of the proceeds should go into a separate trust fund to be used for the development of commercial infrastructure in the municipalities.

Three more drafts were circulated around UNMIK and the OLA/NY in February and March 2003. In each of them, the right of the KTA to charge a conveyance fee that would be passed on to the municipalities was reduced

further. By the end of March, the articles on charging fees had been removed from the Regulation completely.[202] By that time, local stakeholders had joined the debate on the Regulation, in particular through the KTA Board of Directors, on which the PISG and the trade unions were represented. The unions pushed especially hard for a share of the proceeds for the workers; as outlined earlier, the perception that the enterprises really belonged to their workers had been prominent in the former Yugoslavia, because of the high degree of self-management granted to them under the socialist system. Representatives of the KTA supported this position, arguing that this was a way to ensure that workers maintained the assets of the company, and would help the new owners to 'be received with smiling faces at the gate'.[203] The union position also proposed to give workers a stake in the privatization and enhance the policy's legitimacy in their eyes, preventing acts of sabotage and asset stripping that might otherwise occur. As a consequence, the final draft that was sent to OLA/NY contained a clause that 20 per cent of the proceeds would be given to the workers, recognizing 'the special status of employees in SOEs in relation to these Enterprises and the impact that the privatization will have on this status'.[204] Municipalities were not represented on the KTA board, and consequently had little voice in the discussion.

The acceptance of the clause granting parts of the proceeds to workers by OLA/NY is surprising given its previous concerns about liabilities. It seems that the political pressure from key donors such as the USA to move ahead with privatization was growing. The KTA was already preparing the first privatization tenders, and the SRSG, Michael Steiner, was scheduled to leave a month later, and he wanted to have the privatization legislation (one of his declared priorities) in place before he left. In addition, the involvement of the unions increased the pressure, and in the light of the practice in all the other former Yugoslav countries, where workers had been granted either preferential access to shares or part of the proceeds,[205] it seems that OLA/NY accepted this arrangement as a low risk of liability claims.

Implications—Privatization in Kosovo

The first wave of privatization tenders was held on 14 July 2003, and seven enterprises were sold for €4.2 million. On 3 September, in a second wave of tenders, 20 enterprises were sold for €25 million.[206] Despite the long process of finalizing the legislation, privatization got off to a good start, and a third wave of tenders for 19 SOEs was prepared by the KTA. However, at the beginning of October 2003, the new leadership of Pillar IV suspended privatization, stating only that: 'Due to ongoing UN legal clarifications needed

for privatization, the third wave of tenders . . . has been cancelled.'[207] The legal uncertainties arose from fears about litigation against those directly responsible for the privatization process, in particular the management board of the KTA, in courts outside Kosovo.[208] An American businessman, who had signed a commercialization agreement with the DTI for a wood-processing company, had sued the KTA in a New York Court, claiming that the imminent privatization of this enterprise infringed his rights to the enterprise. Similarly, Belgrade strongly objected to the sale of companies it considered to be Serbian property, and threatened to sue the KTA. Pillar IV tried to obtain functional immunity for KTA personnel from the UN, which the UN was unwilling to grant, as it would have opened the way for claims against the UN, which the OLA/NY had been careful to avoid throughout.

Despite several announcements in November and December 2003, privatization was not resumed until March 2004. On 4 March, the new SRSG, Harri Holkeri, requested the KTA board to finalize the sale of SOEs from the first two tender waves, and launch the third wave of tenders.[209] To limit the risk of litigation, the KTA was asked to change its operating policies, and conduct a case-by-case review of all enterprises. This was a response to the information problems that had plagued the privatization efforts since the commercialization attempts of the DTI, and has highlighted the lack of knowledge about the ownership status of many SOEs even four years into the mission. On 10 April 2004, the SRSG dismissed the managing director of the KTA, who had pointed out a range of possible liability problems that resulted from the existing privatization legislation. She was seen as obstructing the privatization process, and had been severely criticized for months in the Kosovar press by local politicians as well as staff of the KTA and the US office.[210] Since then privatization has proceeded without further problems, with proceeds of around € 200 million by the end of 2005, and more than 100 SOEs sold. However, as the money is held in a trust account until the Special Chamber of the Kosovo Supreme Court has decided on competing ownership claims and has determined the list of workers eligible to receive their share of the privatization proceeds, the impact on Kosovo's economic development has been limited. While the clarification of property rights is important to attract foreign direct investment to revive Kosovo's ailing industrial sector, it has so far failed to attract significant investment and increase formal employment. In December 2004, out of an estimated population of 1.9 million,[211] only 150,178 Kosovars had registered and taxed employment,[212] a figure that is unlikely to have increased as privatization proceeded, given the contraction of Kosovo's economy in 2005, which followed the decline of donor aid.[213]

The direct intervention by the SRSG is illuminating in the context of the earlier efforts of the UN to distance itself from the KTA as far as possible. It

suggests that UNMIK, and consequently the UN, see themselves as ultimately responsible for the KTA, a notion that the UN was keen to avoid throughout the privatization process, even though privatization was part of the reserved powers and thus part of the SRSG's authority under the constitutional framework. It also suggests that UNMIK became increasingly concerned about its legitimacy in the light of criticism both from Kosovars and major donors, in particular the USA and the UK. It thus unwittingly espoused the political interpretation of trusteeship it had previously rejected.

The analysis of the privatization policy suggests that the standard of a free market economy has heavily influenced the statebuilding work of UNMIK. The importance of the standard is emphasized in the Kosovo Standards Implementation Plan, which outlines the aim of UNMIK as establishing '[t]he legal framework for a sustainable, competitive market economy'.[214] Similar to the OHR in Bosnia, UNMIK has stressed the importance of 'European standards' for Kosovo to achieve, and conceives these standards in terms of institutions ensuring accountability and transparency, rather than purely technical standards, resulting in greater efficiency in the economy.[215] The recognition that further delays in the privatization process would seriously undermine UNMIK's legitimacy was important for overcoming the legal concerns of OLA/NY with regard to the KTA Regulation in March 2002, and in pushing the SRSG to take action to resume privatization in March 2004. This highlights the importance of providing effective government for the legitimacy of international administrations.

However, the concept of sovereignty as responsibility has not just influenced the statebuilding aims of the international community in Kosovo through the standard of civilization. The analysis of the privatization process also suggests that conceptions of sovereignty have affected the way in which UNMIK has pursued its goals, cautioning UNMIK against changing property rights and consequently significantly delaying the passage of the privatization legislation. It has been the perception that UNMIK is not the legal sovereign in Kosovo, and not therefore does have the right to change property rights, that constrained UNMIK's actions. This is a reminder of the significant problems encountered by the international community in pursuing statebuilding without statehood. Kosovo's contested juridical sovereignty resulted in uncertainty as to whether UNMIK has the authority to change property rights, and has made the UN very cautious when addressing the issue of privatization, for fear of litigation. It also produced extensive debates over the process of privatization and over the distribution of the proceeds, which prolonged the drafting process of the necessary laws. The uncertainty about political authority also meant that decisions about property rights had to remain an UNMIK reserved power, and severely limited the inclusion of local institutions

into the drafting of the legislation, compromising the transition to local self-governance.

The fear of liability raises an interesting problem with regard to sovereignty and statebuilding, as it shows that with the exercise of political authority, international administrations can also assume legal responsibility for their actions. On the one hand, this might offer an accountability mechanism for international administrations. On the other hand, it can seriously constrain their statebuilding activities, as it makes them risk-averse, and potentially unwilling to assume the political responsibilities that come with the exercise of political authority. This has been the case in Kosovo, where at different times the OLA and Pillar IV have been unwilling to address one of the major obstacles to Kosovo's development, the establishment of clear property titles, for fear of liability claims.

SOVEREIGNTY AND STATEBUILDING IN KOSOVO

UNMIK aimed to establish a legal system in Kosovo that could live up to 'European standards'.[216] Similarly, its economic reforms, key to which was the privatization of socially owned assets, sought to move Kosovo towards the 'achievement of European standards'.[217] But what is the content and the aim of the standards to which UNMIK has committed itself and the Kosovars? On the one hand, these standards are functional, aiming to harmonize Kosovar institutions with European ones. They are thus framed to ease Kosovo's integration into Europe in the long run,[218] a goal which European politicians have frequently emphasized.[219] On the other hand, the standards pursued by the reform projects analysed here go beyond the compliance of Kosovar institutions with European organizational and legal structures, and appeal to the norms associated with the standard of civilization outlined in Chapter 1.

The analysis above highlights the role of four of the norms associated with the concept of sovereignty as responsibility: democracy, human rights, the rule of law, and a free market economy. The transition process from direct UNMIK governance towards greater Kosovar participation, and ultimately self-governance, underlines the importance of liberal democracy as the preferred form of national governance. Similarly, the reform of the judicial system shows how UNMIK elevated the protection of human rights and the rule of law, in particular through the emphasis on procedural rights guaranteed by judicial independence and impartiality, over local ownership of the judiciary, as central for the legitimacy of the legal system. Finally, the debate about the privatization of SOEs focused on the removal of a major impediment to the development of a free market economy, namely the lack of clear, tradable

property rights. By initiating the privatization process, the international community emphasized the importance of free markets for the organization of economic life, and as the best guarantee for economic prosperity. In addition, the existence of clear property rights is alleged to increase the transparency and accountability of the companies, and reduce widespread corruption and mismanagement, and thereby contribute to the promotion of the rule of law.

While sovereignty thus shaped the statebuilding agenda of the international community, it also influenced the behaviour of UNMIK, in particular the scope of the authority it exercised. This was particularly evident in the discussions about the KTA Regulation and the Land Use Regulation. There, uncertainty about the rights and responsibilities of the international administration exercising aspects of sovereign authority strongly shaped the positions of different actors in the debate about the regulations, and held up the privatization process in Kosovo even after the regulatory framework was put in place. Sovereignty has therefore not only influenced UNMIK's expectations vis-à-vis the Kosovar institutions, but also its conception of the scope of its own rights and corresponding responsibilities.

Both case studies also show how the standard of civilization applied by the international community in its statebuilding efforts determines one of the boundaries that sovereignty establishes: the boundary between state and society. The international community has limited the authority of state institutions by emphasizing the independence of the judiciary from the government, thus placing the state and its agents under the scrutiny of the judiciary as well. The international community has also limited the state's authority in the economic sphere, by reducing its control over economic assets and economic decisions. Where this line is drawn, however, has not been the result of a political process within Kosovar society, but has been determined according to external criteria set by UNMIK, deciding for example that the SOEs, but not the POEs should be privatized.

The emphasis which is put on the different aspects of the new standard of civilization in UNMIK's 'standards before status' policy suggests that the concept of sovereignty as responsibility not only influences the statebuilding agenda in Kosovo, but also affects the degree of self-governance granted to Kosovars and the determination of the legal status of the territory. In short, it suggests that empirical statehood has been prioritized over legal sovereignty. However, as the process of transition discussed in the first section of this chapter has shown, increasing self-governance has not been granted to local bodies due to their fulfilment of a technical standard of capacity and good governance, but rather reflects pressures from political elites in Kosovo. It was the weakness of UNMIK's authority over Kosovo, and the need to co-opt local elites, which determined the transition, rather than the principle of empirical

statehood. UNMIK's need to strengthen its own authority by increasing the effectiveness of its government activities thus undermined its original strategy to strengthen the capacity of local government institutions.

The statebuilding efforts of the international community in Kosovo have not been purely driven by conceptions of sovereignty, but have been characterized by the way in which conceptions of sovereignty, UNMIK's own requirements for its authority, and other political factors have interacted. This raises interesting questions about the international community's exit strategy: will its exit be determined by merely clarifying Kosovo's juridical sovereignty, or by establishing its empirical sovereignty with legitimate, effective, and sustainable political institutions which can discharge their sovereign obligations towards Kosovo's citizens? In particular, concerns about the consequences of Kosovo's independence for ethnic minorities, without full fulfilment of the standards, are likely to affect the shape of Kosovo's final status, and the nature of the international presence in Kosovo in the aftermath of UNMIK.

NOTES

1. Throughout the book, the Serb 'Kosovo' rather than the Albanian 'Kosova' is used except in citations and names. Similarly, it uses the Serb spelling for place names, rather than the Albanian equivalent, as they are generally better-known internationally, and appear on most maps of the region.
2. Talks about the resolution of Kosovo's status were ongoing when this book was completed (May 2006).
3. Statement by the President of the Security Council, UN Doc. S/PRST/2005/51, 24 October 2005.
4. A claim made, e.g. in a memorandum submitted by the Kosovar Delegation to the ICFY in London, 1992. See Noel Malcolm, *Kosovo: A Short History* (Basingstoke, UK: Macmillan, 1998), xlix.
5. In Yugoslav constitutional theory, nationalities were considered to have a state outside Yugoslavia, and were therefore not entitled to a republic, which was the prerogative of the constituent nations of Yugoslavia. The two recognized nationalities in Yugoslavia were Albanians in Kosovo and Hungarians in the Vojvodina.
6. Slovenia, Croatia, BiH, Serbia, Montenegro, and Macedonia.
7. Marc Weller, *The Crisis in Kosovo 1989–1999: From the Dissolution of Yugoslavia to Rambouillet and the Outbreak of Hostilities* (Cambridge: Cambridge University Press for Documents & Analysis Publishing, 1999), 45. Self-determination importantly also had an economic dimension through the concept of socialist self-management. See Susan L. Woodward, *Socialist Unemployment: The Political Economy of Yugoslavia 1945–1990* (Princeton, NJ: Princeton University Press, 1995).

8. Robert Hayden, *Blueprints for a House Divided: The Constitutional Logic of the Yugoslav Conflicts* (Ann Arbor, MI: University of Michigan Press, 1999); Susan L. Woodward, *Balkan Tragedy: Chaos and Dissolution after the Cold War* (Washington, DC: Brookings Institution Press, 1995), 29–41. In 1992, the Badinter Commission and later the European Community and the USA endorsed the dissolution of the SFRY along republican borders, denying Kosovo's right to statehood. See Maurizio Ragazzi, 'Introductory Note to Conference on Yugoslavia Arbitration Commission', *International Legal Materials*, 31 (1992), 1488; European Political Cooperation Declaration on Yugoslavia, Extraordinary EPC Ministerial Meeting (Brussels), EPC Press Release 129/91, 16 December 1992, *International Legal Materials*, 31 (1992), 1485.
9. Sami Repishti, 'The Evolution of Kosova's Autonomy Within the Yugoslav Constitutional Framework', in Arshi Pipa (ed.), *Studies on Kosova* (New York: Columbia University Press, 1984), 195–231.
10. Malcolm, *Kosovo*, 334–9. The riots broke out in the canteen of Pristina University, as a protest against the food and conditions in the university.
11. Laura Silber and Allan Little, *The Death of Yugoslavia*, revd edn (London: Penguin, 1996), 37–9.
12. Tim Judah, *Kosovo: War and Revenge*, 2nd edn (New Haven: Yale University Press, 2002), 50–63.
13. Ibid., 61–98. For the legislative changes under direct rule, see Marcus Brand, 'Kosovo under International Administration: Statehood, Constitutionalism and Human Rights', Doctoral thesis submitted at University of Vienna, Vienna, 2002, 29–34.
14. For a detailed account of the parallel state established in Kosovo, see Howard Clark, *Civil Resistance in Kosovo* (London: Pluto Press, 2000). On the role of the Diaspora, see Paul Hockenos, *Homeland Calling: Exile Patriotism and the Balkan Wars* (Ithaca, NY: Cornell University Press, 2003), 220–37.
15. For an account of international diplomacy towards Kosovo until 1998, see Richard Caplan, 'International Diplomacy and the Crisis in Kosovo', *International Affairs*, 74/4 (1998), 745–61.
16. The KLA had been founded in 1993, by members of the radical Enverist Popular Movement for the Republic of Kosovo, a small group on the left-wing fringe of the Kosovar Diaspora in Europe. Though it claimed responsibility for several attacks on Serb policemen between 1993 and 1997, members appeared in public for the first time at a funeral of an Albanian teacher killed by Serb security forces in November 1997. On the development of the KLA, see Hockenos, *Homeland Calling*, 242–61; Judah, *Kosovo*, 99–134.
17. The Contact Group consists of the USA, UK, Germany, France, Russia, and Italy.
18. Letter from the Deputy Permanent Representative of the UK to the United Nations Addressed to the President of the Security Council, UN Doc. S/1998/223, 12 March 1998; Letter from the Permanent Representative of the United States to the United Nations addressed to the President of the Security Council, UN Doc. S/1998/272, 27 March 1998.

19. SC Res. 1160 of 31 March 1998.
20. In addition to the small European Community Monitoring Mission (ECMM), the Kosovo Diplomatic Observer Mission (KDOM), constituted of diplomatic personnel from embassies in Belgrade, monitored developments in Kosovo from July 1998 onwards. See Judah, *Kosovo*, 177.
21. The KVM agreement is reprinted in Weller, *Crisis in Kosovo*, 293–94. See also Judah, *Kosovo*, 176–96.
22. Marc Weller, 'The Rambouillet Conference on Kosovo', *International Affairs*, 75/2 (1999), 219–22.
23. Interim Agreement for Peace and Self-Government in Kosovo, 2nd Draft, 18 February 1999 (Rambouillet Agreement)', reprinted in Marc Weller (ed.), *The Crisis in Kosovo 1989–1999* (Cambridge: Cambridge University Press for Documents and Analysis Publishing, 1999), Ch. 5.v. The civilian aspects of the agreement cover institution building, economic development, administration of justice, and elections.
24. See Ch. 3 of this volume for a discussion of the High Representative's Powers in BiH.
25. Contact Group, 'Statement by the Chairman on the Conclusion of the Meeting of the G-8 Foreign Ministers', Bonn, 6 May 1999.
26. SC Res. 1244 of 10 June 1999, Annex 2.
27. For a comprehensive overview over the diplomacy leading to the passing of Resolution 1244, see Paul Heinbecker, 'Kosovo', in David M. Malone (ed.), *The UN Security Council: From the Cold War to the 21st Century* (Boulder, CO: Lynne Rienner, 2004), 537–50.
28. SC Res. 1244, para. 10.
29. See in particular the Chinese statement in the Security Council debate on SC Res 1244 on 10 June 1999: 'The draft resolution before us has failed to fully reflect China's principled stand and justified concerns . . . Therefore, we have great difficulty with the draft resolution. However, in view of the fact that the Federal Republic of Yugoslavia has already accepted the peace plan, that NATO has suspended its bombing in the Federal Republic of Yugoslavia, and that *the draft resolution has reaffirmed . . . the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia*, the Chinese delegation will not block the adoption of this draft resolution.' SCOR, 54th year, 4011th Meeting 10 June 1999, 9 (emphasis added).
30. Conflict, Security, and Development Group (CSDG), *A Review of Peace Operations: A Case for Change—Kosovo Study* (London: King's College, 2003), para 21–2.
31. Heinbecker, 'Kosovo', 547.
32. SC Res. 1244, para. 11.
33. In contrast, SC Res. 1272 of 25 October 1999, establishing UNTAET, is very explicit about the scope of the international authority. See Ch. 5.
34. Interview with UN official, New York, 11 April 2003.

35. Report of the Secretary-General Pursuant to Paragraph 10 of Security Council Resolution 1244 (1999), UN Doc. S/1999/672, 12 June 1999, para. 10.
36. Report of the Secretary-General on the United Nations Interim Mission in Kosovo, UN Doc. S/1999/779, 12 July 1999, paras 35–9.
37. Interview with UN official, New York, 11 April 2003.
38. Report of the Secretary-General, 12 July 1999, para. 35.
39. UNMIK Regulation 1999/1, On the Authority of the Interim Administration in Kosovo, 25 July 1999, sec. 1. Regulations are the primary law-making instrument used by UNMIK.
40. Report of the Secretary-General, 12 June 1999, Annex; Report of the Secretary-General, 12 July 1999, paras 43–108.
41. While the SRSG has always been a European national, the Principal Deputy SRSG has always been a US diplomat. The SRSGs to date have been Bernard Kouchner (1999–2001), Hans Haekkerup (2001–2), Michael Steiner (2002–3), Harri Holkeri (2003–4), and Sören Jessen-Petersen (since August 2004).
42. In September 1999, UNHCR estimated that more than 50,000 houses were destroyed. Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/1999/987, 16 September 1999, para. 11.
43. The management of the police and justice system was later segregated into a new Pillar I that succeeded UNHCR in May 2001.
44. Brand, 'Kosovo under International Administration', 84.
45. Richard Caplan, *A New Trusteeship? The International Administration of War-torn Territories* (Oxford: Oxford University Press, 2002), 24; ICG, *Kosovo: Let's Learn from Bosnia—Models and Methods of International Administration* (Sarajevo: ICG, 1999); William G. O'Neill, *Kosovo: Unfinished Peace* (Boulder, CO: Lynne Rienner, 2002), 37.
46. Report of the Secretary-General, 12 July 1999, paras 110–16.
47. Report of the Secretary-General, 16 September 1999, para. 2. The KTC was never established through a regulation.
48. Ibid., paras 16 and 24.
49. ICG, *Waiting for UNMIK—Local Administration in Kosovo* (Pristina: ICG, 1999), 2–3.
50. European Stability Initiative/Lessons Learned and Analysis Unit, *The Ottoman Dilemma: Power and Property Relations under the United Nations Mission in Kosovo* (Pristina: European Stability Initiative, 2002), 11–13; UNMIK Regulation 1999/1, sec. 1.
51. UNMIK Regulation 1999/14, On the Appointment of Regional and Municipal Administrators, 21 October 1999.
52. CSDG, *Kosovo Study*, para. 244. The concept of the joint civilian commissions was similar to the Joint Implementing Committees (JICs) of UNTAES in eastern Slavonia. See Jelena Smoljan, 'Socio-economic Aspects of Peacebuilding: UNTAES and the Organization of Employment in Eastern Slavonia', *International Peacekeeping*, 10/2 (2003), 27–50.

53. UNMIK Regulation 2000/1, On the Kosovo Joint Interim Administrative Structure, 14 January 2000.
54. Bernard Kouchner, *Les Guerriers de la Paix: Au Kosovo a l'Iraq* (Paris: Bernard Grasset, 2004), 326–7.
55. UNMIK Regulation 2000/1, art. 3.
56. Marcus Brand, *The Development of Kosovo Institutions and the Transition of Authority from UNMIK to Local Self-Government* (Geneva, Switzerland: CASIN, 2003), 16–19.
57. Ibid.
58. UNMIK Regulation 2000/1, art. 7.5. See also Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/2000/177, 3 March 2000, para. 8.
59. Brand, *Development of Kosovo Institutions*, 21–5.
60. UNMIK Regulation 2000/45, On Self-Government of Municipalities in Kosovo, 11 August 2000.
61. Ibid., sec. 48.
62. ICG, *Kosovo Report Card* (Pristina: ICG, 2000), 23–6.
63. Brand, *Development of Kosovo Institutions*, 30.
64. 'IAC Discusses "Pact" for Kosovo Society', UNMIK Press Release, 14 July 2000.
65. Brand, *Development of Kosovo Institutions*, 32. See also Jed Rubenfeld, 'Two World Orders', *Prospect*, 94 (2004), 34.
66. USA, UK, France, Germany, and Italy.
67. 'Kosovo Group to Begin Work on Legal Framework', UNMIK Press Release, 6 March 2001; Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/2001/565, 7 June 2001, paras 21–2.
68. Brand, *Development of Kosovo Institutions*, 32.
69. ICG, *Kosovo: Landmark Election* (Pristina: ICG, 2000), 4.
70. UNMIK Regulation 2001/9, On a Constitutional Framework for Provisional Self-Government, 15 May 2001.
71. Ibid., Ch. 7.
72. Ibid., Ch. 8.
73. Max Weber, 'The Profession and Vocation of Politics', in Peter Lassman and Ronald Speirs (eds), *Weber: Political Writings* (Cambridge: Cambridge University Press, 1994), 310–11.
74. 'PDSRSG announces new Police & Justice Pillar', UNMIK Press Release, 21 May 2001.
75. OSCE, *Parallel Structures in Kosovo* (Pristina: OSCE, 2003).
76. CSDG, *Kosovo Study*, 35; UNMIK Pillar IV,'Economically Motivated Crime in Kosovo: Briefing Paper', Pristina, 2003.
77. ICG, *Kosovo: A Strategy for Economic Development* (Pristina: ICG, 2001), 7.
78. These concerns have been voiced in particular with regard to Ramush Haradinaj, former KLA commander of the Dukadjin region in the south-west of Kosovo, leader of the AAK party, the third largest Albanian party, and Prime Minister of

Kosovo in 2004 and 2005. See ICG, *What Happened to the KLA?* (Pristina: ICG, 2000), 10. Similarly, the Prime Minister of Kosovo since 2006, Agim Çeku, was the chief of staff of the KLA, before he became head of the Kosovo Protection Corps (KPC).

