

ARTICLES

SPECIAL ISSUE – WHAT FUTURE FOR KOSOVO ?

Legitimacy and UN-Administration of Territory

By *Bernhard Knoll**

A. Introduction

Given the scope of authority the United Nations has assumed in order to perform functions of territorial administration both in East Timor and Kosovo, it is, as one commentator remarked, rather surprising that the issue of the legitimacy of the internationalisation of state structures through post-conflict governance has inspired little debate.¹ There are myriad reasons for the erosion of political authority in a territory temporarily administered by the international community – corruption, local obstructionism and internal divisions, failure to promote government transparency, a tenuous link between civil administration and the military command structure, the operation of (inter)national networks of patronage, and general incompetence, to name a few. This article analyses some of the *inherent* tensions involved in international institution-building. It introduces the variety of actors operating in an internationalised territory as the quest for legitimacy creates tensions between them, and portrays the dynamics that unfold in a process in which notions of legitimacy are subject to institutional contestation.

This discussion proceeds in two stages. First, I describe the basic components on which legitimacy rests in a system in which the exercise of power is shared between international and local institutions, concluding that legitimacy rests on a process that seeks to gradually devolve public authority from the former to the latter. Second, I argue that international agents and local actors rely on discrete sources of legitimacy to justify the exercise of public power. An analysis of a territorial

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¹ Outi Korhonen, *International Governance in Post-Conflict Situations*, 14 LEIDEN J. INT'L L. 495, 526 (2001).

administration in which international and local actors are contemporaneously exercising social control through reference to different sources of authority provides a vital key to understanding the tensions which *may*, but do not necessarily, accompany a temporary international territorial administration.

B. A Transitional Administration in Transition

*"No ethnic ties, no shared traditions, no voluntary act of political confidence unite the rulers and their subjects."*²

Following Security Council Resolution 1244 of 10 June 1999 and its first implementing regulations, a plenary system of international administration has emerged in the territory of Kosovo.³ The Resolution created the UN Interim Administration Mission in Kosovo (UNMIK). Two years later, the UN promulgated the Constitutional Framework for Self Government (CF), which established a mechanism of dual-key governance in which competencies are successively transferred from an international agent to local agents.⁴ This arrangement

² ERNST FRAENKEL, *MILITARY OCCUPATION AND THE RULE OF LAW: OCCUPATIONAL GOVERNMENT IN THE RHINELAND, 1918-1923* 205 (1944).

³ On the Authority of the Interim Administration, S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999) (vests UNMIK with "all legislative authority" over the territory and people of Kosovo). Cf. UNMIK Reg. 1999/1, para. 1.1, U.N. Doc. UNMIK/REG/1999/1 (July 25, 1999) (effectively self-institutionalises all public powers that would normally attributed to a state government. UNMIK remains composed of a pillar structure, each reporting to the SRSG. Until 2005, it was divided into four major components; its structure reflected the heavy dependence of the operation on the efforts and resources of various states and international organisations. While two pillars remained with the UN (civil administration and police/justice), the other pillars were distributed to the OSCE (institution building) and the EU (economic reconstruction)). See also cf. Matthias Ruffert, *The Administration of Kosovo and East Timor*, 50 INT'L & COMP. L. Q. 477, 613 (2001); Andreas Zimmermann & Carsten Stahn, *Yugoslav Territory, United Nations Trusteeship or Sovereign State? Reflections on the Current and Future Legal Status of Kosovo*, 70 NORDIC J. INT'L L. 423 (2001); Michael J. Matheson, *United Nations Governance of Postconflict Societies*, 95 AM. J. INT'L L. 76 (2001); Ralph Wilde, *From Danzig to East Timor and Beyond: The Role of International Territorial Administration*, 95 AM. J. INT'L L. 583 (2001); Alexandros Yannis, *The Concept of Suspended Sovereignty in International Law*, 13 EUR. J. INT'L L. 1037 (2002).