79. See, e.g. Jeta Xharra, 'Kosovo Assembly Murals Enrage Serbs', *IWPR Balkan Crisis Report*, 26 February 2004.
80. Lulzim Peci and Ilir Dugolli, *Enhancing civilian management and oversight of the security sector in Kosovo* (Pristina: KIPRED, 2005). Jeta Xharra, 'Kosovo's Intelligence Services Come in from the Cold', *Balkan Insight*, 23 December 2005. Available at www.birn.eu.com (last accessed April 2006).
81. Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/2003/996, 15 October 2003, para. 8; Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/2004/71, 26 January 2004, para. 6.
82. The impact of the lack of information on UNMIK policymaking has been documented in ESI/Lessons Learned and Analysis Unit, *The Ottoman Dilemma*.
83. SCOR, 57th year, 4528th Meeting, 24 April 2002. See also Michael Steiner, 'Three Times for Kosovo—Speech delivered at Humboldt University, Berlin', 12 November 2002. On file with the author.
84. Interview with former Strategic Planning Adviser to the SRSG, Oxford, 22 October 2004.
85. UNMIK, Standards for Kosovo, Pristina, 10 December 2003.
86. Kai Eide, 'A Comprehensive Review of the Situation in Kosovo', Pristina, 7 October 2005.
87. Statement by the President of the Security Council, UN Doc. S/PRST/2005/51, 24 October 2005.
88. See Tim Judah, 'Kosovo's Moment of Truth', *Survival*, 47/4 (2005). In a meeting with Serb delegates at the end of January 2006, the political director of the British Foreign and Commonwealth Office, John Sawer, was reported to have told the delegates that Kosovo's future should be independence. See UNDP, *Early Warning Report Kosovo #12: October–December 2005* (UNDP: Pristina, 2006), 9.
89. Elizabeth Heger Boyle and John Meyer, 'Modern Law as a Secularized Global Model: Implications for the Sociology of Law', in Yves Dezalay and Bryant G. Garth (eds), *Global Prescriptions: The Production, Exportation, and Importation of a New Legal Orthodoxy* (Ann Arbor, MI: University of Michigan Press, 2002), 68.
90. Report of the Panel on United Nations Peace Operations (The Brahimi Report), UN Doc. S/2001/42, 21 August 2000, paras 79–83.
91. UNMIK Regulation 1999/1, sec. 3. Regulation 1999/1 does not list the applicable human rights standards. Such a list is first provided in Regulation 1999/24.
92. OSCE, *Review of the Criminal Justice System in Kosovo (February–July 2000)* (Pristina: OSCE, 2000), 11–12.
93. O'Neill, *Kosovo*, 80.

94. UNMIK Regulation 1999/24, On the Law Applicable in Kosovo, 12 December 1999.
95. Report of the Secretary-General, 12 July 1999, para. 66.
96. See *European Convention on Human Rights*, art. 6-1; European Court of Human Rights, *Belilos* v. *Switzerland* (1988), para. 64; Basic Principles on the Independence of the Judiciary, UN Doc. A/Res/40/34, 29 November 1985.
97. Amnesty International, 'Kosovo—Essential Safeguards for an Agreement', 12 February 1999, sec. 3.
98. O'Neill, *Kosovo*, 75.
99. UNMIK Emergency Decree 1999/1, 28 June 1999.
100. Hans-Jörg Strohmeyer, 'Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor', *American Journal of International Law*, 95/1 (2001), 52.
101. Ibid., 52–53.
102. UNMIK Regulation 1999/7, On Appointment and Removal from Office of Judges and Prosecutors, 7 September 1999. The structure of the court system was the same as the pre-1989 structure, with municipal courts, minor offence courts (in the municipalities), five district courts, and a supreme court.
103. Ibid., sec. 6.
104. Kosovo Judicial and Procecutorial Council, 'Code of Ethics and Professional Conduct for Judges', Pristina, 31 July 2001.
105. Mark Baskin, *Lessons Learned on UNMIK Judiciary,* Pearson Paper (Clemensport: Peacekeeping Press, 2002), 12.
106. UNMIK Regulation 1999/7, sec. 7.
107. Cited in O'Neill, *Kosovo*, 87.
108. UNMIK Regulation 2001/8, On the Establishment of the Kosovo Judicial and Prosecutorial Council, 6 April 2001.
109. UNMIK Administrative Directive 2001/4, Implementing UNMIK Regulation No. 2000/15 on the Establishment of the Administrative Department of Justice, 11 May 2001.
110. One judge was accused of having additional employment with an NGO, another of taking bribes. See Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/2001/926, 2 October 2001, para. 50.
111. Interview with OSCE official, Pristina, 30 April 2003.
112. UNMIK authorized the establishment of a Ministry of Justice in December 2005. See UNMIK Regulation 2005/53, amending UNMIK Regulation No. 2001/19 on the Executive Branch of the Provisional Institutions of Self-Government in Kosovo, 20 December 2005. On the same day, UNMIK replaced the KJPC with the Kosovo Judicial Coucil (KJC), with a purely local membership, responsible for judicial appointments and disciplinary matters. See UNMIK Regulation 2005/52, On the Establishment of the Kosovo Judicial Council, 20 December 2005.
113. Partia Demokratike e Kosovës (Democratic Party of Kosovo). The PDK is the second-largest Albanian party, with strong links to the former KLA.

114. Brand, *Development of Kosovo Institutions*, 16. See also O'Neill, *Kosovo*, 91.
115. O'Neill, *Kosovo*, 86.
116. OSCE, *Kosovo: Review of the Criminal Justice System (September 2001–February 2002)* (Pristina: OSCE, 2002), 25–44. OSCE, *Kosovo: Review of the Criminal Justice System (March 2002–April 2003)* (Pristina: OSCE, 2003), 28–9.
117. OSCE, *Kosovo: A Review of the Criminal Justice System (1 September 2000–28 February 2001)* (Pristina: OSCE, 2001); OSCE, *Review of the Criminal Justice System (September 2001–February 2002)*.
118. Lawyers Committee for Human Rights, *A Fragile Peace: Laying the Foundations for Justice in Kosovo* (New York: Lawyers Committee for Human Rights, 1999).
119. O'Neill, *Kosovo*, 83–8. OSCE, *Review of the Criminal Justice System (February–July 2000)*, 61–9.
120. Michael Hartmann, *International Judges and Prosecutors in Kosovo: A Model for Post-Conflict Peacekeeping* (Washington, DC: USIP, 2003), 6–7; O'Neill, *Kosovo*, 84.
121. UNMIK Regulation 2000/6, On the Appointment and Removal from Office of International Judges and International Prosecutors, 15 February 2000.
122. CSDG, *Kosovo Study*, para. 193; Hartmann, *International Judges in Kosovo*, 11.
123. UNMIK Regulation 2000/64, On Assignment of International Judges/Prosecutors and/or Change of Venue, 15 December 2000.
124. CSDG, *Kosovo Study*, para. 207.
125. UNMIK Regulation 2001/2, Amending UNMIK Regulation 2000/6, as amended, on the Appointment and Removal from Office of International Judges and International Prosecutors, 12 January 2001.
126. CSDG, *Kosovo Study*, para. 219.
127. OSCE, *Case Report: The Public Prosecutor's Office vs Latif Gashi, Rrustem Mustafa, Naim Kadriu and Nazif Mehmeti—The "Llapi Case"* (Pristina: OSCE, 2003), 10.
128. *International Covenant on Civil and Political Rights,* 16 December 1966, art. 14(3)(c); *European Convention on Human Rights*, 4 November 1950, art. 6(1).
129. Strohmeyer, 'Collapse and Reconstruction of a Judicial System', 49.
130. *ICCPR*, arts 9(3) and 14(3)(c). On the situation in Kosovo in 2000 and 2001, see OSCE, *Review of the Criminal Justice System (September 2000–February 2001)*, 19–22.
131. ICG, *Finding the Balance: The Scales of Justice in Kosovo* (Pristina: ICG, 2002), 8.
132. Report of the Secretary-General, 15 October 2003, para. 22.
133. UNMIK Pillar I, *Presentation Paper (3rd Quarter 2003)* (Pristina: UNMIK, 2003), 1.
134. The number of cases international judges and prosecutors were involved in increased from 23 in 2000 to over 200 in 2003. See ibid., 14.
135. Report of the Secretary-General, 12 July 1999, para. 69.
136. Central and Eastern European Law Initiative, '2002 Annual Report Kosovo Judicial Institute', Pristina, 2002.
137. Report of the Secretary-General, 15 October 2003, para. 22.

138. OSCE, *Review of the Criminal Justice System: The Administration of Justice in the Municipal Courts* (Pristina: OSCE, 2004).
139. Joel C. Beauvais, 'Benevolent Despotism: A Critique of U.N. State-Building in East Timor', *New York University Journal for International Law and Politics,* 33/4 (2001), 1107–12.
140. SC Res. 1244, art. 11(b).
141. Ibid., art. 11(c–d).
142. UNMIK, Kosovo Standards Implementation Plan, 31 March 2004, 27.
143. Ibid., 27–46.
144. Report of the Secretary-General, 12 July 1999, paras 101–03.
145. World Bank and European Commission, 'Towards Stability and Prosperity: A Program for Reconstruction and Recovery in Kosovo', Pristina, 3 November 1999, 6–7.
146. Dana Eyre and Andreas Wittkowsky, 'Privatisation in Kosovo: The Political Economy of Property Rights and Stability in a Peace-Building Mission', *Südosteuropa Mitteilungen,* 42/4 (2002), 24–9.
147. On the development of the Yugoslav economic system, see Woodward, *Socialist Unemployment*.
148. *Constitution of the Socialist Federal Republic of Yugoslavia*, 21 February 1974, Part III of the Basic Principles.
149. Robert Muharremi, 'Ownership Rights in Kosovo and the Administration of Kosovo by the United Nations', Pristina, undated, 3. On file with the author.
150. Until the 1988 SFRY Enterprise Act, SOEs were known as 'Associations of Organised Labour'. For reasons of simplicity, the term SOE is used throughout the text.
151. Muharremi, 'Ownership Rights in Kosovo', 5; Milica Uvalic, 'Privatization in the Yugoslav Successor States: Converting Self-Management into Property Rights', in Milica Uvalic and Daniel Vaughan-Whitehead (eds), *Privatization Surprises in Transition Economies: Employee Ownership in Central and Eastern Europe* (Cheltenham: Edward Elgar, 1997), 267.
152. Ibid.
153. The *Act on Enterprise of 29 December 1988*, Official Gazette of SFRY No. 77/88; and the *Act on Social Capital*, Official Gazette of SFRY No. 84/89 and 46/90.
154. Uvalic, 'Privatization in the Yugoslav Successor States', 267–9. The proceeds of the sales stayed in the company.
155. Muharremi, 'Ownership Rights in Kosovo', 11.
156. Ownership Transformation Act, of 27 July 1997, Official Gazette of the Republic of Serbia No. 32/97, arts 12–13. Proceeds from these sales went to the Serbian Development Fund (50%), to the Pension Fund (25%), and the Employment Fund (25%). This distribution of the proceeds from the sales highlights the persistence of the concept of social ownership.
157. In particular, parts of the Trepca mining combinate were arguably transferred to the Greek businessman Evangelos Mytileneos in a debt-asset swap. Michael Palairet, *Trepca 1965–2000* (Pristina: LLA/ESI, 2003), 42–54.

158. Uvalic, 'Privatization in the Yugoslav Successor States', 286.
159. Tim O'Neill and Allen Shinn, 'Conversion of Industrial and Commercial Socially-Owned Enterprises to Joint Stock Companies', Department of Trade and Industry, Pristina, 13 December 2000, 8–9. On file with the author.
160. Joly Dixon, 'Kosovo—Report on Pillar IV's Activities', Pristina, 28 September 1999. On file with the author.
161. World Bank and European Commission, 'Towards Stability and Prosperity', 13.
162. Ibid., 12–13.
163. Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/1999/1250, 23 December 1999, para. 104.
164. Interview with senior UNMIK official, Pristina, 8 December 2003.
165. UNMIK Regulation 1999/1. After the change of the applicable law in December 1999, UNMIK clarified its position and asserted its authority over both state- and socially-owned assets. See UNMIK Regulation 2000/54, Amending Regulation No. 1999/1, as Amended, on the Authority of the Interim Administration in Kosovo, 27 September 2000.
166. Interview with senior UNMIK official, Pristina, 8 December 2003.
167. European Stability Initiative/Lessons Learned and Analysis Unit, *The Ottoman Dilemma*, 18–23.
168. Robert Muharremi et al., *Administration and Governance in Kosovo: Lessons Learned and Lessons to be Learned* (Pristina/Geneva: CASIN, 2003), 41.
169. Phone interview with former DTI official, 20 April 2004.
170. Phone interview with former UNMIK official, 20 April 2004.
171. O'Neill and Shinn, 'Conversion of SOEs to Joint Stock Companies'.
172. Phone interview with former UNMIK official, 20 April 2004.
173. Interview with senior UNMIK official, Pristina, 8 December 2003.
174. Interview with a former UNMIK official, Pristina, 18 November 2003.
175. Ibid.
176. Phone interview with former DTI official, 20 April 2004.
177. Ibid.
178. Telephone interview with former senior UNMIK official, 30 April 2004.
179. The distinction between SOEs and POEs appears in Yugoslav law in the 1990s, indicating the difference between social and state ownership. In the early proposals for privatization, this distinction was not made in Kosovo. The KTA regulation defines a POE as an 'Enterprise that was created as publicly-owned by the Province of Kosovo, a municipality or other public-political organization within the Province of Kosovo, the Republic of Serbia, or the Federal Republic of Yugoslavia or any public–political organization of either the Republic of Serbia, or the Federal Republic of Yugoslavia'. UNMIK Regulation 2002/12, On the Establishment of the Kosovo Trust Agency, 13 June 2002, sec. 3.
180. Phone interview with former senior UNMIK official, 30 April 2004. See also Eyre and Wittkowsky, 'Privatisation in Kosovo', 31.
181. 'Owners' also includes creditors, who could claim a right to SOE property because of outstanding debts.

182. Eyre and Wittkowsky, 'Privatisation in Kosovo', 31.
183. The argument was first published in ESI/Lessons Learned and Analysis Unit (Pillar IV), *De-Industrialisation and Its Consequences: A Kosovo Story* (Pristina: European Stability Initiative, 2002). It is elaborated most clearly in ESI/Lessons Learned and Analysis Unit, *The Ottoman Dilemma*.
184. *Black's Law Dictionary*, 8th edn (St. Paul: Thomson West Group, 2004).
185. William Bain, 'The Idea of Trusteeship in International Society', *The Round Table,* 368 (2003), 68 (emphasis added).
186. See Michael Steiner, 'Address to the Security Council', 24 April 2002.
187. Phone interview with former senior UNMIK official, 30 April 2004.
188. 'Steiner hands PM Rexhepi draft regulation on privatization', UNMIK Local Media Monitoring, 18 April 2002.
189. 'SRSG Steiner signs regulation on Kosovo Trust Agency', UNMIK Local Media Monitoring, 14 June 2002.
190. The statement said: 'Getting the economic fundamentals right is therefore even more important. A key element is privatisation. Privatisation will not solve the problem in the short term, but it is the only basis for secure jobs in the long-term.' See Steiner, 'Address to the Security Council'.
191. Interview with former UNMIK Pillar IV official, 17 October 2003.
192. UNMIK Regulation 20002/12; UNMIK, Regulation 2002/13, On the Establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters, 13 June 2002.
193. *Convention on the Privileges and Immunities of the United Nations*, 13 February 1946, sec. 29
194. Phone interview with senior UNMIK official, 30 April 2004.
195. UNMIK Draft Regulation on the Transformation of the Right of Use to Immovable Socially Owned Property, 8 October 2002.
196. For the practices in the Yugoslav successor states, see Uvalic, 'Privatization in the Yugoslav Successor States'.
197. UNMIK Pillar IV, 'Transformation of SOE Land Use Rights into Leaseholds', Discussion Paper, November 2002, 1. On file with the author.
198. According to Articles 10.1 and 10.2, the municipality in which a property was located would receive a conveyance fee equal to 30% of the value of the leasehold. The value of the leasehold was presumed to be 50% of the purchase price of an SOE, so the municipality would receive 15% of the total privatization proceeds. UNMIK Draft Regulation on the Transformation of the Right of Use of Immovable Socially Owned Property, 2 December 2002.
199. UNMIK Pillar IV, 'Transformation of SOE Land Use Rights', 2.
200. See ESI/Lessons Learned and Analysis Unit, *The Ottoman Dilemma*.
201. *Law on Transfer of Real Property*, Official Gazette of SAP Kosova, No. 45/81 and 29/86.
202. UNMIK Draft Regulation on the Transformation of the Right of Use of Immovable Socially Owned Property, 25 March 2003.
203. Interview with KTA official, Pristina, 9 December 2003.

204. UNMIK Regulation 2003/13, On the Transformation of the Right of Use to Socially-Owned Immovable Property, 9 May 2003, sec. 10.
205. Uvalic, 'Privatization in the Yugoslav Successor States', 275–79.
206. Figures provided by the Kosovo Trust Agency, http://www.kta-kosovo.org.
207. UNMIK Pillar IV, 'Statement to clarify the current situation regarding the privatisation process', Pristina, 7 October 2003.
208. UNMIK DPI Press Briefing Notes, 7 October 2003.
209. 'SRSG Harri Holkeri's Decisions on KTA Matters', UNMIK Press Release, 4 March 2004.
210. 'SRSG Will Replace Managing Director of KTA', UNMIK Press Release, 10 April 2004.
211. Estimates from the Statistical Office of Kosovo, at http://www.ks-gov.net/esk/index_english.htm.
212. Ministry of Economy and Finance, 'Macro-Economic Monitor', Pristina, April 2005.
213. IMF, 'Aide Mémoire of the IMF Staff Mission to Kosovo', Pristina, July 14–25, 2005.
214. UNMIK, Kosovo Standards Implementation Plan, 72.
215. Ibid.
216. Ibid., 27.
217. Ibid., 72.
218. As Kosovo is not a state, it cannot negotiate a Stabilization and Association Agreement with the EU, which would promote the adjustment of its laws to European legislation. Instead, Kosovo has a 'Stabilization Tracking Mechanism', which effectively fulfils the same function.
219. See, e.g. Chris Patten, 'Speech at the European Parliament', Strasbourg, 30 March 2004.

5

Statebuilding in East Timor[1]

Of the three international administrations discussed here, the United Nations Transitional Administration in East Timor (UNTAET) has been the most comprehensive. In addition to exercising the functions of a sovereign state, it also assumed the legal sovereignty of East Timor for the transition period. It is also the only mission of the three that has been concluded at the time of writing. These two aspects of UNTAET make it an important comparison to the administrations of BiH and Kosovo, and grant a range of interesting insights into the normative framework governing the statebuilding activities of the international community.

East Timor posed very different problems to the international administration than BiH and Kosovo did. In contrast to the missions in the Balkan states, UNTAET did not need to find or implement a political solution to the previous conflict: at the end of the mission would always be an independent East Timor. Nobody questioned this goal, and only the timing of the transition and the nature of the political institutions needed to be determined. As a result, institution- and capacity-building dominated the statebuilding agenda, rather than reconciliation or status issues.

To examine the role of the normative framework within which UNTAET operated, this chapter is divided into four sections. The first section discusses the historical background to the establishment of UNTAET, and analyses the development of its structure from its creation in 1999 to May 2002, the month of East Timor's independence and the end of the mission. The second and third sections contain two case studies of policymaking by the international administration in East Timor. The second section discusses the establishment of the judiciary. It looks in particular at the decision of the applicable law for the territory, and explores the impact of human rights on decisions and institutional design by UNTAET. The third section analyses the reform of the public administration, exploring the plans and policies of the World Bank, UNTAET, and UNDP between 1999 and 2004. Although initiated by UNTAET, an important part of the public sector reform—the drafting and passing of the Civil Service Act—took place after UNTAET had been completed. However, because of the central role the international community played in the process through UNDP, and because of the illustrative

comparison this offers to the civil service reform in BiH, it has been included in the analysis. The analysis highlights the importance of the norms of administrative effectiveness and the rule of law. They are part of the new standard of civilization linked to the conception of sovereignty as responsibility, discussed in Chapter 1, which informed the plans and policies of all three organizations involved in reforming the public service in East Timor. The final section of this chapter examines the implications of the two case studies for the debate about the importance of conceptions of sovereignty for statebuilding in East Timor.

BACKGROUND

East Timor Before International Administration

East Timor, the eastern part of the island of Timor in the Indonesian archipelago, had been a Portuguese colony since the sixteenth century.[2] While the Dutch colony in the west of the island became part of Indonesia after 1949, the Portuguese government refused to surrender its authority over the colony, even after the UN General Assembly rejected this claim in 1960 and put East Timor on the list of non-self-governing territories.[3] Only after the 'Carnation Revolution' and the end of the Salazar dictatorship in 1974 did Portugal acknowledge its international obligation to decolonize under Chapter XI of the UN Charter. In July 1974, the Portuguese constitution was changed to end the status of the colonies as 'overseas provinces', granting them the right to self-determination and independence. In July 1975, the Portuguese parliament passed a law that outlined the decolonization process in East Timor, providing for the establishment of a provisional government, elections, and independence by 1978.[4]

Of the two main political parties that emerged after 1974, the Timorese Democratic Union (UDT)[5] favoured a transitional period of association with Portugal before independence, while the Timorese Social Democratic Association (ASDT)[6], which later renamed itself as the Revolutionary Front for an Independent East Timor (Fretilin),[7] wanted immediate independence. Several minor parties favoured integration with Indonesia. A coalition between UDT and Fretilin, based on the common aim of independence, was formed in January 1975, but collapsed after four months as Fretilin maintained its demands for immediate independence and moved increasingly to the left, while the UDT became increasingly pro-Indonesian. The rift between the two parties escalated into civil war during the second half of 1975, amid growing evidence of covert Indonesian attempts to influence the self-determination

process in favour of East Timorese integration with Indonesia. The Indonesian government of Suharto was increasingly concerned about the possibility of a left-wing regime with possible communist links emerging in East Timor, and indicated that it would not accept self-determination for East Timor if this meant a Fretilin government.[8]

In August, the Portuguese governor and his administration fled Dili as a result of the ongoing fighting. On 28 November 1975, Fretilin, which was in control of most of East Timor's territory, declared independence and the establishment of the Democratic Republic of East Timor. Two days later, on 30 November 1975, a coalition of UDT and small pro-Indonesian parties declared Timorese independence from Portugal, and its integration into Indonesia. Neither declaration was recognized by other states or the UN. On 7 December 1975, Indonesia invaded East Timor with tacit American and Australian approval.[9] By May 1976, Indonesian forces managed to suppress military resistance from Fretilin, and Indonesia established a Regional Popular Assembly, which in its only meeting, decided to request the integration of East Timor with Indonesia. On 17 July 1976, East Timor was declared to be Indonesia's 27th province. Indonesia's integration of East Timor was never internationally recognized,[10] and both the UN Security Council and the General Assembly called for the withdrawal of the Indonesian authorities.[11] The armed wing of Fretilin, the Armed Forces for the National Liberation of East Timor (Falintil),[12] continued to resist the Indonesian occupation, and internationally Portugal continued to be considered as the administering authority.[13]

Based on a request by the UN General Assembly, tripartite discussions between the UN, Portugal, and Indonesia started in July 1983,[14] but only the fall of President Suharto's regime in May 1998 opened the way for a breakthrough.[15] On 27 January 1999, following the withdrawal of Australian support for Indonesian sovereignty over East Timor, President B.J. Habibie announced a referendum allowing the East Timorese to vote on the future of East Timor in Indonesia.[16] This decision was discussed with the military, which maintained a strong psychological attachment and economic interest in East Timor, and which accepted the referendum as an opportunity to settle once and for all the Timorese question, by delivering a positive vote for autonomy inside Indonesia through a policy of repression and fear.[17]

On 5 May 1999, amid a rapidly worsening security and human rights situation in East Timor, the Indonesian and Portuguese governments signed an agreement mandating the UN Secretary-General to organize a 'popular consultation', to determine whether the East Timorese people accepted or rejected autonomy within Indonesia.[18] Under Article 6 of the agreement, rejection of the autonomy option would clear the way for a transition to independence

under UN guidance.[19] On 11 June 1999, the Security Council established the United Nations Mission in East Timor (UNAMET), to organize the consultation and carry out an oversight role during the transition to autonomy within Indonesia or independence.[20]

The date determined for the ballot was 30 August 1999, and despite the tight timetable and the precarious security situation in East Timor, UNAMET managed to register over 450,000 voters. On the day of the ballot, 98 per cent of the registered voters went to the ballot boxes, and 78.5 per cent rejected the autonomy proposal, voting in favour of independence. Violence broke out almost immediately after the announcement of the ballot results on 4 September 1999, and pro-integration militias, supported by the Indonesian army and police,[21] killed an estimated 2,000 East Timorese, forcibly deported 230,000 to refugee camps in West Timor, and internally displaced several hundred thousand.[22] In addition, the militias' 'scorched earth' tactics destroyed most of the country's infrastructure. In the light of the Indonesian military's failure to honour its commitment to provide peace and security, the Security Council authorized the establishment of a multinational force to restore order in East Timor (INTERFET),[23] and pressured Indonesia into consenting to its deployment.[24] Led by Australia, INTERFET was deployed from 20 September 1999 and quickly brought the violence to an end.

Limited planning for a transitional administration of East Timor in the case of a vote for independence had been pursued between May and September 1999 by the UN Department of Political Affairs (DPA), in conjunction with the World Bank and the National Council of Timorese Resistance (CNRT).[25] It had been hampered in particular by the unwillingness of the Indonesian authorities to discuss the future process in the case of independence.[26] Rather than a UN administration with complete political authority, the original plans envisaged a smaller mission providing administrative support and capacity-building for Timorese institutions, a modification of UNAMET without extensive legislative or executive authority for the UN, and only a small military component. This position was supported by the UN Secretariat as well as the so-called 'core group' states most deeply involved in the East Timor question at the time.[27] No one expected the comprehensive destruction of infrastructure that followed the ballot, and planning was based on the assumption that the Timorese would gradually take over the bureaucracy from Indonesia, and that the UN would support them in the transition process.[28]

The post-ballot violence made all these plans obsolete. The physical infrastructure was almost completely destroyed by the militias. Indonesian officials, who had dominated the managerial levels of the civil service, had all left East Timor, and the public administration had all but collapsed. The judiciary no longer existed at the time of the arrival of UNTAET. Court

buildings were looted, and law books, case files, and other legal resources burned. In addition, all judges, prosecutors, and lawyers, as well as most of the legal support staff, had left East Timor following the popular consultation as they were Indonesian or sympathetic towards the Indonesian regime.[29]

With the failure of the Indonesian army to provide security, the UN mission needed to include a substantial military component, and consequently planning was assigned to the UN Department of Peacekeeping (DPKO) on 7 September 1999.[30] On the basis of this planning, the Security Council on 25 October 1999 passed Resolution 1272, establishing UNTAET.[31]

Establishing International Authority in East Timor

UNSCR 1272 recognized the Timorese desire for independence as expressed in the ballot, and created UNTAET for the transition towards independence. To that end, UNTAET was

> endowed with overall responsibility for the administration of East Timor and … empowered to exercise all legislative and executive authority, including the administration of justice.[32]

The Resolution outlined the responsibilities of UNTAET as providing security, law and order, establishing effective administration, developing a civil service and social services, coordinating the delivery of humanitarian aid and development assistance, and supporting capacity-building for self-government.[33] To this end, the transitional administrator was given the power to 'enact new laws and regulations, and to amend, suspend, and repeal existing ones'.[34]

In addition to the administration mandate, the Resolution contained a mandate for institution-building and democratization. UNTAET's authority was inherently limited by Resolution 1272, as it stressed

> the need for UNTAET to consult and cooperate closely with the East Timorese people in order to carry out its mandate effectively with a view to the development of local democratic institutions, including an independent East Timorese human rights institution, and the transfer to these institutions of its administrative and public service functions.[35]

This requirement to consult and cooperate underlines the UN's commitment to East Timorese self-determination. In BiH and Kosovo, where the political status of the territory is either unresolved or challenged by parts of the population, no such requirement exists in the mandates of the international administrations.

Though not clearly outlined in Resolution 1272, the planning for UNTAET foresaw a phased strategy of statebuilding and transition to self-governance.

Thus, the first priority was the establishment of security, followed by the restoration of basic government services and the return of refugees. In the following phase, UNTAET was to establish an effective public administration, and only after this would shift its focus to capacity-building for self-governance and eventual transition to Timorese rule.[36] In practice, as will be discussed later, the political environment and the need to engage with local Timorese actors made such a phased, technocratic approach unfeasible.

The structure of UNTAET was first outlined on 4 October 1999 in the Secretary-General's report to the Security Council,[37] and endorsed later in Resolution 1272. UNTAET's structure was inspired by the administrations in Bosnia and Kosovo, and comprised three distinct 'pillars': governance and public administration, humanitarian relief, and the peacekeeping force.[38] In contrast to these two administrations, however, the mission in East Timor was highly centralized: a conscious response to the coordination problems experienced between UNMIK's Pillars in Kosovo.[39] Once the peacekeeping force had succeeded INTERFET on 1 February 2000, both the civilian and military parts of the international presence were under a single command, unlike in BiH or Kosovo, where they remained separate.

The head of UNTAET, the Transitional Administrator, was the SRSG.[40] He was assisted by two Deputy SRSGs, one in charge of the governance and public administration pillar, the other in charge of the humanitarian relief pillar; the Peacekeeping Force Commander, and a Chief of Staff. These five also formed the EXCOM, chaired by the SRSG, which was responsible for the political and managerial decisions of the mission.

With regard to statebuilding, the governance and public administration pillar was by far the most important, as it was tasked with both providing state functions in the absence of functioning domestic institutions (with the exception of defence, which was the responsibility of the Peacekeeping Force), and with developing the local capacity for self-governance. It was thus given the 'dual mandate' of governing East Timor in the short term, and preparing it for democratic self-government in the long run.[41] The five divisions of the pillar covered the judiciary; the police; economic, financial, and development affairs; public services; and the organization of elections (see Fig. 5.1).

In addition to this, the governance and public administration pillar was responsible for the district administrators. The district administration was an attempt to decentralize political authority, and to replicate the divisional structure of the central public administration in East Timor's thirteen districts, both to govern the territory more effectively and to broaden capacity-building beyond the top level of government in Dili, by including the population in the different elements of the administration.[42] It stood in stark contrast

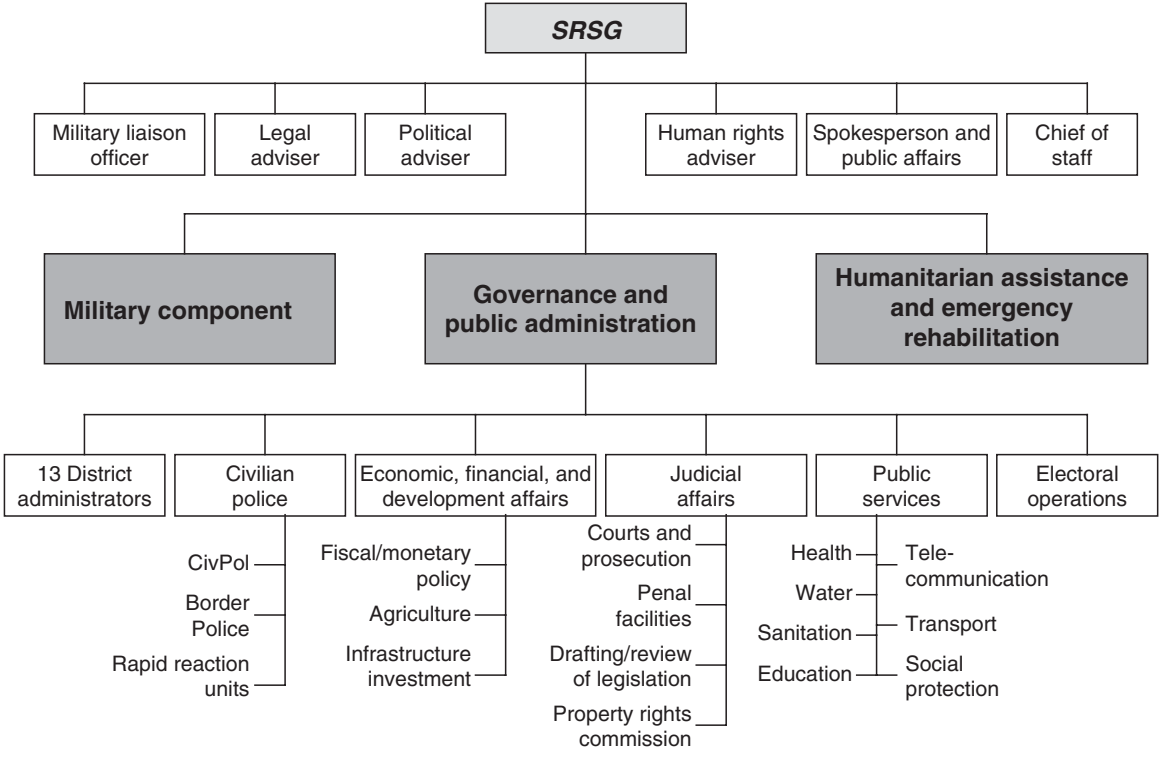

Figure 5.1. UNTAET structure, 1999

to the otherwise centralized nature of UNTAET, reminiscent of a traditional peacekeeping operation.

During the early planning stage, the district administrators were expected to have supreme executive authority in their districts, and certain judicial powers until a judiciary could be established.[43] Instead, the role of the district administrators was watered down in the 4 October 1999 report, giving them a coordination role rather than executive powers,[44] and the reporting lines, rather than running from the divisional field officers to the district administrator, as implied by the UNTAET staffing table, stayed within the divisions, leaving the district administrators uncertain about their authority, and further centralizing authority in the mission's headquarters in Dili vis-à-vis the field offices.

Resolution 1272 mandated UNTAET to consult and cooperate with the Timorese. To this end, one of the first regulations issued by UNTAET established the National Consultative Council (NCC), to advise the SRSG on all matters pertaining to the administration of East Timor.[45] However, Timorese participation in political decision-making and the administration remained very limited. The NCC's 15 members, of whom four were internationals, were not elected and could only offer recommendations to the SRSG, not issue binding decisions or initiate legislation. The weakness of the NCC was exacerbated by SRSG's almost exclusive reliance on Xanana Gusmão, the charismatic CNRT leader.[46]

Public administration was originally provided directly by UNTAET, with international officials running departments while a Timorese civil service was recruited and trained. UNTAET's structure, in particular the governance and public administration pillar, was therefore initially geared towards administration rather than institution- and capacity-building. However, the very powerful mandate of UNTAET did not automatically translate into the capacity to exercise it, and UNTAET was slow to establish its own structures, and spent the first six months developing its own rather than Timorese institutions.[47] During this time, its presence barely extended outside the capital, Dili. Considering that the provision of effective governance is one of the main sources of legitimacy of international administrations, the absence of an UNTAET presence outside the capital compromised its claims to authority.

The lack of local participation in government under UNTAET was increasingly criticised in East Timor and abroad,[48] and threatened the legitimacy of the UN administration. In the absence of an effective international administrative presence, the previous clandestine structures of the CNRT, which had spread into every village in East Timor from the time of the resistance, assumed administrative functions on the village level, distributing aid, providing reconciliation and justice, and a range of other administrative services.[49]

When UNTAET reduced the role of the CNRT to mere consultation through the NCC, many in the Timorese elite found this insufficient to satisfy their demands for participation.[50] In response to their criticisms, UNTAET began to change governance structures and initiated a process of 'Timorization' of the administration.

Timorization—From International Administration to Self-Governance

The development of formal Timorese governance structures started in February 2000 with UNTAET's endorsement of the World Bank's Community Empowerment Project (CEP), which it had resisted for several months, considering it to be a challenge to UNTAET's authority.[51] The programme aimed at developing local governance structures to decide autonomously on the distribution of block grants given to villages and sub-districts, thus creating local decision-making capacities that would facilitate the transition from UN rule to independence.[52] The decision to endorse the project was aided by UNTAET's failure to staff the district and sub-district administrations, and the resulting inability to effectively exercise authority throughout East Timor.[53]

On the national level, the transfer of authority from UNTAET to the East Timorese was initiated at the CNRT conference in Tibar on 30 May 2000, when the head of the UNTAET Political Affairs office, responding to Timorese demands for more participation, proposed a structure of 'co-government' shared between UNTAET and the Timorese, with an increasing Timorization of ministries by gradually replacing international officials with East Timorese civil servants.[54] In addition, the NCC would be replaced with a council made up solely of Timorese members.

The CNRT leadership accepted the proposal, and in July the SRSG established the first formal Timorese national political institutions, the Cabinet of the Transitional Government of East Timor,[55] which had both Timorese and international members, and the National Council (NC), conceptualized as a transitional legislature, replacing the NCC, and which had a purely Timorese membership.[56] UNTAET's government and public administration pillar was dissolved, and the new cabinet was put in charge of its departments, which now formed the East Timor Transitional Administration (ETTA) (see Fig. 5.2).[57]

Initially, eight departments were established, four of which were headed by Timorese politicians: Infrastructure, Economy, Social Affairs, and Internal Administration. The other four—Police and Emergency Services, Political Affairs, Justice, and Finance—continued to be led by internationals.[58] In

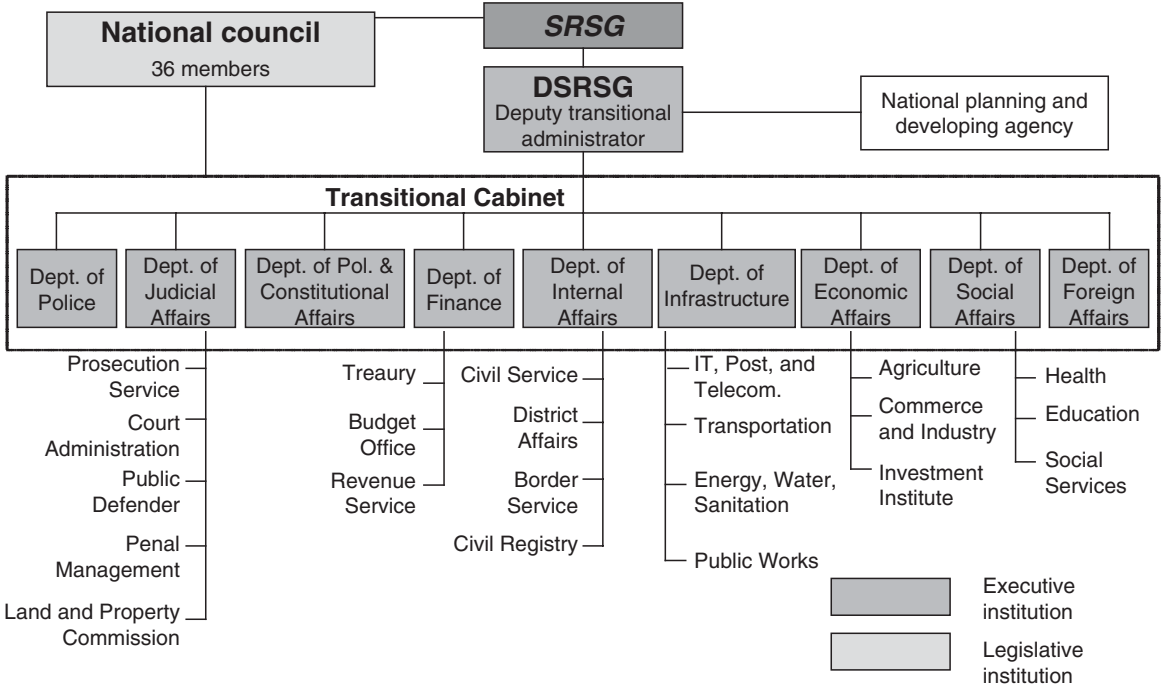

Figure 5.2. The UNTAET–ETTA structure (2000–1)

Source: Adapted version of Figure 4.1 from Richard Caplan, *International Governance of War-Torn Territories: Rule and Reconstruction* (Oxford: Oxford University Press, 2005). By permission of Oxford University Press.

October, the foreign ministry was created, and Jose Ramos Horta, Nobel Laureate and East Timor's most prominent exiled resistance politician, was appointed as foreign minister.[59]

The cabinet was responsible for the formulation of policies and programmes of the government of East Timor. It could propose legislation to the NC, and was in charge of overseeing the administration.[60] However, its executive powers were limited by the role of the SRSG who maintained final authority, and who reviewed and approved all cabinet decisions.[61] East Timorese power in the departments was constrained further by the fact that the senior staff in the departments was almost exclusively international. At the time, there were very few Timorese civil servants UNTAET deemed capable of taking on senior management positions, a consequence of the bottom-up recruitment process of the civil service. As a result, many of the Timorese ministers felt that they were merely fig leafs for continued UN governance. With the exception of Ramos Horta (who at the time was out of the country), all Timorese members of the cabinet threatened to resign in December 2000, eliciting the promise from UNTAET of extended participation.[62]

The NC, which was chaired by Xanana Gusmão, was envisaged to serve as a transitional parliament.[63] Its membership of originally 33 was extended to 36 in October 2000.[64] The NC included 13 representatives of the political parties, a representative from each of the 13 districts, and 10 representatives drawn from religious groups, civil society, and professional organizations.[65] It was to be the transitional parliament until elections in 2001, and its role was to initiate, modify, and amend legislation, and to hold the transitional cabinet accountable.[66] Even though it had more substantive powers than the NCC and could shape the legislative agenda, in the end the final legislative authority remained with the SRSG. This lack of authority was exacerbated by the lack of experience in drafting legislative documents, which limited the effective participation of East Timorese through the NC even further.[67] As legislation was drafted predominantly by the OLA, not by any part of the ETTA structure, the capacity of Timorese institutions to develop public policy was hardly enhanced during UNTAET's reign.[68]

The formation of ETTA and the NC did little to improve the relations between UNTAET and the Timorese political elites, who evermore vocally argued for the withdrawal of the UN and a quick transition to independence for East Timor.[69] In December 2000, the NC endorsed a programme leading towards independence proposed by Gusmão, which included the election of a constitutional assembly, and the formation of a Timorese government by the end of 2001.[70] Responding to these demands, UNTAET developed a very tight timetable for the transition, with elections for an 88-member constituent assembly in August 2001,[71] followed by the drafting of a constitution by the

assembly, and formal independence later in 2002. Though it consulted the cabinet and the NC in February 2001, the timetable was essentially drafted by UNTAET and shaped by the desire to present an exit strategy to the Security Council.[72]

In preparation for the Constitutional Assembly, Constitutional Commissions were established in the 13 districts to solicit the views of the local population on the constitution, and make recommendations on the basis of the consultations.[73] Although more than 36,000 Timorese participated in these hearings,[74] they were criticized by local NGOs for not offering sufficient time for proper consultation and debate.[75] Their records were mostly ignored by the Constitutional Assembly, as Fretilin, which dominated the Constitutional Assembly, argued that they were an attempt by UNTAET to undermine the autonomy of the Assembly.[76]

In the run-up to the elections, the CNRT was dissolved, and the different parties contended the elections separately. Fretilin was the overwhelming winner of the August elections, subsequently dominating the Assembly and the constitutional process.[77] Following the elections, the ETTA cabinet was dissolved on 19 September 2001, and replaced with a purely East Timorese Council of Ministers appointed by the SRSG. The Council of Ministers was in charge of the new East Timor Public Administration (ETPA) that succeeded ETTA (see Fig. 5.3).[78] While the administration still included international officials, all the ministers were now Timorese. However, the SRSG maintained final authority, and legislation had to be approved by him. The Assembly proposed 20 May 2002 as the date of Timorese independence, and the Security Council endorsed this date on 31 October 2001.[79]

Even if the SRSG formally maintained final authority, UNTAET's role changed with the establishment of ETPA, from exercising governmental authority towards an advisory role, in particular after the election of the Constituent Assembly and the formation of a government with democratic legitimacy.[80] Already in January 2001, the SRSG had noted in a briefing of the Security Council that

> UNTAET should in fact no longer be seen as an international transitional administration, but rather as a support structure for the embryonic government of East Timor and other institutions of the state.[81]

While at the time of the statement this reflected the aspirations, more than the reality, of international administration in East Timor, it had become reality by September 2001. Already in the months before the election, UNTAET had been increasingly reluctant to impose its political design on the East Timorese, as witnessed by the reversal of the initial decision to have a quota for women

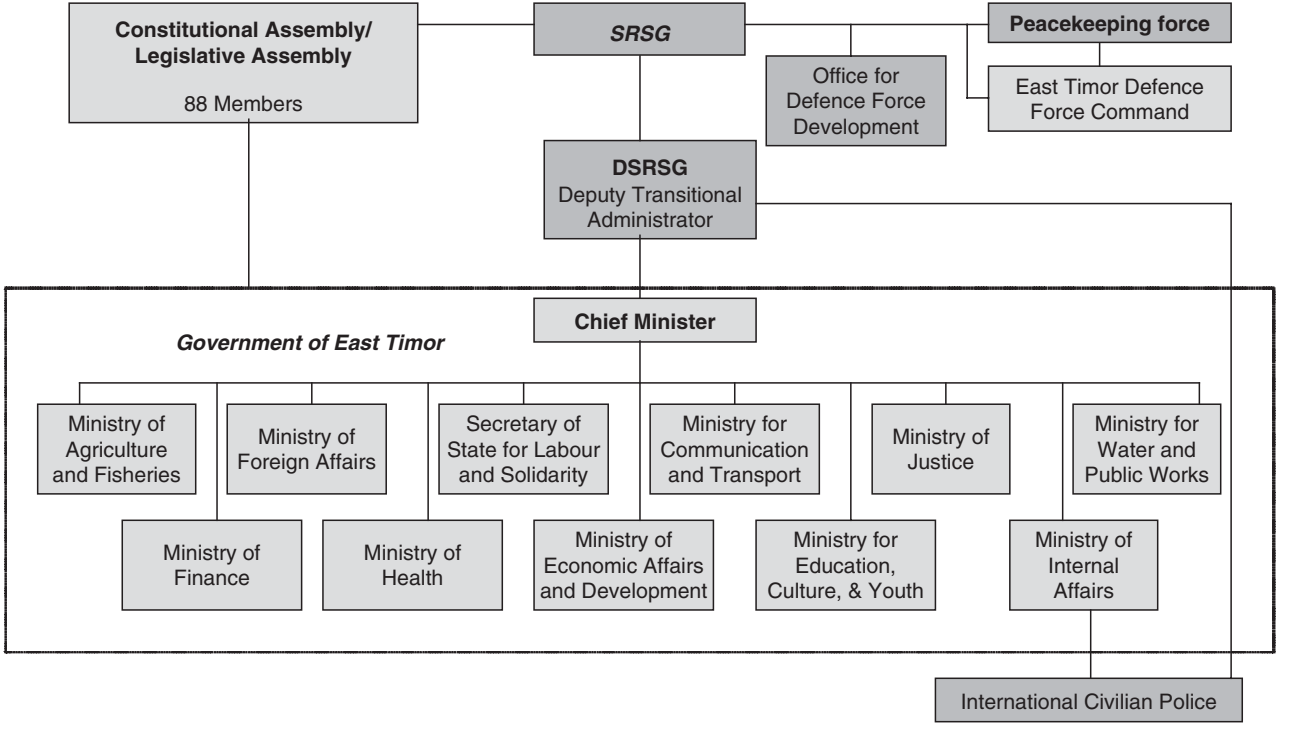

Figure 5.3. The East Timor Public Administration (2001–2)

in the Constituent Assembly, a suggestion that was rejected by the majority of the NC members, including all the female representatives.[82]

While the elections and the establishment of ETPA devolved most political authority to the Timorese, three important exceptions remained: the police, the defence forces, and the judiciary. Both the defence force and the police remained under the SRSG's authority beyond independence, through UNTAET's successor mission, the United Nations Mission in Support of East Timor (UNMISET).[83] The international involvement in the judiciary will be discussed in more detail in the next section of this chapter. After a three-month extension of the drafting period for the constitution, it was adopted by the Constitutional Assembly on 22 March 2002, turning the Constitutional Assembly into the new legislature. Presidential elections were held on 14 April 2002, which Xanana Gusmão won with an overwhelming majority.[84] All political institutions necessary for an independent East Timor were in place, and East Timor declared its independence on 20 May 2002, gaining statehood and ending UNTAET's mandate.