⁴ On a Constitutional Framework for Provisional Self-Government in Kosovo, UNMIK Reg. 2001/9, U.N. Doc. UNMIK/REG/2001/9 (May 15, 2001) (CF divides all spheres of governmental authority into powers that are to be transferred to the newly created local institutions (Chapter V of the CF) and reserves others for the continued exercise by UNMIK (Chapter VIII). The latter mostly concern sovereignty related matters such as external relations, the administration of state and public property and enterprises, control over the civil registry database, railways and civil aviation, protection of minority rights, public order and safety, defence, and the appointment and removal of judges and prosecutors). Cf. Carsten Stahn, *Constitution without a State? Kosovo under the United Nations Constitutional Framework for Self-Government*, 14 LEIDEN J. INT'L L. 531 (2001) (providing a concise study on the constitutional history of Kosovo and the recent attempts to build political institutions).

constitutes a *sui generis*, loosely bounded political system in which policy is made by both the UNMIK and the newly created Kosovo's Provisional Institutions of Self-Government (PISG). Throughout the institution-building sequence, the international agent is vested with a decreasing measure of *Organisationshoheit* (authority or competence to draw up a constitution) to choose a system of government and to obtain means to enable the "state" to execute its functions. At the same time, local institutions gradually assume competencies for a certain range of issues and discharge municipal functions according to their autonomous sphere of action.

In accordance with Strobe Talbott's designation of Kosovo as a "ward of the international community,"⁵ the diverse set of competencies of emergent local institutions can be compared with the capabilities of a minor who grows into a certain age. At the same time, the competencies of the guardian shrink in light of the increasing capacity of the ward. The local institutions' competencies within their autonomous sphere will, however, continue to be subject to the international agent's supervision. This model seeks to encourage pluralism in order to enhance legitimacy and local ownership of measures undertaken during a democratic transition. While the dual key model presents a significant innovation in post-conflict governance, fostering both short-term legitimacy and long-term democratisation, the two actors might, at a particular point of the institution-building trajectory, occupy opposing positions based on the pursuit of conflicting sets of interests, or corporate intentions.⁶

Political transitionality provides the tableau against which the following discussion on the sources of legitimacy can be projected. Given the ecumenical quality of the notion of legitimacy, we assume that nothing is legitimate in itself but only in relation to an audience. The object of legitimacy – a government, be it local or mandated by the international community – raises a claim of legitimacy, and the conditions for meeting it are dependent on an audience as a party to the relationship. Applied to our investigation, we will have to carefully distinguish

⁵ Strobe Talbott, U.S. Deputy Secretary of State, Keynote Address at the Aspen Institute, The Balkan Question and the European Answer (August 25, 1999) (quoted by William Bain). William Bain, *The Political Theory of Trusteeship and the Twilight of International Equality*, 17 INTERNATIONAL RELATIONS 59, 69 (2003).

⁶ The case of Kosovo's privatisation process illustrates the dilemma of pursuing divergent interests: While the provisional institutions of self-government (PISG) have, since 2002, pursued an intensive campaign to kick-start the privatisation of public assets in Kosovo, the international agent has stalled the process by its continued recourse to international law and the limits it imposes on UNMIK in its fiduciary exercise of powers. See Bernhard Knoll, *From Benchmarking to Final Status? Kosovo and the Problem of an International Administration's Open-Ended Mandate*, 16 EUR. J. INT'L L. 637 (2005) (discussing the aforementioned case of Kosovo's privatisation process).

between the discursive spheres in which various claims to legitimate government are framed. Consider a line that frequently appears in our political vocabulary when we, usually in a condescending manner, refer to a particular governmental policy as “designed for local consumption.” We mean simply that internal or domestic interests are pursued at the expense of international legitimacy. While borderline cases exist, the discussion will, for heuristic purposes, treat notions of international and domestic legitimacy as discrete discursive contexts in which different strategies of legitimisation are pursued.⁷

I. International Legitimacy

First, we consider the international validation of UN governance of a territory. We term this sphere *international legitimacy* because the UN addresses its claims of legitimate governance to an international audience, particularly donor countries.⁸ As the sequence of institution-building unfolds, the Special Representative of the UN Secretary-General (SRSG) – in whom the executive, legislative and judicial powers are initially combined – relies on a comprehensive set of arguments to justify the exercise of largely unchecked powers. His arguments appeal directly to and articulate the shared values of the international community. They are largely framed to convince the international public that its sundry actions are consistent with the established best practices of good governance. The importance of those legitimising strategies in the case of Kosovo’s international administration cannot be overstated. UNMIK was not, like the UN Transitional Administration in East Timor (UNTAET), legitimised by the obligations of trusteeship that applied to non-self-governing territories. Nor can its exercise of power be based on an international treaty, sanctioned by the consent of the contracting parties, as in the case of Bosnia. As Bain lucidly observes, UNMIK was created in the wake of a “controversial, if not dubious, use of force that obtained retroactive assent from the Security Council in form of resolution 1244.”⁹ Without international validation – which, one might add, cannot be taken for granted – the task of UN territorial governance is fraught with difficulty.