East Timor's Empirical Sovereignty

With independence, East Timor became a state, with legal personality under international law. However, its empirical sovereignty remained limited by three factors: (*i*) the division of political authority with UNTAET's successor mission, UNMISET; (*ii*) the lack of governmental capacity; and (*iii*) the compromised authority of East Timor's state institutions, which remained ineffective and have been challenged by traditional authority structures.

After independence, UNMISET remained responsible for security through the peacekeeping force and authority over the police. UNMISET personnel were also involved in key public institutions, in particular in the judiciary. International judges continued to sit on the Special Panels for Serious Crimes, as well as in the Court of Appeals. Thus, to some extent East Timor shared its sovereign prerogatives with UNMISET, though it is important to note that the Timorese have been keen to maintain this international presence because of the weakness of their administrative institutions.

The establishment of administrative capacity could not equal the pace of creating domestic democratic institutions. Without international support, East Timor would have faced grave governance problems, and a range of ministries would have been scarcely functional.[85] Capacity-building therefore constituted a central element of UNMISET's mandate, including the establishment of 100 'stability posts' for international experts in the Timorese administration.[86] The mission continued for three years until 20 May 2005,

and devolved the remaining international responsibilities to Timorese institutions. The UN continued to support East Timor through the UN Support Office for Timor-Leste (UNOTIL) for another year, providing advisers for the administration and the security institutions.[87]

The legitimacy of the new state institutions has been challenged by their ineffectiveness, and by alternative paradigms of local authority, which continue to exist in parallel to the new institutions. The problem exists in particular in the justice sector, where the main form of justice used by the rural population is traditional justice, not the formal justice system established by UNTAET, as discussed in detail later. However, a similar challenge has been posed by local conceptions of political authority, based on traditional structures, rather than the new democratic institutions.[88] Thus, as UNDP observed in 2001:

> Over the past 18 months, the inculcation of a wide variety of values, practices, and standards from a diverse international community into the evolving governance systems in East Timor, many of which may not have been adequately adapted to Timor experience and values, have hampered the building of a nationally owned system of government.[89]

The analysis of the transition process of Timorization, from UN governance to co-governance and finally self-governance, shows one of the differences between UNTAET and the two missions in the Balkans: the certainty about the political outcome meant that the focus of the mission was on institution- and capacity-building, not on the resolution of an underlying political conflict and the political status of a territory. It highlights how this process was not so much driven by the increased capacity of the East Timorese to govern themselves—the development of empirical sovereignty—but by Timorese demands for increased participation, and the political impossibility to resist them—a situation similar to that in Kosovo, where the unresolved status, however, has delayed the conclusion of this process. This highlights the limits of the explanatory power of the normative framework of sovereignty as responsibility for the statebuilding practices of the international administration in these cases. The normative framework might shape the design of state institutions, and serve as an implicit blueprint for the international community's statebuilding activities, but it does not determine the nature and timing of the international administrations' exit and handover of political authority.

The following two sections further focus on the influence of the normative framework on the policymaking of UNTAET, looking at the establishment of the judicial system and the public administration. To show how UNTAET's objectives and actions were informed by the concept of sovereignty as responsibility, the sections examine how the reform of these sectors address

important elements of the standard of civilization, in particular effective governance and human rights. Both the policies of the international organizations active in East Timor, and the institutions they chose to build, show the influence of these norms on policymaking.

POLICYMAKING IN EAST TIMOR I: HUMAN RIGHTS AND THE REFORM OF THE JUDICIAL SYSTEM

The establishment of the rule of law and of functioning judicial institutions has been recognized by the international community as a central element of any statebuilding process.[90] A functioning judiciary is essential for the credibility of, and trust in, the state's institutions, as it guards the citizens' rights against the arbitrary use of power by the government. In East Timor, creating an independent and credible judiciary, committed to the protection of human rights, was one of the UN's priorities,[91] in particular as the Indonesian system had been seen by the Timorese population as corrupt and as an instrument of repression rather than justice.[92] However, this commitment to human rights created a predicament for UNTAET when building judicial institutions in one of the world's poorest countries, summarized succinctly by two of its legal advisers: 'How does that organisation [the UN], steeped in Northern European and Anglo-American values and dedicated to upholding the highest international legal standards, establish a cheap and effective legal system?'[93]

Unfortunately, UNTAET failed to establish a judicial system that was effective, that is to say conducting trials speedily, in a procedurally appropriate manner observing international rule of law standards, and at the same time being affordable for one of the world's poorest countries. Instead, it left a legacy of dysfunctional institutions. Not without reason, judicial reform has been identified as the 'Achilles heel' of the international administration in East Timor.[94]

The reform of the judicial system in East Timor posed a range of unique challenges to UNTAET. First, the formal judicial system did not need reform but needed to be rebuilt from scratch. Almost all of the physical infrastructure of the justice system, such as courtrooms, penal facilities, court records, and legal libraries had been destroyed by pro-Indonesian militias.[95] Secondly, only a very limited number of Timorese legal professionals were available to staff the judiciary. Before the post-ballot violence, approximately 100 Timorese had completed a law degree in Indonesia, but when UNTAET arrived it was unclear how many of them were still in the territory. The World Bank's Joint Assessment Mission (JAM) could only identify five lawyers who were licensed to practice law.[96] Under Indonesian rule, no Timorese had been judges or prosecutors, and all the Indonesian legal officials left after the ballot and

the ensuing violence.[97] Finally, UNTAET faced a conflict between the formal judicial system, characterized by international human rights standards, and traditional local law, judging acts in terms of their consequences for the welfare and survival of the local community rather than as a violation of individuals' rights, and prevailing in particular in rural areas. As some of the traditional law's provisions are violating international human rights norms, they challenge the normative framework of UNTAET's statebuilding activities.

Human Rights and the Establishment of Judicial Institutions in East Timor

Once INTERFET had established control over East Timor, it faced the question of how to deal with an increasing number of detainees, both criminals and former militia fighters, whom it had arrested in the pursuit of its mandate. While under the 5 May Agreement Indonesia formally remained responsible for the maintenance of law and order for a transition period,[98] the physical destruction and the exodus of Indonesian judges and policemen made it impossible to handover the detainees to the Indonesian authorities.[99] As UNTAET was not present on the ground in East Timor yet, detainees could not be transferred to the UN either. Thus, INTERFET had to develop its own mechanisms for reviewing the detention of alleged criminals until they could be transferred to a civil judiciary, to protect, as far as possible, the right of the detainees to be tried without undue delay.[100]

To 'balance the rights of the detainees to natural justice and due process against the need to detain',[101] INTERFET, after consultation with the UN and the International Committee of the Red Cross (ICRC), established the Detainee Management Unit (DMU) on 21 October 1999, four days before UNTAET was established, to review detentions.[102] The law used to decide whether individuals should continue to be detained was Indonesian law, applied within a procedural framework based on international humanitarian and human rights law, in particular the Fourth Geneva Convention. Until it was disbanded on 12 January 2000, the DMU reviewed 60 cases of detention, but did not conduct any trials, which were left to the civilian judiciary to whom the detainees were handed over.[103]

The establishment of the DMU by INTERFET bought some time for UNTAET to establish civilian judicial institutions to deal with the detainees. After establishing on which legal basis the formal judicial system should be established (discussed in more detail on pp. 200–202), UNTAET moved quickly to select and appoint legal personnel. This was a process of highly symbolic importance because for the first time, Timorese, who had been

excluded from these offices both during Portuguese colonial rule and Indonesian occupation, would be judges and prosecutors.

The UN had decided in its mission planning that the judiciary should be filled with East Timorese legal professionals to the largest extent possible, while acknowledging that it might be necessary to recruit judges and prosecutors internationally.[104] UNTAET originally went a step further and decided on a purely Timorese judiciary, for three reasons.[105] The first reason was pragmatic: it would be expensive to deploy international judges and prosecutors, and the use of local personnel would make the transition after UNTAET's departure, and the inevitable decline in donor funding easier. The second reason was Timorese ownership: as there had never been a purely Timorese judiciary before, the decision underlined the commitment of UNTAET to Timorese self-determination. However, recognition of ownership was also instrumental in promoting the acceptance of the mission by the local population. It was thought that ownership would be necessary to gain Timorese support for UNTAET's broader mission, an assumption based on the experience of UNMIK in Kosovo, where several key figures, like the legal adviser, had been involved in the early phases of the judicial reform.[106] Finally, a reliance on international judges and prosecutors would have led to further delays in dealing with the backlog of cases that had arisen from INTERFET's arrests, as it would have been impossible to quickly recruit and deploy the necessary number of international judges and prosecutors, and since they would have then needed to acquaint themselves with Indonesian law. This, it was felt, would seriously compromise UNTAET's human rights commitments.

A range of Timorese legal professionals and UNTAET officials expressed a preference for a functioning judiciary over immediate ownership, and argued for the deployment of international judges and prosecutors, in particular to deal with the complex issues of war crimes, but also to allow for time to properly train Timorese legal professionals.[107] Their concerns were disregarded when the decision to appoint only Timorese legal professionals to the judiciary was made.

On 7 January 2000, the first judges, prosecutors, and defence lawyers, all Timorese, were sworn in by UNTAET. By the end of June, 26 judges, eight prosecutors, and six defence lawyers had been appointed.[108] However, it quickly became obvious that a purely Timorese judiciary was hardly sustainable. Of the 60 Timorese who had originally applied for positions in the judiciary, none had any experience as a judge or a prosecutor. Only a few of them had any practical legal experience, mostly in legal aid and paralegal organizations.[109] In March and June 2000, UNTAET finally decided to employ international judges and prosecutors, to deal with serious crimes committed in 1999 in the run-up to and after the ballot.[110]

Thus, East Timor's judiciary experienced a similar development to that in Kosovo, from a purely local to hybrid system with international participation, though for very different reasons. While in Kosovo concerns about judicial independence and impartiality caused the appointment of international legal personnel, and enhancing the procedural legitimacy of the legal system was emphasized over local ownership, in East Timor the main concern was the effectiveness of the system in the light of deficient local capacity, and to this end ownership was compromised.

To uphold the independence of the judiciary—a requirement under international law, but a requirement difficult to reconcile with UNTAET's potentially absolute powers over the judiciary—the SRSG established the Transitional Judicial Service Commission (TJSC) on 3 December 1999. This Commission was responsible for selecting and recommending judicial personnel for appointment, for investigating complaints about the judiciary and recommending disciplinary measures.[111] It was composed of three Timorese and two internationals, all appointed by the SRSG, including Timorese representatives from the Catholic Church and human rights NGOs, as well as an international staff member from the judicial affairs department and the cabinet member for justice.[112] The majority of East Timorese members, which could outvote the internationals, enhanced Timorese ownership of the judiciary.

Regulation 99/3 emphasized the independence and impartiality of the TJSC, manifested in particular in the oath the commission members had to take.[113] However, even if the independence of the TJSC was institutionally upheld until the end of the mission, UNTAET avoided the use of the TJSC for the recruitment of international judges,[114] and at times aimed to achieve a degree of control over the TJSC that would have been incompatible with international standards of judicial independence.[115] Thus, in 2001, the cabinet approved a proposal that the cabinet member for Judicial Affairs, who was already sitting on the TJSC as an international expert, should be a commission member *ex officio*, and planned to amend the regulation accordingly.[116] UNTAET wanted to increase its control over the appointment and disciplinary process to get rid of unqualified judges, and improve the quality and effectiveness of the judiciary.[117] However, by suggesting to amend the regulation in this way, it violated international standards of judicial independence. The National Council, when confronted with the proposal, rejected this and other provisions,[118] and UNTAET subsequently amended the regulation so that it conformed with international standards.[119]

The presence of the cabinet member for Judicial Affairs on the commission, even if not *ex officio*, set a bad precedent for the government after independence, which has continued to take influence on the appointment and disciplinary procedures for judges and prosecutors. The Statute of Judicial

Magistrates, promulgated on 9 September 2002, contains no reference to the independence of the Superior Council of the Judiciary, the successor of the TJSC.[120] Moreover, both local NGOs and the UN Special Rapporteur on the Independence of Judges and Lawyers have expressed concerns that the law might not adequately protect the independence of the judiciary.[121]

UNTAET's efforts to establish the core institutions of the judiciary revealed most clearly the problems of its judicial reform efforts. These were partly due to a lack of human and financial resources compounded by the physical destruction and lack of local expertise; but they occurred also due to the lack of a comprehensive strategy with regard to institution-building: there was little planning regarding the institutional structure of the judiciary, its requirements of personnel and equipment, and its training needs. Consequently, it took a long time for UNTAET to establish the judicial institutions: it was not until three months after it had appointed the first judges that UNTAET created the legal framework establishing the court structure.[122] It took a further three months to establish the public prosecution service,[123] and a public defenders office was not formally created until September 2001, even though the first defence lawyers had been recruited in January 2000.[124] The long time it took to establish the core judicial institutions underlines the problems UNTAET faced in providing effective governance, and raises questions about its authority.

The regulation on the organization of the courts established four district courts of first instance, and an appeals court.[125] In addition, special panels with both international and local judges were established at the Dili District Court, to deal with transitional justice issues in the context of the popular consultation in 1999.[126] The Dili District Court heard its first case in May 2000, and another court, in Bacau, heard its first case in June of the same year.[127] Even though judges and prosecutors were appointed to the other two courts in Oecussi and Suai as well, the court buildings were not finished by the end of UNTAET's mandate,[128] seriously undermining the functioning of the judiciary and the access of Timorese, in particular in rural areas, to the court system.

A range of other factors contributed to the weakness of the judicial institutions. First, the lack of resources and qualified administrators weakened the court administration, compromising the human rights of detainees, such as the right to no undue delay of trial, or to access to case-related information.[129] Secondly, language problems and a lack of interpreters obstructed the effective functioning of the judiciary, as four languages—English, Bahasa Indonesian, Portuguese, and Tetum—were and are used in the courts. The language issue also affected the training of judges, which was conducted in Bahasa Indonesian under UNTAET, the language in which almost all Timorese judges had received their legal training; but which changed to Portuguese once the

Timorese Minister of Justice assumed responsibility—even though only a very small minority of the judges spoke Portuguese fluently.[130] Finally, the training provided by UNTAET and various donors seriously interrupted the work of the judges, and was often perceived as irrelevant for their daily work. Thus, judges spent up to fifteen days each month training in Dili, and as all judges and prosecutors would train together on a regular basis, the court system would be shut down at such times.[131]

As a consequence of the lack of resources and a strategy for the building of judicial institutions, the judicial system of East Timor was dysfunctional when UNTAET handed over authority. More than a year later, almost a quarter of detainees in East Timor's prisons were in jail under expired warrants,[132] the four district courts still barely functioned, with the Prosecutor in Oecussi not having issued a single indictment by June 2003[133] and the Court of Appeal not sitting between October 2001 and June 2003 because of a lack of judges.[134] With continued international support, all courts were operational at the end of UNMISET's mandate in May 2005, but have continued to rely heavily on international judges and prosecutors.[135]

However, one further decision significantly contributed to these problems, the decision on the law applicable in East Timor, which stood at the beginning of the reform of the judicial system. This decision is discussed in detail in the following section.

The Applicability of Indonesian Law

'What law applies in countries that do not yet exist?'[136] This question posed by the SRSG in 2000 summarizes the importance of the first decision the international community had to take with regard to the reform of the judicial system, the decision on the applicable law. The first to face the problem in East Timor, however, was not UNTAET but INTERFET, in the context of the DMU. For predominantly pragmatic reasons, it decided to apply Indonesian law, as this had been the de facto official legal regime in East Timor for the last 24 years.[137] However, in particular with regard to criminal procedure, INTERFET relied on a framework of international humanitarian and human rights law, especially the Fourth Geneva Convention.[138] In its decision to apply Indonesian law, INTERFET was also guided by the Report of the UN Secretary-General from 4 October 1999, which foresaw the continued application of Indonesian law in East Timor.[139]

UNTAET followed this path with regard to the applicable law. Its first regulation, 'On the Authority of the Transitional Administration in East Timor', declared that the laws that applied until 25 October 1999, the day UNTAET

was established, would be the applicable law until replaced by UNTAET regulations or laws passed by democratic Timorese institutions.[140] UNTAET qualified it by a range of international human rights standards,[141] abolished capital punishment, and declared certain laws, such as the laws on anti-subversion and on social organizations, which had previously limited the political activities of the East Timorese, as no longer applicable.[142]

On the one hand, the reasons for applying Indonesian law were largely pragmatic, to ensure a degree of legal continuity and stability,[143] and to avoid a situation where local lawyers, who were almost all trained in Indonesian law, would have to learn a new, foreign legal system.[144] While the decision was not very controversial, some Timorese complained about the continued use of the legal system that had served as an instrument of oppression for almost 25 years.[145] On the other hand, the qualifications to the law, and UNTAET's insistence on applying international human rights standards, reflects UNTAET's commitment to these standards,[146] sometimes regardless of their effects on the sustainability of institutions in East Timor, one of the poorest countries in the world. This was witnessed by the original plan to create eight district courts, which East Timor could not have sustained.[147] As a consequence, UNTAET committed itself to standards, in particular procedural human rights standards, that it could not fulfil given the circumstances the mission faced as a result of the scorched earth tactics of the militias.

The full review of the applicable Indonesian law that was envisaged, to ensure that it complied with international human rights norms, was never undertaken by UNTAET. Indeed, it seems that originally not even a full translation of Indonesian law was available to the mission.[148] Laws were translated and reviewed in an uncoordinated, ad hoc fashion by different departments as the need arose.[149] As a consequence, it was left to the courts to assess whether laws were still applicable, thus shifting the responsibility for review to judges who were insufficiently trained in human rights law. This only increased the burden on the already weak judicial system.

A good example of the problems arising from UNTAET's failure to ensure that the applicable law was consistent with the propagated international human rights standards was the case arising from defamation charges against Takeshi Kashiwagi, a Japanese journalist accused of having made slanderous remarks about Xanana Gusmão. Arrested on 22 August 2000, he was held in prison on the basis of a provision in the Indonesian Criminal Code—the applicable law at the time—on charges of defamation. These were charges incompatible with rights to the freedom of speech, but were punishable with up to nine months of prison under the applicable Indonesian law.[150] Two applications were made by Kashiwagi's defence counsel to the Dili District Court for his release, but in the end only an executive order by the SRSG,

decriminalizing defamation,[151] caused the General Prosecutor to order Kashiwagi's immediate and unconditional release.[152]

The lack of knowledge of Indonesian law also meant that UNTAET's legislative work did not proceed on the basis of existing law, but rather tried to import template legislation taken from other contexts, like the UN administration in Kosovo, thereby frequently failing to obtain adequate input from the Timorese. An example was the criminal procedure code, which UNTAET lawyers drafted in 2000.[153] Several Timorese lawyers recommended use of the Indonesian Criminal Procedure Code, modified by applicable human rights legislation. This law was known by Timorese legal personnel, and seemed sensible in the light of the applicable substantive criminal law, the Indonesian Criminal Code. The UNTAET legal adviser, however, who was charged with the drafting, did not accept these comments, and in the end the SRSG promulgated a law that lacked the full acceptance of the Timorese legal community.[154]

Applied but not Applicable—UNTAET and Traditional Law

These failures might create the impression that UNTAET compromised on international human rights standards, but such a conclusion would be premature. In fact, one important decision with regard to the applicable law suggests the opposite: UNTAET renounced a role for traditional law in the legal system in favour of a formal, European-style civil law order, confirming its commitment to international human rights standards.

While Indonesian law might have been the declared applicable law in East Timor, it was far from being the law applied in most of the rural parts of East Timor, where the majority of the population continues to live. The rural population continues to predominantly employ traditional legal paradigms, which base their legitimacy on history and tradition, and emphasize the welfare and survival of the community, rather than the rights of the individual.[155] Both the Portuguese and the Indonesian formal legal systems coexisted with, rather than superseded, traditional law in East Timor,[156] and even though Indonesia had made a concerted attempt to establish its own legal and administrative system all over the island, the partiality of the Indonesian judiciary, and its failure to bring perpetrators of major crimes to justice, led to widespread mistrust of the formal justice system and continued widespread reliance on traditional justice.[157]

UNTAET's slow deployment, in particular with regard to the police and the district administrators, meant that for several months international authority hardly extended into the provinces outside the capital Dili. As a result, previously clandestine resistance structures and traditional leaders re-asserted their

authority, not only maintaining law and order but also mediating conflicts between villagers.[158] Today, traditional law, rather than the formal justice system established by UNTAET, is considered by many Timorese to be the most legitimate legal paradigm.[159]

Regulation 99/1 did not take any account of this de facto legal order. One reason might have been that little was known about it, and that it was dismissed by international officials as local 'folklore'.[160] It may also have been feared that traditional law masked illegitimate power structures that arose out of the resistance struggle and the power vacuum that followed the post-ballot violence.[161] As one international official, who worked for UNTAET from the beginning, argued there had never been an assessment by UNTAET of how the East Timorese actually perceive justice and the rule of law, and how they access the system.[162] Indeed, the first report on traditional justice was not published until 2001.[163] Prior to 2001, evidence about the nature and content of traditional justice in East Timor was mostly anecdotal.[164]

A further reason that Regulation 1999/1 did not acknowledge traditional law was that this law was seen as an insufficient legal basis for a modern state, and could not regulate the complexities of a modern economy.[165] This argument certainly struck a chord with the Portuguese-educated political elite that had returned from exile, and which largely viewed traditional law as 'uncivilized'.