⁷ This categorisation is frequently employed. Cf. Ed Vulliamy, *Farewell, Sarajevo*, THE GUARDIAN, November 2, 2005 (comment made by the former High Representative for Bosnia, Lord Jeremy Ashdown: “I am formally accountable to the Steering Board of the [Peace Implementation Council] every week... I have to have the capitals’ broad agreement with what I do. Sometimes, if I have 70% of them behind me, I’ll go ahead with the decision... I am also responsible to the Bosnian people. If I pass a decree that is refused, my authority is gone like morning dew”).

⁸ See Joel C. Beauvais, *Benevolent Despotism: A Critique of U.N. State-building in East Timor*, 33 N.Y.U. J. INT’L L. & POL. 1101, 1106 and 1166 (2001) (makes reference to the UN Security Council and donor countries as UNTAET’s primary constituencies).

⁹ WILLIAM BAIN, BETWEEN ANARCHY AND SOCIETY: TRUSTEESHIP AND THE OBLIGATIONS OF POWER 153 (2003).

International political scrutiny of an administrative organ operating in an internationalised territory aims at nothing less than ensuring that its practices comply with a particular system of good governance. For that reason, the administrative organ is forced to employ strategies of justification and legitimisation towards the international community. The absence of constitutional limits to the exercise of international political power within such territories can, for example, spill into the international domain and mobilise serious discontent among the global political and diplomatic constituency. Failure to justify its coercive measures presents a serious challenge to an international territorial administration's legitimacy.¹⁰ The legitimacy of an international territorial administration in the eyes of a global audience naturally increases with the international representativeness of such an administration (in terms of participating states and the availability of lead-nation resources), along with the rate at which an "exit strategy" is formulated and with the speed at which the devolution of government power to local institutions takes place.¹¹

II. Domestic legitimacy

Second, we consider the UN's authority within the territory where it exercises the function of government. We term this sphere *domestic legitimacy*. As a relational concept, domestic legitimacy captures the properties of the performance of the fiduciary bond in which an international agent is appointed *ex lege* to supervise a formally constituted, locally based management structure operating with respect to a particular territorial unit.¹² As the UN conceives "good governance" as *ersatz* for democratic legitimisation in an internationalised territory, its claim to legitimacy is based on the exercise of its powers in a manner inviting societal trust. In the words of Caplan, "the idea of international rule over foreign territory can be legitimate

¹⁰ See e.g., a report by the Council of Europe's Parliamentary Assembly which, regarding the continuation of supreme international authority in Bosnia, considered it "irreconcilable with democratic principles that the HR should be able to take enforceable decisions without being accountable to them or obliged to justify their validity and without there being a legal recourse" (Article 13 of Resolution 1384 of the CoE PA, 20th Sitting, 23 June 2004). See also Report by the CoE Political Affairs Committee, *Strengthening of Democratic Institutions in Bosnia and Herzegovina* (Doc. 10196, 4 June 2004), §35. The absence of legislative review and other defects of Kosovo's legal system are discussed in Bernhard Knoll, *Beyond the Mission Civilisatrice: The Properties of a Normative Order within an Internationalized Territory*, 19 LEIDEN J. INT'L L. 275-304 (2006).

¹¹ See David Harland, *Legitimacy and Effectiveness in International Administration*, 10 GLOBAL GOVERNANCE 15, 18 (2004) (presenting a similar argument); see also RICHARD CAPLAN, *INTERNATIONAL GOVERNANCE OF WAR-TORN TERRITORIES: RULE AND RECONSTRUCTION* 34 (2005).

¹² This definition of an international territorial administration is drawn from Wilde, *supra* note 3, at 585.

only if that rule is exercised on behalf of, and for the benefit of, the foreign population.”¹³ In this domestic sphere, the legitimacy of a UN territorial governance mission thus depends upon its ability to incorporate the views of the people’s representatives. Conversely, an international organisation that lacks acceptable legitimated accounts of its activities is vulnerable to claims that it is negligent and unnecessary.

The manner in which an international administration resorts to arguments “legitimising” the exercise of *imperium* in an internationalised territory thus depends on the function it is cast in: as a territorial government, an international mission’s arguments possess a domestic dimension; and as an organ of the international community, it is under pressure to justify its plenary administration to an international audience. We have accordingly termed these two discrete dimensions “*domestic*” and “*international*” legitimacy, with the former denoting an attribution of the relationship between the international agent and the people temporarily governed by it, and the latter indicating an attribution of the relationship between the international organ and the international community.