However, the main reason for the comprehensive shunting of traditional law was its incompatibility with the international human rights standards the UN aims to adhere to. Unlike liberal, western formal legal systems which are based on the rights of the individual, traditional law in East Timor aims to protect a social order conceived of in terms of the traditional needs of the community. While formal legal systems emphasize accountability, and thus punishment for transgressions, traditional law focuses on compensation and reconciliation in addition to punishment.[166] Thus, traditional law raises a number of important human rights issues, both procedural and substantive. The traditional legal process is predominantly community based, and involves traditional authorities like household and village chiefs as well as the conflicting parties in the negotiations. It therefore does not necessarily fulfil standards of judicial independence or impartiality. As restoring social order within a community is an important aspect of traditional justice, and '[t]here cannot be a winner and a loser left behind in the same village',[167] the rights of the individual risk being subordinated to the restoring of social order as interpreted by the traditional authorities, who might also use their authority to manipulate decisions to their own advantage. The latter is problematic in particular because traditional law often does not have an appeals process.

In addition, the traditional law process appears insufficient to adequately protect women from domestic and sexual violence in a very patriarchal, conservative society. In the case of rape, for example, traditional law does not demand a prison sentence, but rather that the perpetrator either marries the woman or pays compensation to the family, as her reputation has been damaged and she cannot find a husband.[168] Similarly, domestic violence is not always seen as a serious matter under traditional law, even by women in the countryside, who stopped reporting cases of domestic violence to UNTAET after they led to the detention of the perpetrators.[169] The socio-economic conditions, particularly in rural areas, where imprisonment of violent husbands would deprive women of the family's breadwinner, undermined the acceptance of key institutions of the formal legal system—police and the courts—by a large part of the rural population of East Timor.

These aspects of traditional Timorese law are incompatible with a range of international human rights standards, in particular civil and political rights related to judicial procedure, and this seems to have made it difficult for UNTAET to integrate traditional law with the legal framework. This finding is supported by the research of Tanja Hohe and Rod Nixon on traditional law in East Timor, who observed that

> the requirements of those principles underlined in UN Security Council Resolution 1272/1999 relating to 'international humanitarian, human rights and refugee law, including child and gender related provisions' …, would have complicated any attempts to reconcile these two requirements [human rights obligations and relying on traditional justice mechanisms] in a formal policy development process.[170]

According to UNTAET officials, both the Human Rights Unit and the Judicial Affairs Department were aware of the human rights problems posed by traditional law.[171] However, neither of them managed to develop an effective policy response. While the Human Rights Unit tried to facilitate access of parties and victims to the formal justice system on an ad hoc basis where it believed that their rights were violated by traditional law,[172] the Judicial Affairs Department focused solely on the strengthening of the formal justice system,[173] in particular trying to increase the effectiveness of the courts, as the best response to the problems posed by traditional law. Thus, no imaginative attempt was made to reconcile the two legal orders, for example by allowing the traditional law system to deal with particular minor issues that would not have raised human rights implications.[174] This inclination to sideline traditional law has been continued by the Timorese government, dominated by politicians who have returned from exile in Mozambique. Thus, when the government adopted the Law on the Applicable Law in East Timor in May 2002, it refrained from making any reference to traditional law.[175]

An exception to this has been the establishment of the Commission for Reception, Truth, and Reconciliation (CRTR), where UNTAET attempted to reconcile traditional with formal law. The Commission had been a suggestion of the CNRT in June 2000, and a proposal for a Truth and Reconciliation Commission was prepared by two experts from the International Centre for Transitional Justice.[176] UNTAET's Human Rights Unit and Judicial Affairs Department drafted a Regulation under extensive consultation with the CNRT, local NGOs, and international experts, and the Regulation was promulgated on 13 July 2001.[177]

The CRTR Regulation established community-based panels to try perpetrators of human rights violations during the Indonesian occupation and the post-ballot violence, and to reconcile and receive them back in their communities. The panels could determine their own procedures, and include participation from traditional authorities such as community leaders.[178] Interestingly, the Regulation foresaw a strong role for the General Prosecutor responsible for serious crimes, who could choose to end the truth and reconciliation process, undertake investigations, and bring to court cases of serious crimes.[179] Thus, the primacy of formal over traditional law was also reflected in the truth and reconciliation process; minor crimes were supposed to be predominantly dealt with through traditional law in the commissions, and serious crimes through formal law in the courts.

However, the limited resources available to the Serious Crimes Unit, to whom the Office of the General Prosecutor delegated the review and investigation of cases from the Commission, constrained the attempts to bring perpetrators of serious crimes to justice through the formal legal system.[180] As a consequence of the growing backlog of cases, it appears that the Serious Crimes Unit and the Office of the General Prosecutor have frequently allowed serious crimes to be processed through the truth and reconciliation process.[181] The priority of formal over traditional law has thus to some extent been compromised, but as the result of insufficient resources rather than deliberate policy.

Implications—Establishing the Judicial System in East Timor

The analysis of the policies around the establishment of the judiciary shows the influence of elements of the new standard of civilization on UNTAET's decisions. The emphasis put on promoting and safeguarding not only fundamental human rights, but also a long list of civil and political rights, as well as the focus on establishing the rule of law, led to the establishment of a judicial system that East Timor's post-conflict economy has been ill-equipped

to sustain. The decisions made by UNTAET did not formalize an existing political reality on the ground, but instead reflected the aspirations of the international community for East Timorese society.

The conflict between the formal judicial system and the emphasis on human rights on the one hand and traditional local law on the other reflects a conflict between competing notions of legitimate political authority, a conflict best captured by Max Weber's notions of legal-rational and traditional authority. For Weber, legal-rational authority rests on a system of legally enacted rules, defining authority relationships and the scope of political authority in a society. This type of authority is characterized by being impersonal, general, and universal within society.[182] Traditional authority, on the other hand, is based on beliefs in immemorial traditions, and individuals are in authority because of their traditional and long-standing status. Similarly, rules are valid because of their history and tradition.[183] In East Timor, UNTAET sided firmly against the conception of traditional authority, and tried, with limited success, to supplant it with legal-rational authority, because it rightly felt that traditional justice would compromise the human rights standards to which UNTAET had committed itself and East Timor. However, as the traditional justice system continues to enjoy much legitimacy in large parts of the country—some analysts even argue that it has become increasingly popular since 1975[184]—this decision has undermined the legitimacy of the judiciary in the eyes of much of the local population.

POLICYMAKING IN EAST TIMOR II: REBUILDING THE CIVIL SERVICE

A functioning public administration is viewed as a necessary condition for effective governance as well as for economic development. This relationship was endorsed by the international community as it engaged in the reform of the public administration in East Timor, to 'develop basic cross-sectoral capacities essential for the functioning of a lean public administration supportive of a market economy in a democratic system of governance'.[185] Similarly to BiH, the international community aimed to improve the legitimacy of East Timor's administrative institutions and the ability to govern itself, that is, its empirical sovereignty, in two ways through these reforms. First, the reforms intended to increase the effectiveness of East Timor's institutions through the establishment of a professional, meritocratic civil service, strengthening the ability of the state to develop and implement public policy. Secondly, as was the case in BiH, in order to increase the legitimacy of the state institutions, the international community attempted to enhance the rule of law by protecting

the independence of the civil service and shield it from politicization, to minimize the dangers of nepotism, cronyism, and corruption. However, the policymaking process with respect to the civil service reform in East Timor was very different from BiH, with a greater emphasis on local ownership at the expense of realizing some of the international community's ambitious objectives.

The World Bank Joint Assessment Mission (JAM)

The limited access of Timorese officials to the senior levels of the civil service under Indonesian rule,[186] the rapid departure of Indonesian officials in September 1999, and the comprehensive destruction of public infrastructure meant that the public administration in East Timor needed rebuilding rather than reforming. This context, however, also had the positive effect that the international organizations involved in rebuilding the public sector did not have to address the legacy of overstaffing, organizational fragmentation, and corruption which had characterized the Indonesian public administration in East Timor.[187]

Immediately after the end of the violence in East Timor, the World Bank and other leading donors, together with East Timorese experts, established the JAM to assess the state of public institutions and infrastructure in East Timor, and made a range of policy recommendations for the transitional administration. Among these were several recommendations for the establishment of the new civil service, aimed at enhancing its effectiveness and at protecting its independence from political influence, to curb the potential for corruption.

The first recommendation sought to increase the effectiveness of the civil service. The World Bank suggested significantly reducing the number of civil servants, but increasing their pay in order to attract higher quality candidates, to improve their motivation, and reduce incentives for corruption. To this end, it recommended targets to reduce the number of civil servants from *c.* 28,000 under Indonesian rule to around 12,200 for an independent East Timor,[188] to remove unproductive, duplicated functions from the Indonesian structure, and to allow for more competitive wage levels in a professional civil service.[189] The second recommendation concerned the criteria for recruitment, to ensure the effectiveness of a civil service less than half the size than the one that existed before the conflict. The JAM emphasized the importance of merit as the overriding recruitment criterion, and demanded open, competitive, and transparent selection and appointment to ensure this.[190] The recommendation therefore also aimed at shielding the independence of the civil service from political influence. A look at the economic situation in East Timor

underlines why the World Bank emphasized open and transparent recruitment to ensure merit. In an economy dominated by subsistence agriculture, which makes up almost 90 per cent of all employment,[191] the public sector is a significant, if not the most important non-agricultural employer. Consequently there are strong incentives to attain employment by other means than merit, for example through family ties.[192] To protect the autonomy of the civil service, the JAM made a third important recommendation to ensure open, merit-based recruitment. It suggested the establishment of an independent Civil Service Commission, charged with promoting recruitment on the basis of merit and competence in the East Timorese civil service. It envisaged the Commission as having three main tasks: (*a*) the determination of personnel policies, (*b*) the technical processing of recruitment, and (*c*) the actual appointment and selection decisions.[193] The emphasis on independence is reflected in the proposed composition of the Commission: a panel of seven people, among them not more than two internationals, which was to be chaired by an eminent Timorese personality, whose independence from the government—presumably both UNTAET and later local institutions—would be beyond doubt.[194]

CISPE and the Public Service Commission

The lack of UN participation in the JAM, coupled with resource constraints and planning problems, meant that UNTAET's commitment to the JAM's recommendations varied between different parts of the public sector.[195] However, with regard to the central human resource management institutions, UNTAET followed the path mapped out by the World Bank and quickly established the two key institutions: the Public Service Commission (PSC) and the Civil Service and Public Employment Division (CISPE).

As recommended by the JAM, UNTAET created the independent PSC in January 2000, to oversee the proper functioning of the East Timor administration.[196] The PSC was mandated to formulate personnel policies and guidelines, including those for recruitment and disciplinary matters; to arbitrate in labour disputes; to supervize the implementation of these procedures; and to recommend officials for appointment by the Transitional Administrator.[197] As recommended, the PSC had seven members, two of whom were internationals, while the others were appointed after consultation with the NCC,[198] and was chaired by a Timorese member. The Regulation emphasized the independence of the Commission and its commitment to the establishment of an independent civil service.[199] However, this independence was immediately compromised when the PSC was placed under the authority

of ETTA's Department of Internal Administration. The PSC continued as a part of the administration after the establishment of the second transitional government in September 2001.[200] The Regulation's provisions for independence were never fully implemented, either by UNTAET or the Timorese government.

The PSC drafted the procedures for the recruitment process, and processed the applications for top-level civil service posts.[201] The recruitment for the vast majority of posts was carried out by the different Departments and Secretariats themselves, or was conducted by CISPE, which was part of the Department (and later Ministry) for Internal Administration. CISPE was responsible for the implementation of the human resource management and training programmes for the civil service,[202] writing the job descriptions, advertising vacancies, screening applications, and interviewing applicants. It then shortlisted candidates and forwarded them to the PSC or the department in question for selection.[203] While this arrangement safeguarded the development of an independent civil service—at least until the PSC was put under the authority of the Ministry of Internal Administration—three problems arose from the recruitment process and from the way the institutional framework was established.

First, the decision to recruit from the bottom-up meant that the senior levels of the civil service in the Transitional Administration were for a long time dominated by internationals.[204] Internationals also dominated the recruitment panels, and rigidly applied the formal selection criteria, in particular education criteria, which poorly reflected Timorese reality. Thus, all applicants for higher level civil service jobs (Grades 4–7) required at least three years of post-secondary education,[205] a requirement that sometimes excluded persons with previous public sector management experience. Furthermore, as many of the internationals on the panels did not speak Tetum or Bahasa Indonesian, they relied heavily on translators, and might have shown an (un-deliberate) bias towards English or Portuguese speakers.[206]

Second, ETTA gave newly recruited civil servants only one-year contracts, raising concerns about the danger of politicization of the civil service. Security of tenure is generally considered to be an essential safeguard for the independence of civil servants.[207] The short-term contracts given by ETTA raised the potential of cronyism and corruption with regard to the recruitment of civil servants after the handover to the Timorese government, as it could decide not to renew contracts or refill positions on grounds other than merit.

Finally, the legal and institutional framework for the civil service lacked consistent and complete regulatory guidelines and management processes, hampering the process of building an independent, professional civil service.[208] As a consequence, donors at a meeting in Brussels in December

2000 called for a comprehensive Civil Service Act and set it as a benchmark for the capacity-building of the civil service.[209] UNDP, which had been designated as the lead agency for building the public administration, took on the responsibility for supporting the drafting of a Civil Service Act.

The Civil Service Act

The drafting of the Civil Service Act, which the international community considered to be necessary to establish transparency, accountability, and fairness in the public sector,[210] was conducted in the last months of UNTAET's rule and continued after East Timor had achieved independence in May 2002. Independence strongly influenced the policymaking process, and the way in which the international community interacted with the Timorese government.

The Civil Service Act was a central part of UNDP's Governance and Public Sector Management (GPSM) programme, set up to strengthen the institutions and the capacity of the public service in East Timor. Work on the draft law started in June 2001 with the preparation of a policy paper that analysed the current situation of the public service in East Timor, and that served as the framework for the eventual law. The paper examined issues such as performance and career management, human resource planning, training, and the legal and regulatory framework, analysing the strengths and weaknesses of each of these elements and outlining recommendations for future developments in the different sectors. An important thread running through the whole analysis was the need to protect the independence of the civil service from political influence, and the necessity to establish rules and institutions to prevent corruption. With regard to the future development of the legal and regulatory framework for the Civil Service, the paper emphasized the importance of local participation in the drafting of the law.[211]

UNDP hired several consultants in 2001 to support the drafting work of the PSC, responsible for developing the regulatory framework.[212] By mid-2002, the Commission circulated a draft among cabinet ministers through the Ministry of Internal Administration, and with technical support from UNDP began a wide-ranging consultation process on the law. During the second half of 2002, UNDP and the Commission organized four consultative seminars with ministers, district administrators, and civil servants, which made a range of comments regarding in particular issues of recruitment and compensation.[213] In November and December 2002, a peer review process was organized, with five international experts, both from civil law and common law civil service traditions, who reviewed the draft from their respective legal

paradigms.[214] Finally, the director of the PSC took the draft on three study trips to Malaysia, Singapore (both in December 2002), and Australia (January 2003), to look in particular into different pay scale models for civil servants.[215]

All of this feedback was worked into a draft law, which made strong provisions guaranteeing the independence of the civil service. The responsibility for recruitment and performance management of civil servants, including promotion and disciplinary measures, would rest with an independent PSC, now renamed as the National Directorate for Public Services. Through this mechanism, the drafters thought to protect the independence of the civil service from political influence. To the same end, the draft law made a clear distinction between political and administrative posts, and tried to institutionalize a high degree of transparency, for example by introducing a declaration requirement for ministerial assets.[216]

The draft was finalized in English in February 2003, and submitted to the government in Portuguese in April 2003, together with a systematic analysis of the regulatory articles.[217] During the following months, the government significantly revised the draft law, firmly establishing its control over the civil service. The Directorate for Public Services was put back under the authority of the Ministry for Internal Administration, threatening the independence of the civil service by putting all internal control mechanisms under the control of the government. The provisions for distinguishing between political and administrative posts were also removed, as were the requirements for greater transparency, and the determination of civil service pay scales. The consequences of these changes to the draft law were greater constraints on the independence of the civil service, and greater control over its composition and management by the government.[218]

In November 2003, UNDP made a last concerted attempt to convince the government to put the old provisions back into the draft, submitting to the government a list of 25 provisions that the law should contain. The World Bank, which had been involved in public sector reform since the JAM, and which had made the Civil Service Act a benchmark for capacity-building at the Brussels Donor Conference in 2000,[219] supported UNDP's efforts. Neither UNDP nor the World Bank had the authority to impose these provisions on the Timorese government, and did not use other means of pushing for their adoption, for example by attaching their adoption as a conditionality to aid. While the government conceded several minor changes, the law remained fundamentally unchanged.

The government approved the law and passed it on to the National Parliament in March 2004. Parliament passed it in April 2004, without making any substantive changes. Under the law, all internal oversight lies with the National Public Service Directorate, which is part of the Ministry of Internal

Administration. While the international community has generally welcomed the law, it has voiced concern about the lack of supplementary legislation necessary to implement its provisions, and its insufficiency for protecting the independence of the civil service. Thus, the World Bank remarked in July 2004, that:

> While the proposed statute provides a broad framework for civil service management and an outline of disciplinary mechanisms, supplementary regulations covering disciplinary procedures, gifts, reporting requirements and the role of the Public Service Directorate will be needed to implement the statute. *Particular attention needs to be given to ensuring that the most serious disciplinary measures, and recruitment and promotion of senior personnel are overseen by panels rather than civil servants hierarchical superiors.*[220]

What is striking with regard to the civil service is the desire of first UNTAET, and later the East Timorese, government to maintain control over composition and management of the civil service, despite the commitment, in particular by UNTAET, to the independence of the civil service. This raises the interesting question of whether UNTAET's style of policymaking and administration provided a model for the Timorese government. If this were so, it would raise an important issue for future international administrations to consider when they plan their own operations and structures, highlighting the importance to ensure that their own structures contribute to transparent, accountable, and responsive governance.

Implications—Rebuilding the Civil Service in East Timor

The different international agencies involved in the development of the institutional framework of the public sector—the World Bank, UNTAET, and UNDP—emphasized the importance of increasing the effectiveness of the civil service, to strengthen East Timor's empirical statehood, and protecting the independence of the civil service, both as a means of ensuring the effectiveness of public administration through recruitment on the basis of merit, and as a protection against corruption. The case study therefore confirms the influence of two elements of the new standard of civilization on the statebuilding policies of the international community: (*i*) effective governance; and (*ii*) the rule of law. Both legitimize the exercise of political authority.

This underlines the similarity of the normative framework that has informed the international statebuilding efforts in BiH, Kosovo, and East Timor. In East Timor as well as in BiH, it was the international community that pushed for institutions protecting the independence of the civil service,

citing the same fears of political influence and the potential for corruption in their absence. However, despite these similarities, there are significant differences between the two cases of reform that emerge, in particular from the processes of policymaking. In BiH, the drafting of the Civil Service Law was conducted mostly without local participation, and ended with a stand-off between the Bosnian government and the OHR, which the OHR ended by ultimately imposing the law against the objections of local politicians. In East Timor, on the other hand, UNTAET first established institutions geared to protect the independence of the nascent civil service, but was not involved in drafting the Civil Service Act, which mostly occurred after East Timor's independence. Consequently, no international organization with the authority to impose such a law was in place. Instead, it was UNDP which provided extensive support for the drafting of the law, and which emphasized the importance of local participation in drafting the legislation. Thus, it cooperated with the government, and ultimately accepted that the law did not include central provisions protecting the independence of the civil service that it had pushed for, as the government had opposed them.

The civil service reform thus highlights the highly political nature of statebuilding. While international agencies might have technical blueprints for what they consider to be appropriate state institutions, the need to create local support for the establishment and sustainability of these institutions means that the outcome of statebuilding strongly depends on political bargaining processes. In the absence of the authority to impose legislation, UNDP undoubtedly had to rely much more on the cooperation of Timorese politicians than UNTAET had to in the previous years to pass the Civil Service Act. However, the lack of attempts by both UNDP and the World Bank to use their substantial financial clout vis-à-vis the Timorese government, for example through conditionalities, suggests that these traditional development institutions had a stronger normative commitment to local participation than the international administrations have displayed. While this participatory approach has resulted in less controversy over the civil service system in East Timor in comparison to BiH, it is too soon to tell whether it has led to more sustainable, and better functioning, institutions.

SOVEREIGNTY AND STATEBUILDING IN EAST TIMOR

Of the three international administrations analysed here, UNTAET is the only one that has been concluded, therefore offering a unique opportunity to assess the influence of sovereignty norms on the international institution-building efforts as well as on the transition of authority to local institutions. With

regard to institution-building, UNTAET aimed to establish an independent and credible judiciary that would promote and protect international human rights standards.[221] Similarly, its establishment of the new public administration, key to which has been the reform of the civil service, sought to move East Timor towards transparent, accountable, and efficient institutions.[222] In both cases, the standards that UNTAET committed itself and East Timor to, and the fulfilment of which were promoted through the reforms analysed, appealed to the norms associated with the standard of civilization outlined in Chapter 1.

The case of East Timor thus helps to further highlight the influence on statebuilding by four of the norms associated with the concept of sovereignty as responsibility: democracy, human rights, the rule of law, and effective governance. The transition process from direct rule by UNTAET towards Timorese self-governance and ultimately independence underlines the importance of liberal democracy and self-determination as the preferred forms of national governance. Similarly, the reform of the judicial system showed how UNTAET elevated the protection of human rights and the rule of law, which it considered central to the legitimacy of the legal system, over the incorporation of local norms, as reflected in the traditional law prevalent in rural areas of East Timor. It did so in particular through the emphasis on procedural rights guaranteed by judicial independence and impartiality.

Both case studies also show how the standard of civilization applied by the international community in its statebuilding efforts determines one of the boundaries that sovereignty establishes: the boundary between state and society, the scope of the state's authority vis-à-vis its citizens. As in BiH and Kosovo, the international community has aimed to limit the authority of the state: first, by emphasizing the independence of the judiciary from the government, thus placing the state and its agents under the scrutiny of the judiciary as well; and second, by trying to limit the role of the state in the recruitment and disciplinary process of civil servants. Unlike in BiH and Kosovo, however, East Timorese political elites had a stronger influence on where this boundary between state and society was drawn, in particular with regard to the civil service, where the majority of the legal framework for its management was established after Timorese independence.

However, while the concept of sovereignty as responsibility and the accompanying standard of civilization have influenced the institution-building activities of the international administration, they played only a minor role with regard to the transition of authority from international to local institutions. As discussed in the first section of this chapter, authority was handed over to local institutions not on the basis of the strength and legitimacy of the newly

established institutions, but predominantly as a consequence of East Timorese pressures for self-governance. This observation underlines the importance of the contest between the norm of self-determination and the norms associated with sovereignty as responsibility that was discussed in Chapter 1. In contrast to Kosovo and BiH, where the structural sources of the conflict (the competing self-determination claims of the different ethnic groups) remain largely unresolved until today, in East Timor the aim of self-determination was clear from the outset of UNTAET's mission: independent statehood. As this was uncontested and never seriously questioned or challenged, it was much more difficult for UNTAET not to submit to pressure for self-governance on the grounds of lack of preparedness of the new institutions, as unlike in Kosovo and BiH, this did not raise any security implications. This raises interesting questions with regard to the feasibility of exit strategies of statebuilding missions, which will be explored in more detail in the final chapter.