By discussing legitimacy in both its domestic and international dimensions in dyadic terms, we do not however intend to assume a neat separation between the two realms of domestic and international politics. Such a separation is merely an analytical device to contextualise the various claims to legitimate government. Arguments advanced towards one audience reinforce claims made to the other; they occasionally conflict with each other as well. For example, pragmatic appeals to the local population to sustain more power cuts during a harsh winter may debase lofty claims, made towards the international community, that the funds utilised to stabilise the energy supply have been put to good use. Hollow platitudes regarding the adequacy of discharge of a governmental duty, made to local institutions, may signal the shirking of pragmatic exchanges with the international community on how the UN administration itself can be subject to good governance benchmarks. On the other hand, a boost in a UN mission’s domestic credibility (as witnessed under the leadership of the former UNMIK SRSG, Jessen-Petersen) facilitates its re-legitimation in the international sphere.

C. The Pursuit of Domestic Legitimacy: Two Promises

An international authority’s construction of “legitimate rule” within the administered entity is of a special quality. Ordinary logic will designate it as an

¹³ RICHARD CAPLAN, A NEW TRUSTEESHIP?: THE INTERNATIONAL ADMINISTRATION OF WAR-TORN TERRITORIES 57-58 (Mats R. Berdal ed., 2002).

agent whose short-term purpose is to solve problems associated with the immediate aftermath of war: enormous social dislocation and human protection. The special position of a trustee administration implies that it cannot draw legitimacy from foundational myths, scientific doctrine, alleged providence or the political will of a nationally constituted *demos*.¹⁴ This is, of course, a sociological triviality. Yet it serves to illustrate the point that an international administration can utilise other legitimising strategies that resemble those of national public administrations. In its governorship role, a trustee's ability to generate domestic legitimacy hinges then, firstly, on the effective provision of public goods and, secondly, on its compatibility with prevailing local ideology and cultural background. Beyond traditional considerations of "output legitimacy" an international administration bases its claim to exercise authority on two argumentative "pillars."

I. The Foundational Promise

As a first order legitimising strategy within an internationalised theatre, the international agent relies on its primary competency to activate the latent subjective approval of the people within the territory. In what we may term the foundational promise of fiduciary administration, the international agent establishes and sustains the identity and status of a particular polity *qua* polity. In the case of Kosovo, the (international) drafters of the Constitutional Framework pursued such foundational promise by positing that Kosovo would be an undivided territorial unit under interim international administration – an "entity...which, with its people, has *unique* historical, legal, cultural and linguistic attributes."¹⁵ The foundational promise inherent to an institution-building mandate is also visible in its reconstitution of the collective, ideally across divisive ethnic and religious lines.¹⁶ The expectations arising from the constitutional promise of temporary protection and institution-building represent the primary source of UNMIK's domestic legitimacy, which depends on the extent of trust it maintains in pursuing the interests of the thus constituted polity.

The following two examples illustrate these propositions. The exercise of fiduciary functions of UNMIK have been subject to fierce local contestation as the UN

¹⁴ Adapted from Jens Steffek, *The Legitimation of International Governance: A Discourse Approach*, 9 EUR. J. INT'L REL. 249, 271 (2003).

¹⁵ UNMIK/REG/2001/9, *supra* note 4, at §1.1 and §1.2 (emphasis added).

¹⁶ See The Secretary-General, Report of the Secretary-General, *No Exit without Strategy: Security Council Decision-Making and the Closure or Transition of UN Peacekeeping Operations*, p. 2, U.N. Doc. S/2001/394 (April 20, 2001).

responded ambiguously to a 2001 border demarcation agreement, concluded between the Federal Republic of Yugoslavia (FRY) and Skopje, which concerned Kosovo's southern border with Macedonia (fYRoM).¹⁷ Through this agreement, the holder of nominal sovereignty – the FRY – signed away a territory of 2,500 hectares of pastures claimed by Kosovo residents. One year later, the agreement had severe repercussions on Kosovo's institutional structure. As UNMIK and KFOR continued to state that the agreement was irrelevant,¹⁸ FRY's President addressed a letter to the UNSG in which he stressed that the border accord between the FRY and fYRoM was reached "between two sovereign and independent countries, members of the United Nations" and that it reaffirmed the existing border between the two republics (Serbia and Macedonia) of the former Yugoslavia.¹⁹ This view eventually was also adopted by SRSG Steiner, who announced that the agreement must be respected.²⁰ UNMIK's astounding *volte-face* was necessitated by the Security Council's (erroneous) belief that the FRY had the authority to dispose of parts of Kosovo territory.²¹

This decision had severe consequences for UNMIK's ability to generate domestic legitimacy as it openly demonstrated to the wider public that the administration did not wholeheartedly advocate Kosovo's interests on the international stage. It instead became clear that, in its second identity as subsidiary organ of the UN, UNMIK would have to pursue the legal interest of the organised international community, directing it to respect the territorial integrity of the FRY. These observations serve to highlight that the fiercest challenges to the political legitimacy

¹⁷ The agreement was signed on 23 February 2001 and promulgated by Serbia on 16 June 2001 following its ratification by both countries' parliaments.

¹⁸ <http://www.unmikonline.org/press/2002/trans/tr210202.htm> (UNMIK Spokesperson noted in a 21 February 2002 press brief that "it is not up to us to recognize the Agreement or not. We administer the territory as it was defined by the 1244").

¹⁹ Marcus Brand, *Kosovo under International Administration: Statehood*, in CONSTITUTIONALISM AND HUMAN RIGHTS 143 (2002) (quoting President Kostunica) (dissertation on file with the University of Vienna).

²⁰ Press Release, Security Council, Security Council Deplores Kosovo Assembly's Resolution Concerning Province's 'Territorial Integrity,' U.N. Doc. SC/7413 (May 24, 2002) (strongly condemning subsequent Resolution by the Kosovo Assembly on the Territorial Integrity of Kosovo, which was also declared void by the SRSG).

²¹ See Bernhard Knoll, *UN Imperium: Horizontal and Vertical Transfer of Effective Control and the Concept of Residual Sovereignty in 'Internationalised' Territories*, 7 AUSTRIAN REV. INT'L & EUR. L. 3 (2002) (It is more than questionable whether Serbia has ever been in a position to exercise aspects of foreign relations with regard to territorial dispositions during the period of Kosovo's protected status. By signing away land to fYRoM during UNMIK's interim *imperium* over the territory, Serbia failed to recognise the United Nations jurisdiction therein. Such interpretation would see both fYRoM and Serbia in breach with their obligations under the UN Charter).

of an international agent's governorship emerge as the agent is perceived to breach the trust, the cornerstone of the international intervention project.

On the flipside, domestic legitimacy can be bolstered by active performance of the fiduciary capacity, within which UNMIK acts as a territorial government to further the interests of the entity under its temporary protection. One such example involved the provisional release of former Prime Minister of Kosovo from the custody of the ICTY after protracted proceedings, upon decision of the Trial Chamber in June 2005.²² UNMIK, in a confidential written submission and during the course of oral pleadings before the Chamber, decided to offer guarantees to the ICTY that it was in a position to secure the arrest of the accused, should he violate the terms of his provisional release. The Trial Chamber noted that "the Accused's former position as Prime Minister implicates that guarantees would carry less weight were they to be provided by his government, whereas the situation in this case fundamentally differs in that UNMIK is an international agency headed by the United Nations."²³ Strengthening its domestic legitimacy by that same token, UNMIK fulfilled the duties stemming from the performance of its fiduciary bond vis-à-vis the territory.

II. Devolution of Power and the Democratic Moment

An international agent's governmental decisions will be empirically accepted to the degree that its "foreign rule" is perceived to set in motion constitutional processes that fill the initial administrative vacuum and later shape the political structure's transition while nurturing participation. Domestic legitimacy can thus be defined as a property of international territorial governance that is measured, firstly, by the extent to which it creates a thick weave of enabling structures to set local institutions on a sustainable path, and secondly, by the degree and pace it devolves authority in a sequence of instituted transfer to local actors under a "participatory model."²⁴ Hence, the second strategy in pursuit of domestic legitimacy builds upon

²² Both the Decision on Ramush Haradinaj's Motion for Provisional Release (Case No. IT-04-84-Pt, Trial Chamber II, (June 6, 2005) and the subsequent permission to engage in political activities (Case No. IT-04-84-AR65.1) (March 10, 2006) have infuriated not only Serbia's government but also the ICTY Prosecutor. Statement, Statement to the Security Council, U.N. Doc. AN/MOW/1085e (June 7, 2006) (alleged that UNMIK "refuses to co-operate fully with the Tribunal").