NOTES

1. With its independence in May 2002, East Timor took on the Portuguese name República Democrática de Timor-Leste (Timor-Leste). For reasons of simplicity and consistency, it is referred to as 'East Timor' throughout the book.
2. For a history of East Timor, see James Dunn, *East Timor: A People Betrayed* (Milton, Queensland: Jacaranda, 1983); John G. Taylor, 'The Emergence of a Nationalist Movement in East Timor', in Peter Carey and Carter Bentley (eds), *East Timor at the Crossroads: The Forging of a Nation* (London: Cassell, 1995).
3. GA Res. 1542 (XV) of 15 December 1960.
4. Ian Martin, *Self-Determination in East Timor: The United Nations, the Ballot, and International Intervention* (Boulder, CO: Lynne Rienner, 2001), 15–17.
5. União Democrática Timorense.
6. Associação Social Democrática Timor.
7. Frente Revolucionária de Timor Leste Independente.
8. Michael G. Smith, *Peacekeeping in East Timor: The Path to Independence* (Boulder, CO: Lynne Rienner, 2003), 37.
9. Ibid.
10. Only Australia *de jure* recognized Indonesia's claim to sovereignty over East Timor in 1978.
11. SC Res. 384 of 22 December 1975; SC Res. 389 of 22 April 1976; GA Res 31/53 of 1 December 1976.
12. Forças Armadas de Libertação Nacional de Timor Leste.
13. See, e.g. GA Res. 37/30 of 23 November 1982.
14. Ibid.
15. Martin, *Self-Determination in East Timor*, 18–24.

16. Harold Crouch, 'The TNI and East Timor Policy', in James Fox and Dionisio Babo-Soares (eds), *Out of the Ashes: Destruction and Reconstruction of East Timor* (Adelaide, Australia: Crawford House, 2000), 157–8; Smith, *Peacekeping in East Timor*, 42.
17. Crouch, 'The TNI and East Timor Policy', 158–60.
18. Indonesia rejected the term 'referendum' for the planned ballot in East Timor, claiming that it implied an act of self-determination by East Timor, while it considered any change of the status of East Timor to be the result of a decision by Indonesia's parliament, the Majelis Permusyawartan Rakyat (MPR; People's Consultative Assembly), in the light of the 'consultation' in East Timor. See Martin, *Self-Determination in East Timor*, 28.
19. Report of the Secretary-General on the Question of East Timor, UN Doc. S/1999/513, 5 May 1999, Annex 1.
20. SC Res. 1246 of 11 June 1999. For an excellent account of the planning of the ballot, the ballot, and its aftermath, see Martin, *Self-Determination in East Timor*.
21. Report of the Security Council Mission to Jakarta and Dili, 8 to 12 September 1999, UN Doc. S/1999/976, 14 September 1999, para. 14.
22. See Joel C. Beauvais, 'Benevolent Despotism: A Critique of U.N. State-Building in East Timor', *New York University Journal for International Law and Politics,* 33/4 (2001), 1103; Smith, *Peacekeping in East Timor*, 44.
23. SC Res. 1264 of 15 September 1999.
24. In the Security Council debate on East Timor on 11 September 1999, all permanent members accepted the need for outside intervention, though both China and Russia emphasized the importance for Indonesian consent to the deployment of INTERFET. See SCOR, 54th year, 4043rd Meeting, 11 September 1999.
25. Sarah Cliffe, 'The Joint Assessment Mission and Reconstruction of East Timor', in James Fox and Dionisio Babo-Soares (eds), *Out of the Ashes: Destruction and Reconstruction of East Timor* (Adelaide, Australia: Crawford House, 2000), 252–3.
26. Interview with UN official, New York, 9 April 2003.
27. The core group included Australia Japan, Portugal, the UK, and the United States. See Conflict Security and Development Group (CSDG), *A Review of Peace Operations: A Case for Change—East Timor Study* (London: King's College, 2003), paras 14–15; Stewart Eldon, 'East Timor', in David M. Malone (ed.), *The UN Security Council: From the Cold War to the 21st Century* (Boulder, CO: Lynne Rienner, 2004), 552–3.
28. Interview with UN official, New York, 9 April 2003; Report of the Secretary-General on the Question of East Timor, UN Doc. S/1999/862, 9 August 1999.
29. Hansjörg Strohmeyer, 'Policing the Peace: Post-Conflict Judicial System Reconstruction in East Timor', *University of New South Wales Law Journal,* 24/1 (2001), 172.
30. For a detailed account of the mission planning, see CSDG, *East Timor Study*.
31. SC Res. 1272 of 25 October 1999.
32. Ibid., art. 1.
33. Ibid., art. 2.

34. Report of the Secretary-General on the Situation in East Timor, UN Doc. S/1999/1024, 4 October 1999, para. 32.
35. SC Res. 1272.
36. CSDG, *East Timor Study*, para. 292.
37. Report of the Secretary-General, 4 October 1999, sec. IV.
38. Ibid., sec. IVC.
39. Eldon, 'East Timor', 560.
40. SC Res. 1272, para. 6. Throughout the existence of UNTAET, the SRSG was Sergio Vieira de Mello.
41. Beauvais, 'Benevolent Despotism'; Ralph Wilde, 'From Danzig to East Timor and Beyond: The Role of International Territorial Administration', *American Journal of International Law,* 95/3 (2001), 583–606.
42. Jarat Chopra, 'Building State-Failure in East Timor', *Development and Change,* 33/5 (2002), 985.
43. Ibid., 986.
44. Report of the Secretary-General, 4 October 1999, para. 69.
45. UNTAET Regulation 1999/2, On the Establishment of a National Consultative Council, 2 December 1999.
46. Beauvais, 'Benevolent Despotism', 1123–4.
47. Interview with World Bank official, Washington, 14 April 2003.
48. See, e.g. Jarat Chopra, 'The UN's Kingdom of East Timor', *Survival,* 42/3 (2000).
49. Tanja Hohe and Rod Nixon, 'Reconciling Justice: "Traditional" Law and State Judiciary in East Timor', Draft Report prepared for the US Institute for Peace, January 2003, 32.
50. CSDG, *East Timor Study*, para. 296.
51. UNTAET Regulation 2000/13, On the Establishment of Village and Sub-District Development Councils for the Disbursement of Funds for Development Activities, 10 March 2000; World Bank, *East Timor Community Empowerment and Local Governance Project* (Washington, DC: World Bank, 1999). For a critical assessment of UNTAET's role regarding the CEP, see Chopra, 'Building State-Failure', 992–4.
52. World Bank, *East Timor Community Empowerment Project*, para. 10.
53. CSDG, *East Timor Study*, para. 175.
54. 'Transfer of Political Responsibilities', UNTAET Daily Briefing, 30 May 2000.
55. UNTAET Regulation 2000/23, On the Establishment of the Cabinet of the Transitional Government in East Timor, 14 July 2000.
56. UNTAET Regulation 2000/24, On the Establishment of a National Council, 14 July 2000.
57. 'New Structure of East Timor Transitional Administration', UNAET Daily Briefing, 8 August 2000.
58. Report of the Secretary-General on the United Nations Transitional Administration in East Timor, UN Doc. S/2000/738, 26 July 2000, para. 3.
59. Report of the Secretary-General on the United Nations Transitional Administration in East Timor, UN Doc. S/2001/42, 16 January 2001, para. 19. See

also 'Ramos Horta New Cabinet Member', UNTAET Daily Briefing, 15 October 2000.
60. UNTAET Regulation 2000/23, sec. 4.
61. Ibid., art. 4.3.
62. Beauvais, 'Benevolent Despotism', 1128.
63. UNTAET Regulation 2000/24, art. 1.1.
64. UNTAET Regulation 2000/33, To Amend Regulation 2000/24 on a National Council, 26 October 2000.
65. Ibid., art. 3.2.
66. Ibid., art. 2.1.
67. Beauvais, 'Benevolent Despotism', 1129–30.
68. CSDG, *East Timor Study*, para. 180.
69. See, e.g. Xanana Gusmão, 'New Year's Message', 31 December 2000, at http://www.etan.org/et2001a/january/01-06/01xanan.htm; SCOR, 55th year, *4165th Meeting*, 27 June 2000, 4.
70. Report of the Secretary-General, 16 January 2001, paras 2–5.
71. UNTAET Regulation 2001/2, On the Election of a Constituent Assembly to Prepare a Constitution for an Independent and Democratic East Timor, 16 March 2001.
72. CSDG, *East Timor Study*, para. 302. Interview with member of the Constitutional Assembly, New York, 9 April 2002.
73. UNTAET Administrative Directive 2001/3, On the Establishment of Constitutional Commissions in East Timor, 31 March 2001.
74. Progress Report of the Secretary-General on the United Nations Transitional Administration in East Timor, UN Doc. S/2001/719, 24 July 2001, para. 7.
75. Letter from the East Timor NGO Forum to Peter Galbraith, Member of the Transitional Cabinet of East Timor, 18 April 2001. On file with the author.
76. Anthony Goldstone, 'UNTAET with Hindsight: The Peculiarities of Politics in an Incomplete State', *Global Governance*, 10/1 (2004), 94.
77. For an overview of the constitution-making process, see Alipio Baltazar, 'An Overview of the Constitution Drafting Process in East Timor', *East Timor Law Journal* (2004). Available at www.eastimorlawjournal.org.
78. UNTAET Regulation 2001/28, On the Establishment of the Council of Ministers, 19 September 2001.
79. Statement by the President of the Security Council, UN Doc. S/PRST/2001/32, 31 October 2001.
80. See Sergio Vieira de Mello's briefing to the Security Council after the Constituent Assembly elections: 'At this stage, UNTAET is, quite clearly, a mission in support of the Government. Within the parameters laid out in resolutions 1272 (1999) and 1338 (2001), and the powers assigned therein to UNTAET, all administrative decisions are now taken by the East Timorese themselves.' See SCOR, 56th year, 4403rd Meeting, 31 October 2001, 3.
81. SCOR, 56th year, 4265th Meeting, 26 January 2001, 4.

82. Jonathan Morrow, 'The Development of the Constitution of East Timor: A UN Perspective', *Proceedings of the 10th Annual Conference of the Australian and New Zealand Society of International Law* (2002), 29–31.
83. SC Res. 1410 of 17 May 2002; Report of the Secretary-General on the United Nations Transitional Administration in East Timor, UN Doc. S/2002/432, 17 April 2002, para. 68.
84. Gusmão received 82.69% of the votes. Report of the Secretary-General on the United Nations Transitional Administration in East Timor—Addendum, UN Doc. S/2002/432/Add.1, 24 April 2002.
85. CSDG, *East Timor Study*, para. 356–7.
86. SC Res. 1410, art. 3(a). The central role of capacity-building in UNMISET's mandate is reflected in particular in the Secretary-General's reports on UNMISET. See, e.g. Report of the Secretary-General on the United Nations Mission of Support in East Timor, UN Doc. S/2002/1223, 6 November 2002, Part III.
87. SC Res. 1599 of 28 April 2005.
88. Jarat Chopra and Tanja Hohe, 'Participatory Intervention', *Global Governance*, 10/3 (2004); Tanja Hohe, 'The Clash of Paradigms: International Administration and Local Political Legitimacy in East Timor', *Contemporary Southeast Asia,* 24/3 (2002).
89. Patrick Keuleers, *Human Resource Management in the Civil Service* (Dili: UNDP, 2001), 6.
90. Report of the Panel on United Nations Peace Operations (The Brahimi Report), UN Doc. S/2000/809, 21 August 2000, paras 76–83.
91. Report of the Secretary-General, 4 October 1999, para. 29(h).
92. CSDG, *East Timor Study*, para. 219.
93. Jonathan Morrow and Rachel White, 'The United Nations in Transitional East Timor: International Standards and the Reality of Governance', *Australian Yearbook of International Law*, 22 (2002), 1–2.
94. By Dennis McNamara, Deputy SRSG in East Timor. Cited in CSDG, *East Timor Study*, para. 214.
95. According to the World Bank, 'over 70% of administrative buildings have been partially or completely destroyed, and almost all office equipment and consumable materials have been destroyed.' World Bank, *Report of the Joint Assessment Mission to East Timor* (Washington, DC: World Bank, 1999), 4.
96. World Bank, *Joint Assessment Mission to East Timor—Governance Background Paper* (Washington, DC: World Bank, 1999), para. 21.
97. Strohmeyer, 'Policing the Peace', 175.
98. SC Res. 1246, art. 5.
99. Report of the Secretary-General, 4 October 1999, para. 13.
100. *International Covenant on Civil and Political Rights*, 16 December 1966, art. 9(3).
101. Maj. Bruce M. Oswald, 'The INTERFET Detainee Management Unit in East Timor', *Yearbook of International Humanitarian Law,* 3 (2000), 351.

102. On the DMU, see Lt. Col. Michael Kelly, 'INTERFET Detainee Management Unit in East Timor', paper presented at the Swiss Seminar on the Law of Armed Conflict, Geneva, 27 October 2000, on file with the author; Oswald, 'The Detainee Management Unit'.
103. Kelly, 'INTERFET Detainee Management Unit', 9–10.
104. Report of the Secretary-General, 4 October 1999, para. 51.
105. The official reasons for a fully 'Timorized' judiciary are outlined in Strohmeyer, 'Policing the Peace', 176–7.
106. See Hans-Jörg Strohmeyer, 'Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor', *American Journal of International Law*, 95/1 (2001).
107. Phone interview with former UNTAET official, 7 September 2004. Interview with member of the Constitutional Assembly, New York, 9 April 2002.
108. Strohmeyer, 'Policing the Peace', n. 12; Report of the Secretary-General on the United Nations Transitional Administration in East Timor, UN Doc. S/2000/53, 26 January 2000, para. 44; Report of the Secretary-General, 26 July 2000, para. 42.
109. Strohmeyer, 'Policing the Peace', 175. The World Bank JAM identified a total of 29 persons in East Timor with experience in the judicial sector (list compiled on 4 November 1999). See World Bank, *Governance Background Paper*, 69.
110. UNTAET Regulation 2000/11, On the Organization of Courts in East Timor, 6 March 2000, sec. 15. UNTAET Regulation 2000/16, On the Organization of the Public Prosecution Service in East Timor, 6 June 2000.
111. UNTAET Regulation 1993/3, Establishment of a Transitional Judicial Service Commission, 3 December 1999.
112. CSDG, *East Timor Study*, para. 231.
113. '*I swear (solemnly declare) that in carrying out the functions entrusted to me as a member of the Transitional Judicial Service Commission, I will perform my duties independently and impartially. I will, at all times, act in accordance with the dignity that the performance of my functions requires.*' UNTAET Regulation 1999/3, art. 4.
114. Frederick Egonda-Ntende, 'Building a New Judiciary in East Timor', *Commonwealth Judicial Journal*, 14/1 (2001), 26.
115. 'Any method of judicial selection shall safeguard against judicial appointments for improper motives.' UN, Basic Principles on the Independence of the Judiciary, UN Doc. A/40/32, 29 November 1985, art. 10.
116. Morrow and White, 'The United Nations in Transitional East Timor', 18–19.
117. Ibid., 19. This was confirmed in a phone interview with a former UNTAET official, 17 April 2003.
118. It was also suggested by UNTAET that the Prosecutor General should sit on the commission. For the National Council's position, see Yayasan HAK, 'Serious Concerns Regarding the Independence of the Judiciary under United Nations Transitional Administration in East Timor', Dili, 24 July 2001.

119. UNTAET Regulation 2001/26, On the Amendment of UNTAET Regulation No. 1999/3 on the Establishment of a Transitional Judicial Service Commission and on the Amendment of UNTAET Regulation No. 2000/16 on the Organization of the Public Prosecution Service in East Timor, 14 September 2001. See also UNHCHR, 'Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in East Timor', 1 March 2002, para. 36.
120. Democratic Republic of East Timor, *Statute of Judicial Magistrates*, unofficial translation from Portuguese, on file with the author.
121. Judicial System Monitoring Project (JSMP), *Report on Statute of Judicial Magistrates: Law No. 8/2002 of 20 September 2002* (JSMP, Dili, 2003); Special Rapporteur on the Independence of Judges and Lawyers, 'Civil and Political Rights, Including the Questions of: Independence of the Judiciary, Administration of Justice, Impunity—Report of the Special Rapporteur on the independence of judges and lawyers', Addendum, 25 February 2003, para. 202.
122. UNTAET Regulation 2000/11.
123. UNTAET Regulation 2000/16.
124. UNTAET Regulation 2001/24, On the Establishment of a Legal Aid Service in East Timor, 5 September 2001.
125. UNTAET Regulation 2000/11. Originally, the regulation foresaw eight district courts (Section 7.1), but as this was later considered disproportionate to the needs of East Timor as well as its ability to pay for such a system, the regulation was amended. See UNTAET Regulation 2000/14, Amending Regulation 2000/11, 10 May 2000.
126. UNTAET Regulation 2000/15, On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, 6 June 2000. These 'hybrid' tribunals addressing serious crimes and war crimes, and have also been established in Cambodia and Sierra Leone, present a middle way between international tribunals and local justice, and are a recent development in transitional justice. For a discussion, see Suzanne Katzenstein, 'Hybrid Tribunals: Searching for Justice in East Timor', *The Harvard Human Rights Journal,* 16 (2003); Suzannah Linton, 'New Approaches to International Justice in Cambodia and East Timor', *International Review of the Red Cross*, 845 (2002).
127. Report of the Secretary General, 26 July 2000, para. 42.
128. CSDG, *East Timor Study*, n. 238.
129. See JSMP, *Justice in Practice: Human Rights in Court Administration* (JSMP: Dili, 2001).
130. UNDP, *Support to the Judiciary in East Timor—Project Review, Final Report* (UNDP: Dili, October 2001), 9.
131. Interview with former JSMP member, London, 17 March 2003.
132. Report of the Secretary-General on the United Nations Mission of Support in East Timor, UN Doc. S/2003/944, 6 October 2003, para. 20.
133. JSMP, 'Background Paper on the Justice Sector', Dili, 4 June 2003.
134. Report of the Secretary-General, 6 October 2003, para. 7.

135. JSMP, 'Justice Update: Recent Developments in the Court', Dili, October 2005.
136. Sergio Vieira De Mello, 'How Not to Run a Country: Lessons from Kosovo and East Timor', unpublished manuscript, 2000. On file with the author.
137. Kelly, 'INTERFET Detainee Management Unit', 4.
138. Ibid.
139. Report of the Secretary-General, 4 October 1999, para. 32.
140. UNTAET Regulation 1999/1, On the Authority of the Transitional Administration in East Timor, 27 November 1999, art. 3.1.
141. Ibid., art. 2. The applicable human rights provisions include the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights and its Protocols; the International Covenant on Economic, Social, and Cultural Rights; the Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention Against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment; and the International Convention on the Rights of the Child.
142. Ibid., art. 3.3.
143. Report of the Secretary-General, 4 October 1999, para. 32.
144. Strohmeyer, 'Policing the Peace', 174. Phone interview with former UNTAET official, 7 September 2004.
145. Ibid. Among the critics of the decision was the leader of the conservative, pro-Portuguese União Democrática Timorense (Timorese Democratic Union), who suggested that Portuguese law continued to apply in East Timor, notwithstanding Regulation 99/1. See Morrow and White, 'The United Nations in Transitional East Timor', n. 33. Members of the NGO community generally supported the application of Indonesian law, as it was known by the people. Phone interview with a former UNTAET official, 17 April 2003.
146. See also Report of the Secretary-General, 4 October 1999, para. 54.
147. UNTAET Regulation 2000/11.
148. Phone interview with a former UNTAET official, 17 April 2003. The Judicial Affairs Office was originally mandated to conduct such a review. See Report of the Secretary-General, 4 October 1999, para. 50.
149. CSDG, *East Timor Study*, para. 226.
150. Amnesty International, 'East Timor: Justice past, present, and future', 27 July 2001, 23–4.
151. UNTAET Executive Order 2000/2, On the Decriminalization of Defamation, 7 September 2000.
152. Amnesty International, 'Justice past, present, and future', 24–5.
153. UNTAET Regulation 2000/30 On Transitional Rules of Criminal Procedure, 25 September 2000.
154. Morrow and White, 'The United Nations in Transitional East Timor', 10–11.
155. It should be noted that there is no single traditional law in East Timor, but a wide range of different local systems. See Hohe, 'The Clash of Paradigms'; Hohe and Nixon, 'Reconciling Justice'; David Mearns, 'Variations on a Theme: Coalitions

of Authority in East Timor. A Report on the Local and National Justice Systems as a Basis for Dispute Resolution', Report prepared for Australian Legal Resources International, December 2001.

156. Hohe, 'The Clash of Paradigms', 573–9.
157. CSDG, *East Timor Study*, para. 219.
158. Hohe and Nixon, 'Reconciling Justice', 28–37.
159. JSMP, 'The Interaction of Traditional Dispute Resolution with the Formal Justice Sector in Timor-Leste', Dili, November 2005.
160. Hohe, 'The Clash of Paradigms', 570.
161. Strohmeyer, 'Policing the Peace', 179–80.
162. Phone interview with former UNTAET official, 7 September 2004. The most comprehensive study on how the East Timorese population views and accesses the justice system was published in 2004, two years after the conclusion of UNTAET: The Asia Foundation, *Law and Justice in East Timor: A Survey of Citizen Awareness and Attitudes Regarding Law and Justice in East Timor* (Dili: Asia Foundation, 2004).
163. The first published report seems to have been Mearns, 'Variations on a Theme'.
164. Phone interview with former UNTAET official, 19 August 2004.
165. Morrow and White, 'The United Nations in Transitional East Timor', 7.
166. See Hohe and Nixon, 'Reconciling Justice', 17–18.
167. Ibid., 22.
168. Ibid., 19. See also JSMP, 'Traditional Dispute Resolution'.
169. Hohe and Nixon, 'Reconciling Justice', 49–50.
170. Ibid., 38–9.
171. Phone interview with former UNTAET official, 19 August 2004; phone interview with former UNTAET official, 7 September 2004.
172. Phone interview with former UNTAET official, 19 August 2004.
173. Phone interview with former UNTAET official, 7 September 2004.
174. As Hohe and Nixon show in their analysis, many police officers in the districts tried to reconcile formal law requirements with the traditional justice mechanisms they encountered. However, they did not receive any guidance on how to proceed from the UN mission, and UNTAET never developed any policy guidelines for dealing with traditional law. See Hohe and Nixon, 'Reconciling Justice'.
175. Democratic Republic of East Timor, *Law No. 2/02 on the Interpretation of Applicable Law*, 19 May 2002. Unofficial translation from Portuguese, available at www.eastimorlawjournal.org.
176. Piers Pigou, *The Community Reconciliation Process of the Commission for Reception, Truth and Reconciliation* (Dili: UNDP, 2004), n. 3.
177. UNTAET Regulation 2001/10, On the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor, 13 July 2001. For a detailed account of the drafting of the regulation, see Pigou, *The Community Reconciliation Process*, 15–21.
178. UNTAET Regulation 2001/10, sec. 26.1.

179. UNTAET Regulation 2001/10, sec. 24.
180. Pigou, *The Community Reconciliation Process*, 52–3.
181. Ibid., 7.
182. Max Weber, *Economy and Society* (New York: Bedminster Press, 1968), 217–23.
183. Ibid., 226–31.
184. Pigou, *The Community Reconciliation Process*, 25.
185. UNDP, *Timor Leste: Strategy for Strengthening the Public Service* (UNDP: Dili, 2003), 8.
186. Keuleers, *Human Resource Management*, 1.
187. World Bank, *Governance Background Paper*, 1–2.
188. Ibid., 2.
189. Klaus Rohland and Sarah Cliffe, *The East Timor Reconstruction Program: Successes, Problems, and Tradeoffs* (Washington, DC: World Bank, 2002), 4.
190. World Bank, *Governance Background Paper*, 3.
191. East Timor Planning Commission, *East Timor—National Development Plan* (Dili: East Timor Planning Commission, 2002), para. 2.9. All these figures are based on estimates by financial organizations involved in East Timor.
192. Although there are no comprehensive statistics on corruption in East Timor, corruption and nepotism within the civil service have been considered an important problem both by the government and by the public. See World Bank, *Timor Leste: Third Transition Support Program (FY2005)* (Washington, DC: World Bank, 2004), 25.
193. World Bank, *Governance Background Paper*, 4–5.
194. Ibid., 5.
195. See CSDG, *East Timor Study*, Ch. 4.
196. UNTAET Regulation 2000/3, On the Establishment of a Public Service Commission, 20 January 2000.
197. Ibid., sec. 1.
198. Ibid., sec. 2.1.
199. Ibid., sec. 2.3.
200. UNTAET Administrative Directive 2002/8, On the Organic Structure of the Ministries and Secretariats of State of the Second Transitional Government of East Timor, 18 May 2002, sec. 5.1(c).
201. Ibid., sec. 1.2.2.
202. National Planning and Development Agency, *Capacity Development for Governance and Public Sector Management—Programme Overview* (Dili: National Planning and Development Agency/UNDP, 2001), Doc. 2.
203. For a summary of the recruitment process, see Keuleers, *Human Resource Management*, 16.
204. Thus, by June 2001, the recruitment targets for the top three levels of the civil service (Levels 5–7) had been fulfilled to 52.69%, 40.12%, and 76.47%, compared to an average of 85.75%. Figures from Keuleers, *Human Resource Management*, 17.
205. Ibid., 22.