²³ *Id.*

²⁴ Benevolent Despotism, *supra* note 8, at 1129-1134 (Beauvais notes, the shift from the factional representation in East Timor's National Consultative Council to the expanded representation in the East Timorese National Council led to a considerable increase in the legitimacy of UNTAET).

an international administration's promise to transfer competencies to local stakeholders in order to vest them with a sense of ownership.

The international agent enters into a power-sharing agreement with the local institutions precisely with a view to establishing the latter's functional limitations with respect to the legitimate exercise of local administration and governance. As Chesterman suggests, the transfer of power, typically mediated through an election, is the central purpose of any transitional administration.²⁵ The democratisation of a polity administered by the international community serves not only as an organisational arrangement vesting local institutions with the power of legitimacy, but also, before such vestment, as a legitimisation principle to which the international organ has recourse. The international agent's reliance on democratic reform is thus a second-order argument. Its normative essence emphasises the "constitutionalisation" – i.e., the entrenchment within the municipal constitutional order – of the power of local political institutions which, reaping the benefits of popular sovereignty, operate under the terms set for reaching legitimate decisions.

According to this second-order legitimising strategy, the international agent itself has brought about the institutions whose legitimacy it has not only assisted to activate but indeed created: "The more powers conferred on local representatives, the closer power is to the people and thus the more legitimate the nature of the administration."²⁶ As a corollary, the democratic moment endows the local agent (i.e. a local political institution) with confidence to represent the perspectives of the new political collective. This emerging confidence can be well demonstrated by pointing at the ongoing discussions about the transfer of competencies from the international administration to local institutions in Kosovo. In a conversation with the former Principal Deputy UNMIK SRSG Brayshaw, the former Speaker of the Kosovo Assembly, Nexhat Daci, is reported to have said: "UNMIK cannot set the priorities for the Kosovo Assembly. The MPs are responsible before their electorate. They know what their priorities are."²⁷ This is an interesting claim. While the language of law and accountability, introduced by the international agent, imbues the local institutions with legitimacy and authority, the latter relies on the criterion

²⁵ SIMON CHESTERMAN, *YOU, THE PEOPLE: THE UNITED NATIONS, TRANSITIONAL ADMINISTRATION, AND STATE-BUILDING* §§ 223 (2004). See also NOAH FELDMAN, *WHAT WE OWE IRAQ: WAR AND THE ETHICS OF NATION BUILDING* 98 (2004).

²⁶ UNTAET SRSG SERGIO VIEIRA DE MELLO, *HOW NOT TO RUN A COUNTRY: LESSONS FOR THE UN FROM KOSOVO AND EAST TIMOR* 4 (2000) (unpublished manuscript).

²⁷ KOHA DITORE, June 24, 2004; see also his more recent remarks that "Kosovo institutions should express the political will of Kosovo citizens. It is the obligation of the institutions to convey this will in a democratic way" (ZËRI, November 16, 2005, 3).

of popular legitimacy in order to challenge international tutelage. The texture of legitimacy is, in this reading, fungible; its transfer under an asymmetrical “dual-key” constitutional arrangement can be accompanied by a struggle to appropriate powers in accordance with different sets of interests pursued by international and local actors. While a local institution wielding a measure of political authority will initially pursue a strategy of building domestic legitimacy (including developing mechanisms for aggregating interests, organising political agendas, etc.), the challenge for an international institution-building mission consists of ensuring that international and local institutional activity do not compete for legitimacy.

D. Institutional Contestation

In an environment in which the international administration claims to have created the conditions under which free and fair elections can be conducted and local institutions are being established, a curious phenomenon can be observed. The international agent can be seen making a second order argument in order to *resist* the rapid transfer of competencies. On the one hand, the argument appears plausible: after all, the international agent is mandated to first bolster the democratic credentials of such local institutions and increase the capacity of a troubled society to act collectively before it devolves itself of power.

Gradually, however, the international administrations’ claim to power becomes less plausible as the local agent becomes more stable and representative. Any argument the international agent makes in opposition to the further transfer of competencies to local actors will sound increasingly hollow as the local political institutions assert their democratic credentials. In such a scenario (which is playing out in the ongoing battle between respective spheres of competency of the PISG and UNMIK), the internal power sharing agreement itself is likely to be contested.

From what can be gleaned from the past seven years of international institution-building in Kosovo, local institutions have built effective methods of to resist international authority. At times, the elected leaders have borrowed from the rational-legal language of the international administration and argued that continuing discharge of UNMIK’s remaining powers would contravene its professed values. In fact, local institutions have mounted increasing challenges that are primarily framed in the aspirational idiom of Western constitutionalism.

In July 2004, attentive observers of Kosovo’s domestic politics would have noted that a process of institutional contestation of legitimacy was well under way. In autumn 2003, the Kosovo Assembly had endorsed an initiative to establish a working group charged with proposing amendments to the Constitutional Framework (CF). It met several times throughout the following months, and

eventually rejected an offer from UNMIK to form a joint working group in order to identify amendable provisions.²⁸ The Working Group's proposal²⁹ was approved by the Kosovo Assembly, recommending amendments to the CF that would, in addition to infringing UN Security Council Resolution 1244, also negatively affect the interests of minority communities. While UNMIK concluded somewhat soberly that a "comprehensive review of the Constitutional Framework is outside the competence of the Assembly,"³⁰ an OSCE Report explained more sensibly that

such a seemingly illogical and desperate initiative may reveal the depth of frustration within the PISG due to the perceived slow rate of transfer of powers to local institutions... Supporters of the initiative expected that either UNMIK would ultimately make some concessions, or, more likely, it would appear stiff and bureaucratic, the PISG thereby having won a "moral victory" in the eyes of the public, at UNMIK's expense.³¹

Another report by this component UNMIK-pillar even surmised that

the SRSG is in a strong position vis-à-vis the Assembly as he retains the final decision-making authority in this matter and may selectively approve amendments proposed by the Assembly or reject the entire package.³²

In this instance, a local institution, confident that it would be in a position to take over new competencies from the international administration, challenged the international agent's continuing claim to effective control of key areas, accusing it of implementing "foreign rule" that would increasingly alienate the international

²⁸ See OSCE Mission in Kosovo, *Background Report On the Assembly's Proposal of Amendments to the Constitutional Framework* (July 12, 2004) (providing background to the amendment process).

²⁹ Working Group on Preparing Proposals to Amend and Complete the Constitutional Framework, *Proposal of Amendments and Supplements to the Constitutional Framework* (May 24, 2004) (proposed amendments foresaw new competencies for the PISG in a number of areas including international relations, public security, justice and judicial review, energy, and local government. Extensive changes to the right to hold referenda on issues of "particular importance to the people of Kosovo" were proposed as well, all of which would have encroached upon UNMIK's reserved competencies). See also the Kosovo daily *ZËRI*, May 27, 2004, at 1 and 4-5.

³⁰ Press Release, UNMIK, UNMIK's Statement on Today's Session of the Kosovo Assembly, U.N. Doc. UNMIK/PR/1202 (July 8, 2004).

³¹ See OSCE Mission in Kosovo (OMIK), *Spot Report: On the Monitoring of the Assembly of Kosovo 3* (July 7, 2004), at 3.

³² OMIK, *Spot Report on the Assembly of Kosovo's Adoption of Proposed Amendments to the Constitutional Framework 2* (July 13, 2004).

agent from the interests and opinions of the “people” that it, the local agent, represents as a structured social group.

I. The Two Fronts of the Struggle over Domestic Legitimacy

The progressive erosion of an international mission’s authority can hence be explained in the following way: the internal legitimacy of an international agent – the extent to which its rule is accepted by the local polity as just and worthy of recognition³³ – decreases when the local actor refuses to comply with a rule that it perceives as inconsistent with its interests. An international agent’s domestic legitimacy weakens when its rule is perceived as obstructing the realisation of self-government. This is the process of de-legitimisation; a governance system gradually loses its capacity to engender and maintain the belief that the existing political institutions are the most appropriate ones for a particular society.

The substantive struggle between local institutions and its international guardians takes place on two cognitive fronts. On the one side, local institutions perceive it as a conflict over the *degree* of local participation (devolution). Conversely, in the minds of international officials, the conflict looms over the *quality* of local participation (standards). On this second front, local institutions will find further grounds for disclaiming the authority of an international agent, while the latter endeavours to evaluate the former’s governance performance against a set of “benchmarks,” without subjecting the performance of its own governance apparatus to any scrutiny. The international agent, convinced that the local political institutions are not yet ready to meet the standards they are charged to implement, will tend to de-legitimise the latter in the eyes of the “people” who compose the electorate. By portraying the local agent as overly corrupt and incapable of conforming to the benchmark standard for self-government, an international authority communicates that the institutional resources for democratic authorisation are lacking.