206. Ibid., 19.
207. Barbara Nunberg, *Managing the Civil Service: Reform Lessons from Advanced Industrialized Countries* (Washington, DC: World Bank, 1995), 30.
208. CSDG, *East Timor Study*, para. 179.
209. Interview with World Bank official, Washington, DC, 14 April 2003.
210. UNDP, *Strategy for Strengthening the Public Service*, 28.
211. Keuleers, *Human Resource Management*, 40.
212. Phone interview with John Vong, UNDP Timor Leste, 20 August 2004.
213. Phone Interview with John Vong, 20 August 2004.
214. UNDP, *Building the Public Administration in a Post-Conflict Situation: The Case of Timor-Leste* (UNDP: Bangkok, 2004), 10.
215. UNDP, *Strategy for Strengthening the Public Service*, 28.
216. Phone Interview with John Vong, 20 August 2004.
217. UNDP, *The Case of Timor-Leste*, 10; UNDP, *Strategy for Strengthening the Public Service*, 28.
218. UNDP, *The Case of Timor-Leste*, 10–11.
219. Interview with World Bank Official, 14 April 2003.
220. World Bank, *The Democratic Republic of Timor-Leste: Public Expenditure Review* (Washington, DC: World Bank, 2004), 46 (emphasis added).
221. Report of the Secretary-General, 4 October 1999, para. 29(h).
222. Ibid., para. 29(k).

6

The Sovereignty Paradox

The aim of this book was to understand the statebuilding activities of international administrations, by exploring the normative framework underlying their policymaking. To this end, the first part set up the theoretical framework for such an analysis. Chapter 1 clarified the concept of sovereignty and the norms associated with it, while Chapter 2 discussed the nature and sources of the authority of international administrations. The second part then analysed the influence of the sovereignty norms on key policies of the administrations in BiH, Kosovo, and East Timor, and examined the consequences of their policymaking practices for their authority. To conclude the analysis, this chapter brings together the findings of the three case studies, and discusses their implications for two main themes: the influence of sovereignty on the policymaking of international administrations, and the development and governance activities of international administrations in international society.

The discussion of sovereignty showed that authority is central to the conception of sovereignty as responsibility. Sovereignty divides authority in two respects: internationally between political communities, and within a political community between state and society. To be legitimate, sovereign authority needs to be recognized by both international and domestic society. This requirement of legitimacy imposes a set of responsibilities on the state—responsibilities vis-à-vis other states, but in particular vis-à-vis its own population. These responsibilities constitute a standard of civilization, which in contemporary international society encompasses democracy, human rights, the rule of law, effective government, and a free market economy. This standard describes the responsibilities a state has to fulfil in order for international society to recognize its political authority, thereby linking domestic legitimacy and the international recognition of authority.

As the case studies have shown, this standard of civilization has guided international administrations in their statebuilding policies, providing a roadmap or blueprint for their institution-building efforts, as well as serving as a justification for withholding self-governance to local institutions. The statebuilding activities performed by international administrations are therefore reflective of a paradox of sovereignty: the establishment of these administrations compromises an important aspect of state sovereignty—the

Westphalian principles of autonomy and self-government—in order to give the administered territories empirical sovereignty and make them capable of fulfilling their obligations as sovereigns. In the case studies, this concept of sovereignty has interacted with another normative framework, self-determination, and with broader political concerns, in particular about regional stability, to shape the statebuilding efforts of the international administrations.

The analysis of the normative framework underlying the statebuilding practices of international administrations raises a range of questions for theory as well as policy, which are discussed in this chapter. Section 1 looks at the theoretical implications of the analysis for our understanding of the role of sovereignty in international society, raising three questions. First, what does it suggest about the content of the standard of civilization associated with the conception of sovereignty as responsibility? Second, how does this conception of sovereignty affect the policymaking of international administrations? And finally, what are the limits of the normative framework's explanatory power, and what are possible alternative theoretical explanations?

Section 2 discusses three policy implications for the governance and development efforts made by international administrations. First, what are the main challenges to the authority of international administrations, and how can their authority be strengthened in the light of these challenges? Second, what are the problems that arise for the institutions established through statebuilding activities as a consequence of the governance by international administrations? And finally, what are possible exit strategies for the statebuilding activities of international administrations?

SOVEREIGNTY IN INTERNATIONAL SOCIETY

The Content of Sovereignty

The analysis of the international administrations in BiH, Kosovo, and East Timor supports the claim that the contemporary understanding of sovereignty is one of sovereignty as responsibility. The idea that states have responsibilities towards their citizens is reflected both in the mandates of the statebuilding missions in BiH, Kosovo, and East Timor, and in their subsequent statebuilding practices. These responsibilities amount to a new standard of civilization, the influence of which has been highlighted by the case studies. This standard underlines the importance of legitimacy for sovereign authority, and outlines what the international community considers as legitimizing social purposes and procedures.

First, the mandates of the three missions emphasize the importance of democratic government, and commit the international administrations to the establishment of democratic institutions. Thus, the preamble of the Bosnian constitution, which is part of the GFAP, defines BiH as a democratic state, and commits local actors, as well as the international community in BiH, to support and strengthen its democratic institutions.[1] Similarly, UNMIK and UNTAET have been explicitly mandated by the UN Security Council to build democratic institutions of self-governance.[2] Both UNMIK and UNTAET were very reluctant to allow local political institutions that were not democratically legitimized to exercise governmental authority. Thus, UNMIK did not recognize the municipal administrations that de facto governed in the absence of UNMIK administrators in the second half of 1999, when UNMIK was unable to deploy its personnel quickly across the province. Similarly, UNTAET did not grant an official role to the CNRT structures, even though they had taken over administrative functions in the villages after the end of the violence, as UNTAET was slow to establish its presence in the districts. The unwillingness to grant political authority to a body that was not legitimized by internationally supervised elections informed this decision.

The second element of the new standard of civilization is the protection and promotion of human rights, in particular civil and political rights. In their decisions on the applicable law, UNMIK and UNTAET included a wide range of international human rights standards, while in BiH the central government and entities had to commit themselves to similar standards in the GFAP. Furthermore, as suggested by the analysis of the judicial reforms in Kosovo and East Timor, certain policies of the international administrations, in particular the introduction of international judges and prosecutors into the legal system, aimed at strengthening the procedural human rights of detainees. Finally, a range of human rights institutions were established to protect and promote the human rights of individuals both against local political institutions and the international administration, including ombudspersons in all three territories under international administration, and the Human Rights Chamber in BiH.

Third, the importance of establishing the rule of law is reflected strongly in the policies of the three international administrations. In the words of the former High Representative in BiH, Lord Paddy Ashdown, reflecting on the experience of the OHR in BiH,

> we should have put the establishment of the rule of law first, for everything depends on it: a functioning economy, a free and fair political system, the development of civil society, public confidence in police and the courts.[3]

In the case studies, this emphasis on the rule of law has been most evident in the desire to protect the independence of the judiciary from political influence

in East Timor and Kosovo, in particular through the establishment of independent institutions responsible for judicial recruitment and disciplinary procedures, and the unlimited tenure of judges. However, it is also reflected in the desire to minimize political influence over the civil service, and to reduce the opportunities for corruption in particular in the recruitment process; and in the desire in BiH to weaken parallel, unaccountable political structures through the reform of the payments system, removing the financial benefits that accrued to the parties controlling the payment bureaux.

Fourth, the international administrations aimed to establish an effective administration and functioning public services in the three post-conflict territories. Both UNMIK and UNTAET justified their exercise of administrative functions with the absence of local administrative institutions, and continued to support the local administration once it was established. The analysis of the civil service reforms in BiH and East Timor suggests that both strengthening administrative capacity and increasing administrative effectiveness strongly informed the statebuilding policies of UNTAET and the OHR, emphasizing recruitment and promotion on the basis of merit, rather than other criteria, such as ethnicity or seniority.

Finally, the establishment of free market economies, as the best way to promote economic growth and prosperity, has been central to international statebuilding efforts. This attempt to establish market economies has been more pronounced in the activities of the OHR and UNMIK, operating in formerly socialist territories, than in East Timor, where the non-oil economy continues to be dominated by subsistence agriculture, and where no industrial sector or sophisticated service sector exists. Therefore, East Timor does not face the transition issues prevalent in BiH and Kosovo, from a planned to a market economy. However, even in East Timor the World Bank and IMF have emphasized the importance of developing the regulatory framework deemed necessary to enable private sector development.[4] In BiH and Kosovo, transforming the former socialist economies has been one of the main priorities of the international community, even if it is not part of the GFAP[5] and is only indirectly mentioned in UNSCR 1244.[6] Limiting the role of the state in the management of the economy, and creating the regulatory framework for the development of a private sector and a market economy, have been central to these efforts, as evidenced in the discussions of the reform of the payment bureaux in BiH and the privatization efforts in Kosovo.

Thus, the three case studies suggest that the standard of civilization legitimizing the exercise of political authority is a predominantly Western standard, reflecting the values of economic and political liberalism. The language of 'Europeanization' that has been employed by the international community in both BiH and Kosovo further underlines the Western nature of the new

standard. As the case studies have shown, the states most deeply involved in the three administrations have been predominantly European states and the USA, and the international organizations present are predominantly Western. Non-Western states, like Russia and China, but also many developing countries, have been concerned about this standard of civilization associated with the interpretation of sovereignty as responsibility, and have objected to intrusive forms of implementing it, for example through humanitarian intervention.[7] Thus in BiH, Russia has not supported all the policies of the PIC, and announced publicly that it did not consider itself bound by the Declaration of the 2000 Brussels PIC, which had called, *inter alia*, for the creation of a single economic space in BiH.[8] It was the first time that a member of the Steering Board distanced itself publicly from PIC decisions.

In addition, the affected societies do not necessarily share all the elements of this liberal conception of sovereignty as responsibility. This problem arose in East Timor in the context of the decision on the applicable law, where UNTAET sidelined traditional law because of its partial incompatibility with international human rights standards, but where large parts of the local population continue to rely on traditional law to regulate their affairs. Similarly, in BiH local political elites eschewed the establishment of a civil service established purely on the basis of merit in favour of a civil service based on the principle of ethnic representativeness, emphasizing a very different source of legitimacy than the international community. In neither case was this tension resolved, instead the international community imposed its institutional designs.

The observed paradox of the international community 'forcing states to be sovereign' reveals a deeper tension in liberalism—the tension between the aim of creating a liberal order within a society, and the means used to attain it. At the core of the doctrine of liberalism is the concern with individual agency, which finds expression in the principle of self-determination.[9] For classic liberals like John Stuart Mill, this meant that a people has the right to choose its own political institutions, and that government institutions cannot be imposed externally.[10] Liberals see the state as the 'servant of society',[11] protecting the liberties of its citizens, and allowing citizens to exercise their agency by protecting them from interference by other states. However, a tension arises when a state cannot or does not want to protect its citizens. Then, the establishment of a liberal order may rely on some form of coercion by imposing liberal institutions of government externally, thereby denying the citizens of this state their choice of political institutions, and thus their agency and right to self-determination.

In the nineteenth century, 'civilization' was invoked as a criterion for whether such an intervention was justifiable, and to reconcile between the

demands of civilization on the one hand, and the rights to self-determination on the other. If a political community was considered to be civilized, international society had no right to interfere with the organization of its domestic affairs. If, however, it was deemed uncivilized, civilized states had the right to assume its governance to improve the conditions of the affected political community. In the last decade, this concept of civilization has been invoked once again to decide between political communities with a right to self-governance and those to whom this right is denied. The use of the concept of civilization has not been explicit, because of its colonial connotations. Instead, it has been couched in the language of sovereignty as responsibility. As the case study of Kosovo in particular has shown, the international community's commitment to self-governance has often been instrumental, as a way to establish effective governance institutions, rather than based on its intrinsic normative value.

The concept of civilization thus served to reconcile the contradictory liberal principles of self-determination of peoples or states on the one hand, and of self-determination of the individual on the other, denying self-determination to peoples that did not have established the institutions considered necessary by European states to guarantee the self-determination of the individual. It thus created two distinct liberal international orders: one of toleration and pluralism among European states who were considered to possess the necessary institutions, emphasizing state sovereignty and the principle of non-intervention; and an hierarchical order encompassing both European states and the rest of the world, emphasizing civilization as a justification to intervene in non-Western states to allow individuals to exercise their agency.[12] It remains to be seen whether the understanding of sovereignty as responsibility can reconcile these contradictory aspirations without discrimination, while maintaining the single international legal and political order established after 1945.[13]

The discussion of the new standard of civilization shows how this liberal conception of sovereignty is associated with a certain form of political and social organization, in particular the separation of the public and the private sphere. The association with a particular understanding of political organization suggests that the statebuilding activities of international administrations should be seen as part of a 'liberal project', involving agency that can pursue a strategy of transformation and help to implement a particular set of ends deemed desirable.[14] This is underlined by the conflicts between local politicians and the agents promoting the liberal project—Western governments and international organizations—that arose, for example, in the context of the Civil Service Laws in BiH or in East Timor, and the reform of the judiciary in Kosovo. These reform efforts have been deeply political and not just technical in nature, addressing questions about the legitimacy and scope of

state authority. From this perspective, the international statebuilding efforts can be seen as necessary for the completion of a liberal conception of international society. They are part of a development towards the expansion of a particular model of organizing political authority domestically, universalizing substantive elements of Western international society, and they complement the expansion of the formal principle of organizing international society—sovereign statehood—through the decolonization process after the Second World War.[15]

The Impact of Sovereignty Norms on Policymaking

The discussion of statebuilding in BiH, Kosovo, and East Timor has shown that norms impact on the three aspects of statebuilding by international administrations analysed here—institution-building, the interaction with local institutions and actors, and the transition of authority from international to local institutions—in several ways.

First, the norms embodied in the standard of civilization have provided a blueprint for statebuilding.[16] On the one hand, this blueprint has been implicit, as in East Timor or the first years of statebuilding in Kosovo. Faced with large-scale destruction and the collapse of formal political and administrative institutions, UNMIK and UNTAET officials fell back on the institutions they were familiar with from their home countries, when building such institutions in the post-conflict environments they faced. One of the most startling examples of this has been the introduction of German-style investigative judges in East Timor, where such an institution had never been part of the legal system before, by UNTAET's German legal adviser. On the other hand, this blueprint has been explicit, forming parts of the mandates or key policy documents of international administrations. Thus, the UN Security Council mandates for Kosovo and East Timor, and the GFAP for BiH, set out certain standards for the institutions to be built, in particular with regard to human rights, the rule of law, and democracy. Most explicitly, the 'standards before status' policy in Kosovo, and the Brussels PIC Implementation Agenda for BiH, provide a blueprint for how to build institutions that legitimize the exercise of political authority, and that are necessary for the establishment of empirical statehood.

The second way in which norms influence policymaking is by providing a justification for intervention. The lack of political authority, and the inability or unwillingness of local political elites to live up to the 'standard' have been invoked to justify the exercise of international authority and the denial of self-determination in these territories. Thus, UNMIK and UNTAET defended their exercise of administrative authority with the absence

of legitimate domestic institutions. The introduction of international judges into the domestic legal systems was justified by a lack of legal capacity in East Timor, and with the lack of judicial independence and the violation of human rights and rule of law principles in Kosovo. Finally, the unwillingness to implement the provisions of the Dayton Agreement by the local parties led to the granting of the Bonn Powers to the High Representative, and to the use of the power to impose legislation in the cases of the civil service law and those laws that were related to the abolishment of the payment bureaux.

However, the case studies do not suggest that the lack of legitimate political authority *caused* the military interventions by the international community that preceded and accompanied the statebuilding efforts of international administrations. The interventions in BiH, Kosovo, and East Timor were initiated as the result of concerns about humanitarian emergencies and their consequences for regional security, such as refugee flows, or the spillover of conflict into neighbouring countries. Material security concerns thus informed these interventions as much as ideational factors. However, once the international community had assumed political authority over these territories, the absence of domestic legitimate institutions was invoked as a justification for the continued exercise of international authority and the denial of self-determination.

Similarly, the exit of international administrations is not necessarily determined by fulfilling the sovereignty norms, as discussed in Chapters 4 and 5. In the case of East Timor, it has not been the capacity of Timorese institutions, nor their ability to fulfil the requirements of any standard, that led to the termination of UNTAET, but rather local pressure for more self-government. The transition of elements of political authority to local institutions in Kosovo occurred not because local institutions displayed the capacity for effective self-governance, but because local actors needed to be co-opted into the government to establish effective international control over the province. Similarly, concerns about regional stability have influenced the international community's policy towards resolving Kosovo's status as much as the ability of Kosovo to fulfil the benchmarks of the standards before status policy. While exit strategies will be discussed in greater detail on pp. 242–244, this brief sketch raises the question of alternative theoretical explanations for the policy choices of international administrations.

Theoretical Alternatives

The failure of sovereignty norms to adequately explain certain important aspects of policymaking by international administrations, such as the process and timing of the handover of authority from international to local

institutions, necessitates the discussion of theoretical alternatives to the normative argument pursued in the previous chapters. Undeniably, 'realist' security concerns motivated European states and the USA to intervene in the Balkans. The danger of the wars spilling over into neighbouring countries, the possible destabilization of the region through further refugee flows, and the threat to the credibility of international organizations, including NATO and the EU, could only be contained by an effective international intervention, establishing peace in the region.[17] Similarly, Australia might have been motivated to some extent by regional security concerns when it led the intervention in East Timor—with Indonesian consent—though the decision to intervene in East Timor seems to have been influenced predominantly by the impressions of the post-ballot violence and the ensuing humanitarian disaster, rather than by concerns about cross-border flows of refugees and the potential of destabilizing spillover of the conflict.[18]

However, if security concerns had been the underlying motivation for international intervention, it is difficult to see why the establishment of international administrations and their attempts to create liberal, democratic market economies would be the most effective and cheapest way of pursuing such an agenda. It would suggest, for example, that the establishment of a democratic, multi-ethnic BiH or Kosovo is the best solution for sustainable peace, despite the endemic lack of trust between the different ethnic groups in both territories. If security and stability were the main concerns of the international community, would a division of Kosovo or BiH, as has been advocated by a range of realist commentators, not have been simpler?[19] Critics of norms-based accounts of statebuilding have to explain why these avenues were not pursued, even though they might have established peace, order, and regional stability earlier and probably at a lower cost. Another factor must have predisposed the international community to choose the option of developing empirical statehood in BiH and Kosovo. The best explanation for this is the influence of the norms of sovereignty.[20] These norms limited the range of options for addressing the problems that BiH and Kosovo posed for European security, and shaped the international community's response: creating a sovereign state according to the new standard of civilization. The policies of the international community are not just a result of a 'logic of expected consequences' of peace and stability, as realists claim, but of a 'logic of appropriateness',[21] where norms have influenced the decision-making process and shaped the interests of members of the international community. The international community has thus been influenced by a particular conception of the appropriate relationship between state and society, a particular conception of domestic sovereignty. The desire to implement this conception of domestic sovereignty has justified the ongoing intervention by the international community.

In addition to this general challenge to the influence of sovereignty norms on political decisions of the international administrations, there are three more specific challenges to the influence of norms in the different cases: one to the OHR's mission in BiH, one to the missions in BiH and Kosovo, and one to UNTAET in East Timor. The first challenge is the observable discrepancy between the rhetoric of the international community on the strengthening of central state institutions, human rights, and economic reform in BiH, and its actions on the ground in 1996 and 1997. While the international community emphasized the importance of creating and empowering the central state-level institutions, it increasingly dealt directly with the entity authorities, especially in the RS, and only from 1997–8 onwards consistently tried to strengthen the central institutions. While the PIC was emphasizing the importance of democratic norms and human rights,[22] politicians later indicted as war criminals by the International Criminal Tribunal for the Former Yugoslavia (ICTY); such as Momcilo Krajišnik (the Bosnian Serb member of the Presidency),[23] remained in power or they were even actively supported by the international community, like Biljana Plavšić (the RS Prime Minister during the war),[24] who had openly broken with Radovan Karadžić and was willing to cooperate with the international community. While the PIC stressed the importance of establishing an open, free market economy in BiH,[25] the necessary reforms, especially privatization and the creation of a single economic space, were only addressed after 1998. Neither observation supports the assertion that the international community was influenced in its policies by the lack of empirical statehood, and the norms associated with sovereignty as responsibility.

However, this criticism ignores the constraints arising from the situation in BiH immediately after the war. First, humanitarian concerns and the need for reconstruction took priority over institutional reform. Second, until the elections in September 1996, no central common institutions existed yet that might have represented realistic candidates for strengthening, and after the elections it proved very difficult to generate functionality within the institutions.[26] Finally, the High Representative did not yet have the Bonn Powers, which made it much more difficult to implement the international community's agenda against the obstruction from local political elites. Even with these obstacles apparent in 1996 and 1997, the international community attempted to employ the standard of civilization by attaching conditionalities to the disbursement of economic aid to push for the implementation of the GFAP.[27] Furthermore, it began to establish an extensive institutional network for monitoring and implementing human rights in BiH in 1996. Taken together, this suggests that while the immediate post-war conditions in BiH prevented the international community from consistently acting on its

conception of sovereignty, these norms did exert some influence on its aims and activities.

A second challenge to the case studies of BiH and Kosovo is that the invocation of Europeanization is not normative but purely functional, preparing both territories for integration into the EU. In other words, it is not the norms associated with sovereignty that shape the statebuilding agenda in these places, but rather concerns about European security. If this is true, it suggests a particular understanding of security, as guaranteed by democracy, human rights, the rule of law, and free markets. Thus, security would be enhanced by changing the identity of a state or a political community.[28] This understanding of security, however, does not challenge the account of the normative framework that underpins and justifies the statebuilding policies of international administrations, as its emphasis on identity (and thus recognition) underlines the social nature of international politics, and the importance of shared ideational frameworks necessary to make such a conception of security intelligible. Thus, only a particular kind of state—stable, with functioning institutions, encompassing the different elements of the standard of civilisation—is considered as 'European', and thus sustaining European security. This European identity is defined nowhere clearer than in the EU's 'Copenhagen Criteria' for membership: (*a*) stability of institutions guaranteeing democracy, the rule of law, human rights, and respect for and protection of minorities; (*b*) the existence of a functioning market economy; and (*c*) the ability to take on the obligations of EU membership[29]—that is an effective administration which can implement European legislation.

A final challenge to the argument concerns the timing of UNTAET's exit from East Timor—well before domestic institutions were strong enough to cope without international support. As Anthony Goldstone has argued, UNTAET's exit was determined by a timetable set by the UN on the basis of judgments about the major donors' willingness to contribute financially to the mission, and 'the Security Council's limited patience with nation-building'.[30] However, as the analysis of UNTAET in Chapter 3 suggests, the timing of the transition of authority to local institutions was also influenced by pressures from the local political elite for more self-governance—a process that could also be observed in Kosovo. Local elites used references to the undemocratic nature of UNTAET to push for more self-government. As the local leadership grew increasingly frustrated about the unwillingness of UNTAET to share more power, the whole cabinet threatened to resign in December 2000. In an open letter to the SRSG, they complained that, 'The Timorese Cabinet Members are caricatures of ministers in a government of a banana republic. They have no power, no duties, nor resources to function adequately'.[31]

As argued in Chapter 1, the sovereignty norms compete with other well-established normative frameworks, such as self-determination. In particular, in the light of the huge sacrifices made by the East Timorese population to attain self-determination, it would have been difficult to deny 'Timorization' and self-governance on the basis of the weakness of East Timor's institutions. Furthermore, the fact that, unlike in Kosovo, the political status of East Timor was resolved before UNTAET was mandated to administer the territory meant that the norm contestation between denying self-governance to achieve the standard of civilization through international administration on the one hand, and self-governance and independence on the other, was more pronounced than in the other cases, as the two alternatives were clearly articulated.

These challenges help to clarify aspects of the international community's statebuilding policies which the normative framework of sovereignty as responsibility cannot convincingly explain. However, they do not refute the central argument of this book, that the concept of sovereignty as responsibility influences these statebuilding policies by providing a blueprint for the institutions to be built, and by serving as a justification for the continued governance of post-conflict territories by international administrations. This inquiry has focused on the normative context of statebuilding, and has shed light on questions that realist approaches have been unable to explain, such as reasons for developing the empirical statehood of BiH, Kosovo, and East Timor, and the form of the institutions established in these places. The challenges to this argument suggests that one needs to explore the social as well as the material context in which international administrations take place, to fully understand their statebuilding practices. This calls for more openness towards different theoretical approaches when trying to explain complex phenomena in international relations.

INTERNATIONAL SOCIETY AND INTERNATIONAL ADMINISTRATIONS

The Authority of International Administrations

The analysis of the sources of authority of international administrations in Chapter 2 raises a series of questions about how international administrations can assert their authority in contemporary international society. It suggests that the authority of international administrations is based either on the consent given by governments whose lack of legitimacy made international involvement necessary in the first place, or on the delegation of authority from the Security Council, a body whose legitimacy can be challenged because of its lack of representativeness. One set of challenges to their authority

relates to the legitimacy of these processes of authorization, the principles of consent and delegation. Another set of challenges relates to the universality of the social purposes towards which international authority is exercised in post-conflict territories.

The case studies of the international administrations in BiH, Kosovo, and East Timor have shown how their authority is compromised in three further ways. First, it has been challenged by local political elites demanding self-governance, in particular in Kosovo and East Timor, where UNMIK and UNTAET originally did not share political authority with local institutions, unlike the OHR in BiH. These demands for self-governance, which both UNMIK and UNTAET largely conceded, have compromised the legitimacy of the exercise of authority by the affected international administrations, as local political elites have called into question the right of the international administrations to exercise governmental authority, and have appealed to a competing normative framework: self-determination.

Second, the conduct of international administrations in their exercise of government functions has undermined their authority. The absence of accountability mechanisms and the limited provisions for local ownership have been identified in all three case studies, and in particular in the drafting of the civil service law in BiH and the judicial reform efforts in East Timor. In both cases, the lack of local ownership and international accountability had significant effects on the policies of the international administrations. In BiH, the acrimonious debates about the Civil Service Law between the international community and the BiH government, and consequently the long time it took to pass the law, were partly due to the OHR's decision to draft the law in a 'technical' working group, consisting solely of international officials, and only later discussing the draft with the government. Similarly, in East Timor the continued coexistence of the formal and traditional legal systems, and the weakness of the formal judiciary have been a partial consequence of UNTAET's shunting of traditional law. Arguably, the lack of local ownership and accountability have thus not only undermined the authority of international administrations, but also the quality and effectiveness of their governance efforts.

Finally, the authority of international administrations has been challenged by their lack of effectiveness in administering and developing the post-conflict territories. As the case studies have shown, this lack of effectiveness has to some extent been the consequence of insufficient planning and resources on the ground. In addition, the ability to effectively develop and implement public policy has been compromised by insufficient information about local conditions, customs, and circumstances. This was particularly evident in the privatization process in Kosovo, where the lack of knowledge about property

rights stalled both the drafting of legislation and later the implementation of the privatization process. Similarly, the lack of knowledge about local conceptions of justice in East Timor, and about how the local population accesses the judicial system, hindered any engagement of UNTAET with the traditional legal system, to integrate it into the formal legal system. Given that international administrations base their authority claims on their expertise and their effectiveness in addressing governance problems, this lack of effectiveness as a consequence of insufficient planning and insufficient capacity to collect and manage the information necessary for public policymaking strongly compromises these claims.

How could the authority of international administrations be enhanced in the light of these challenges? Three opportunities seem most promising in this context. First, international administrations need to increase the effectiveness of their governance and development activities. This involves better planning ahead of the missions, and faster deployment of the necessary personnel, so that the administrations can quickly address the problems of the post-conflict societies they are governing, rather than having to address their own organizational problems. It also involves better collection and management of information about the societies they are governing, rather than applying template solutions. Finally, it requires capturing the lessons of different state-building policies, to see which factors have contributed to the establishment of legitimate, sustainable state institutions. The decision to establish a Peacebuilding Commission and a Peacebuilding Support Office at the UN,[32] and the creation of the national institutions like the Post-Conflict Reconstruction Unit and the Office of the Coordinator for Reconstruction and Stabilization in the UK and the USA respectively, indicates that the international community has recognized this challenge.

Second, international administrations could be made more accountable to the local population. As discussed in Chapter 2, it is difficult to hold international administrations democratically accountable. However, horizontal accountability could be strengthened, for example by extending the jurisdiction of local supreme courts over acts of the international administration, as has happened in the case of the Supreme Court in BiH, which has reviewed legislative decisions of the High Representative; by strengthening the Ombudsperson institutions; or by establishing appeal boards to which the local population has access, and which can review and sanction the decisions of the administration, rather than just issue recommendations and opinions. An example of the latter is the Media Appeals Board in Kosovo, which reviews decisions of UNMIK against the media, such as the closure of newspapers. These institutions can help to uphold due process, and to increase the transparency and responsiveness of international administrations.

Furthermore, even if it is not possible to make international administrations democratically accountable, one can establish local ownership by endowing local political institutions, which have been democratically legitimized, with decision-making autonomy over certain policy areas, unqualified by an international authority to veto them. To fulfil the statebuilding mandate of international administrations, and to prepare territories for self-governance, it is important that local actors have real and meaningful power to make decisions already during the phase of international administration. Giving local elites a stake in the statebuilding project can help to increase its legitimacy in the eyes of the population.

Finally, to buttress the authority of international administrations one should also consider the road not taken earlier: the alternative concept of authority, authoritativeness. Authoritativeness is based on expert knowledge. The emphasis international administrations put on good governance and on capacity building suggests that expert knowledge is an important source of their authority, in particular in the long run as political authority is increasingly handed over to local institutions. The extensive expert resources international administrations can draw on, through their links to international organizations and the bureaucracies of developed countries, suggest that claims to authoritativeness are potentially strong.

However, authoritativeness suggests a different relationship between international administrations and the local population, one not based on an *obligation* to comply, but one based on *reasons* to comply. Thus, invoking the authoritativeness of international administrations underlines the importance of restructuring the relationship between international and local institutions, and increasing the participation of local institutions in a policymaking process that emphasizes discussion between both sides, to sustain the authority of international administrations. It also underlines the importance of knowledge about local conditions and complexities, to make the governance and development reforms initiated by international administrations more effective.

Pathologies of International Governance

In addition to the problems for governance arising from the lack of local ownership and accountability, international administration can lead to two more pathologies for development. First, it can create a culture of dependency; and second, it can undermine the sustainability of governance reforms.

In an assessment of governance in BiH in 2004, the European Stability Initiative (ESI) described the main problem of governance in BiH in the following terms:

> At the heart of the Bosnian governance problem … lies the lack of engagement by Bosnian citizens and interest groups in the practice of government. … Faced with the enormous problems of today, an important part of the Bosnian elite is falling prone to an authoritarian temptation—the belief that policy (mainly understood as legislation) can best be formulated outside the political process, and imposed on society without the participation of stakeholders.[33]

International administrations remove political authority from local political institutions, bypassing the usual political processes, and thereby weakening the capacity of local institutions to develop and implement public policy. This approach risks nurturing a culture of dependency thus achieving the opposite of what statebuilding intends to attain: empirical sovereignty. Just as extensive development aid can lead to donor dependency, as already witnessed in a range of sub-Saharan countries,[34] international administration can also lead to political dependency, as the possibility of having legislation imposed by the international community relieves local politicians from the responsibility of taking difficult and politically costly decisions. To avoid such dependency, local politicians must be both encouraged and allowed to play an active role in the political process, to increase their ownership of the process, and to encourage them to take on political responsibility. The local exercise of political authority is central to the development of local governmental capacity, which would otherwise be substituted by international administrations. Furthermore, if local politicians have no formal stake in the political process, and little to lose from resisting reforms as they are not holding any office, it is more difficult to hold them accountable for their actions, and to discourage them to spoil reforms. Allowing for local participation can therefore help to channel local political demands through legitimate institutions, rather than having them made and pursued outside the institutional framework, possibly even with violence.

A second, and related, issue concerns the effect of international administration on the sustainability of institutions and governance reforms. An important aspect of democratic political processes is the creation of consensus on—or at least general acceptance of—public policy. Democratic political processes help to create local support for policies and institutions, which are essential for their sustainability. A perceived need to impose particular institutions and policies is indicative of the absence of a domestic political consensus on the aims of the reform, and, resulting from that, an unwillingness to implement the reform by local politicians. Their support is important for the sustainability of institutions once they are no longer backed by the guns and grants of the international community.

Similarly, the political and administrative institutions established by international administrations in the long term need to be financed from local

resources, which might be insufficient. For example, it seems doubtful that East Timor can afford a judicial system that conforms to the highest procedural human rights standards. In BiH, the IMF has commented on the high costs that the institution-building efforts of the OHR at the central state level impose on the country's weak budgetary position.[35] This underlines the problem of building state institutions according to templates, without considering contextual local conditions.

Exit Strategies

In the context of international administrations, exit refers to the transition of political authority from international to local institutions. Exit, then, does not necessarily mean the end of international involvement in a post-conflict territory, but rather the transfer of authority and a change in the nature of international involvement, from exercising government functions to supporting local government. This is reflected in the remarks by Britain's ambassador to the UN, Sir Jeremy Greenstock, in the Security Council's debate on the closure and transition of peacekeeping missions in November 2000: 'The decision on exit has to be related to a transitional mechanism. We do not just get out. We hand over to a mechanism that deals with the next stage.'[36] An exit strategy does not have to lead to disengagement, but rather to a follow-on arrangement, which in a different, less intrusive fashion continues the statebuilding work of the international administration and solidifies its achievements.

The case studies reveal a very diverse experience of exit strategies of international administrations. Only in one case, East Timor, has political authority been comprehensively transferred to local institutions. The follow-on mission, UNMISET, still encompassed the UN peacekeepers, and had some authority over the judicial system, in particular the hybrid local/international chamber at the Dili District Court responsible for war crimes. Beyond this, UNMISET no longer exercised any executive or legislative authority, but continued to support the local administration. It thus supported self-governance of the East Timorese, without abandoning the still weak political and administrative institutions. However, the handover of power was strongly driven by local demands for self-government, not by the strength of the new institutions to bear the burden of governance.

Similarly, in Kosovo the transition of political authority to local institutions has been driven both by local demands for self-government, and the need to co-opt local elites in order to effectively control the administration all over Kosovo. However, the transition remained incomplete because of uncertainty about the future status of the territory. In BiH, by contrast, international

authority has not contracted (though the international civilian and military presence has declined significantly); instead, the international community remains deeply involved in the governance of BiH and the control of local institutions.

From the case studies, three factors emerge that have shaped the nature of exit strategies. First, in both Kosovo and East Timor, local pressures for self-governance have determined the timing of transition. These pressures can be very effective as they appeal to the international community's normative commitment to self-determination, as witnessed in both Kosovo and East Timor. Interestingly, there have been few such pressures in BiH despite almost ten years of international involvement. One possible explanation for this is the continued lack of trust between the three principal ethnic groups, each of which therefore prefers international rule to instability or domination by the other groups.

Second, the handover of authority has been shaped by the need to co-opt local elites into government, because of the international administrations' inability to assert their authority throughout the territory. This has most obviously been the case in Kosovo, but to some extent also in East Timor. Consequently, the control of the international administration over the timing and nature of the transition process is limited. The local involvement in the transition processes meant that they have been characterized by political bargaining between the international community and local political elites, rather than technical blueprints of the institutional framework to be achieved by the international statebuilding efforts.

Third, a successful exit requires an agreement on the future political status of a territory, to determine to whom authority will be handed over. As Jacques Paul Klein, the head of UNTAES and later of the UN Mission in BiH, observed: 'if you start out and don't know where you want to go, you will probably end up somewhere else.'[37]

Kosovo is the obvious example of a statebuilding mission without a political settlement. Resolution 1244 left important questions about ownership and governance unanswered, and postponed their resolution to an unspecified date in the future. This constrained the statebuilding work of UNMIK and made it difficult to transfer certain powers to democratically legitimized local institutions, as this might have prejudiced the resolution of Kosovo's status, tying UNMIK's exit to the resolution of the status question.[38] This has forced governance by an international organization on an increasingly hostile majority population that considers independence as the only acceptable form of self-governance.

In BiH, the constitutional settlement anchored in the GFAP no longer determines the limits of international institution-building efforts, which have

gone well beyond the GFAP provisions. It is therefore not at all clear what the BiH that the international community aims to build actually looks like—nor is it clear whether this BiH will have the support of all ethnic groups in the country. The transition from UNTAET to a Timorese government, on the other hand, was not problematic, as it was certain from the beginning that East Timor would attain statehood at the end.

The influence of these factors suggests that international administrations are not necessarily in control over the nature and the timing of their exit, but frequently have to respond to local pressures and conditions. Thus, the technocratic approach they have chosen to manage the transition process, building a particular set of institutions and transferring authority to them once they are considered strong enough, is not feasible in the light of these political and normative constraints.[39] Both the contestation between different normative frameworks—self-determination on the one hand, and sovereignty as responsibility on the other—and the pressures in particular from local political elites, work against such a technical approach. This underlines the fundamentally political nature of international administrations.[40]

What emerges from this diversity of prospects and strategies for exit in the three missions is a warning against the use of 'templates', a set of state institutions that can be carboncopied in every society. The use of templates assumes a degree of universalism and homogenization that does not reflect reality. It treats societies as if they have no contextual attributes. As a result, templates can fail to address many of the real problems a society faces, as these are not prone to universal solutions. While general lessons can be learned from comparing different statebuilding experiences, nothing can in the end replace detailed analysis of each specific case, to tailor the statebuilding efforts to the specific local conditions.

CONCLUSION

In the autumn of 2003, an American working for one of the international organizations in Kosovo walked past the government building on Pristina's Mother Theresa Street. The large, four-storey monument to socialist architecture housed parts of UNMIK, the Kosovo government, and the parliament. The UN and EU flags in light and dark blue, and the Albanian flag with its black double-headed eagle on red ground, moved in the gentle breeze. An Albanian workman, taking a break and drawing on his cigarette, sat next to the half-painted iron fence which encircled the building. Passing the painter, the American quipped in Albanian: 'UNMIK's blue!'; referring to the colour of

the fence the man was painting. 'Yes', the Albanian grudgingly replied, before he pointed at the unfinished part of the fence and continued with a smile, 'but underneath it is [Albania's] red!'

The Albanian's remark highlights the perception of those affected by international administration, that international rule is transitional and superficial, that every instance of international statebuilding has a local core. This underlines the importance of local ownership not only for the ultimate legitimacy of international statebuilding efforts, but also for their effectiveness. The ability of international administrations to govern and to build and shape local institutions is limited both in time and scope. International administrations are consciously transitional. They are constrained by their normative commitment to democratic self-government, which limits their ability to resist calls for handing over power to local institutions; and by their limited capacity to govern, forcing them to rely on local cooperation with their statebuilding goals. Successful statebuilding relies on the inclusion of local actors in the political process and the constructive engagement with their norms, to effectively embed institutions into wider normative structures and to ensure the local support necessary for their sustainability beyond the international presence.

Statebuilding and forms of international administration are likely to remain prominent features of international relations for years to come. In the wake of the terror attacks against the USA of 11 September 2001, weak and 'failed' states have increasingly been considered as a threat to international security, seen as potential havens for terrorists, and liable to promote organized crime and regional instability.[41] This has sustained the demand for future international statebuilding efforts. As a policy instrument to address security and development challenges, statebuilding has also been increasingly institutionalized. Since the beginning of the new millennium, a 'statebuilding architecture' has developed both internationally, for example with the Peacebuilding Commission and the Peacebuilding Support Office at the UN, but also on the national level in leading donor countries, as with the British Post-Conflict Reconstruction Unit and the American Office of the Coordinator for Reconstruction and Stabilization. This evolving statebuilding architecture might help to capture the lessons from past missions, and to improve the international capacity to build and strengthen institutions. However, awareness of the limitations of the instruments of statebuilding and international administration, their careful and considered use, close attention to unique local conditions, and local cooperation and participation will be important to make them effective instruments to promote prosperity and stability in weak and post-conflict societies.

NOTES

1. *Constitution of Bosnia and Hercegovina*, 14 December 1995, art. I.2
2. SC Res. 1244 of 10 June 1999, art. 11(c); SC Res. 1272 of 25 October 1999, art. 8.
3. Paddy Ashdown, 'What I learned in Bosnia', *New York Times*, 28 October 2002.
4. IMF, *Country Report Timor Leste* (Washington, DC: IMF, 2003), para. 11; World Bank and UNTAET, 'Background Paper for the Donor's Meeting on East Timor', Brussels, 6 December 2000.
5. Unlike other statebuilding issues, economic development does not have its own Annex in the GFAP, but the Constitution of BiH commits BiH to 'promote the general welfare and economic growth through the protection of private property and the promotion of a market economy'. See *Constitution of Bosnia and Hercegovina*, Preamble.
6. SC Res. 1244 contains no direct reference to the establishment of a free market economy. It only 'Welcomes the work in hand in the EU and other international organizations to develop a comprehensive approach to the economic development and stabilization of the region affected by the Kosovo crisis, including the implementation of a Stability Pact for South Eastern Europe'. SC Res. 1244, art. 17. The Stability Pact though aims at establishing free market economies. See Stability Pact for South Eastern Europe, 'Cologne Document', 10 June 1999, art. 10.
7. On Russian and Chinese interpretations of sovereignty, see Neil MacFarlane, 'Russian Perspectives on Order and Justice', in Rosemary Foot, John Lewis Gaddis and Andrew Hurrell (eds), *Order and Justice in International Relations* (Oxford: Oxford University Press, 2003); Rana Mitter, 'An Uneasy Engagement: Chinese Ideas of Global Order and Justice in Historical Perspective', in Foot et al. (eds) *Order and Justice in International Relations*, esp. 224–9.
8. Peace Implementation Council, 'Communiqué by the PIC Steering Board', Sarajevo, 13 July 2000.
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10. John Stuart Mill, 'Representative Government', in John Stuart Mill, *Utilitarianism, Liberty and Representative Government* (London: J. M. Dent, 1910), 177.
11. Hoffmann, 'Liberalism in International Affairs', 395.
12. Edward Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics* (Cambridge: Cambridge University Press, 2002).
13. Ibid., 120–44. For a criticism of this view of sovereignty, see Mohammed Ayoob, 'Humanitarian Intervention and State Sovereignty', *The International Journal of Human Rights*, 6/1 (2002).
14. For the characterization of liberalism as a project, see Tom Young, 'Global Liberalism and a New World Order', in Edward Keene and Eivind Hovden (eds), *The Globalization of Liberalism* (Basingstoke: Palgrave, 2002).

15. Hedley Bull, 'The Emergence of a Universal International Society', in Hedley Bull and Adam Watson (eds), *The Expansion of International Society* (Oxford: Clarendon Press, 1984).
16. On the role of norms as 'roadmaps' or blueprints', see Judith Goldstein and Robert Keohane, 'Ideas and Foreign Policy: An Analytical Framework', in Judith Goldstein and Robert Keohane (eds), *Ideas and Foreign Policy: Beliefs, Institutions, and Political Change* (Ithaca, NY: Cornell University Press, 1996), 13–17.
17. Ivo H. Daalder, *Getting to Dayton: The Making of America's Bosnia Policy* (Washington, DC: Brookings Institution Press, 2000), 162–6; John Dumbrell, *American Foreign Policy from Carter to Clinton* (Basingstoke: Macmillan, 1996), 186.
18. Stewart Eldon, 'East Timor', in David M. Malone (ed.), *The UN Security Council: From the Cold War to the 21st Century* (Boulder, CO: Lynne Rienner, 2004), 556–60.
19. Thomas Friedman, 'Not Happening', *New York Times*, 23 January 2001; John Mearsheimer, 'Shrink Bosnia to Save It', *New York Times*, 31 Mach 1993; John Mearsheimer and Stephen van Evera, 'The partition that dare not speak its name—when peace means war', *The New Republic*, 18 December 1995. On partition as a strategy to end civil conflict, see Chaim Kaufmann, 'When All Else Fails: Ethnic Population Transfers and Partition in the Twentieth Century', *International Security*, 20/4 (1996).
20. Susan Woodward argues that it was the sovereignty norm which prevented Western states from dealing with the dissolution of Yugoslavia in a way that might have enabled a peaceful transition. See Susan Woodward, 'Compromised Sovereignty to Create Sovereignty: Is Dayton Bosnia a Futile Exercise or an Emerging Model?' in Stephen D. Krasner (ed.), *Problematic Sovereignty: Contested Rules and Political Possibilities* (New York: Columbia University Press, 2001), 266–7. East Timor is not considered in this discussion of partition, as its political status has not been disputed after the ballot, unlike in BiH or Kosovo. That the conception of statehood implemented in East Timor by UNTAET is so similar to the ones applied in BiH and Kosovo underlines the point that these statebuilding exercises are not just informed by the desire to resolve political conflicts (a logic of consequences), but by a particular conception of legitimate statehood (a logic of appropriateness).
21. James G. March and Johan P. Olsen, 'The Institutional Dynamics of International Political Orders', *International Organization*, 52/4 (1998), 949–54.
22. Peace Implementation Council, 'Bosnia and Hercegovina 1997—Making Peace Work', London, 4–5 December 1996.
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24. International Criminal Tribunal for the former Yugoslavia, *The Prosecutor Of The Tribunal Against Biljana Plavšić*, Indictment, 3 April 2000, Case No. IT-00-40-I.
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32. SC Res. 1645 of 20 December 2005, and GA Res. 60/180 of 20 December 2005.
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34. David Williams, 'Aid and sovereignty: quasi-states and the international financial institutions', *Review of International Studies*, 24/4 (2000).
35. IMF, 'Bosnia and Hercegovina: Selected Economic Issues', Washington, DC, June 2005, 90.
36. SCOR, 55th year, *4223rd Meeting*, UN Doc. S/PV. 4223, 15 November 2000, 24.
37. Quoted in Chesterman, *You, the People*, 240–1.
38. As the UN Secretary-General stated in a report on exit strategies in 2001: 'In the case of Kosovo, the mandates benchmark for the exit of UNMIK is tied to a determination of the final status of the territory. No agreement which would command the necessary support of the parties and the international community appears in sight on this question at this time'. Report of the Secretary-General on 'No exit without strategy: Security Council decision-making and the closure or transition of United Nations Peacekeeping Operations', UN Doc. S/2001/394, 20 April 2001, art. 39.
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Index