In the process, the international agent will, however, contribute to its own de-legitimisation for, as the article demonstrated, it also relies on the second-order argument of democratic institution-building. Well into the institution-building exercise and the “civilising mission” it is bound to pursue, UNMIK (as well as the High Representative for Bosnia and Herzegovina) tended to increase its vigilance against popular aspects of legitimacy and fell back upon more coercive means. Both in Kosovo and BiH, the international administrations were accordingly inclined to

³³ See JÜRGEN HABERMAS, COMMUNICATION AND THE EVOLUTION OF SOCIETY 178 (T. McCarthy trans., 1978).

“perennialise” their stronghold over “reserved competencies.”

They have done so by asserting the conditions necessary for effective control by local agents are not met at a given point in time. This argument is incoherent as it undermines the normative foundation for the legitimate rule by the international agent. The very purpose of the initial concentration of plenary authority within the international institutions is, it must be recalled, the mobilisation of institutional resources for democratic authorisation for government and the rapid establishment of a local architecture that is capable of assuming competencies in a sequence of transferences. Temporary derogation from the participatory paradigm to manage emergencies notwithstanding, the maintenance of, or reversion to, the coercive model is nothing more than a contradiction to the initial mandate.

II. Negative Externalities

These processes of reciprocal de-legitimisation between the international agent and local actors not only impose heavy additional enforcement costs on the controllers. They cause confusion on the part of a population over which institution, if any, is the right one to make authoritative declarations and may also lead to the effective diffusion of what Raz termed “normative power.”³⁴ Where the realisation of legitimate domestic political order in one jurisdiction threatens its realisation in others, conflict is more likely. Such contestation of legitimacy results in negative externalities and threatens to derail the institution-building sequence.

As a consequence, the international agent is more likely to be tempted to abandon a “consent-based” dual-key model of authority that had placed the local institutions in a partnership role. It may adopt a coercive model which permits it to regain centralised control in order to make rapid decisions and to reduce the disruptions that it perceives to be caused by local actors. By basing its authority more and more on “international legitimacy,” an international territorial administration perennialises its position into what some authors have termed “enlightened despotism” and formulates policies that are not perceived as providing gains for society as a whole.

At its best, such a return to centralised control, which effectively rolls back the process through which local stakeholders have gained a voice in decision-making, helps to minimise the short-term risk of open political conflict. At worst, the effective reversal of building local “ownership” undermines the capacity of local

³⁴ JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* §§ 16 (1979).

institutions to develop legitimate mechanisms to resolve internal conflict.³⁵ Indeed, the international community should have to assume some responsibility for setting in motion a destabilising political dynamic that rendered a power-sharing agreement in Kosovo subject to local contestation.

On the security side, it has proven to be extremely difficult to call on reluctant players of the prospective democratic (and multi-ethnic) game to renounce alternatives. Given the uncertain future status of Kosovo in international law – its reincorporation into Serbia’s jurisdiction or independence – the challenge for an interim administration has been to compel local institutions to work within uncertain parameters and to build a presumptive legitimacy. This challenge has been met only to a certain extent. The dismal economic situation in Kosovo after seven years of international administration documents the failure of a system of power that became chronically unable to meet the interests of the people under its tutelage.

E. Conclusion

International agents and local institutions derive their respective legitimacy to exercise public power from different sources and work to satisfy different “constituencies.” While the international agent relies on a dual set of arguments legitimising its authority, local institutions rely on the mandate of the electorate to the same extent that they base their claim to legitimate authority on the *telos* of the participatory model that the international agent promises to implement. This article has stressed that the struggle over the conferral or denial of legitimacy takes place within the context of the devolution of public authority from international to local institutions and described an institutional dynamic that breeds conflicts over the appropriation of political capital.

It is, however, important at this point to remind ourselves that phenomena of reciprocal de-legitimisation of public authority are not path-dependent. They are not inevitable, they do not occur as a by-line of the methodology of internationalisation of territory, as can be easily shown by the overlapping, contemporaneous and mutually reinforcing activities of the UN Council for Namibia and the South West Africa People’s Organisation (SWAPO) as “sole and authentic” representative of the Namibian people during the 1970’s. Post-conflict administrations, like occupation authorities, do not get to choose between the two

³⁵ See Gerald Knaus & Felix Martin, *Travails of the European Raj: Lessons from Bosnia and Herzegovina*, 14 JOURNAL OF DEMOCRACY 60, 66-67 (2003). Nicholas Wood, *Nation-Building Effort in Kosovo is at a Crossroads*, N. Y. TIMES, October 10, 2005 (As the former Principal Deputy SRSG Rossin admitted, “the development of their institutions is somewhat retarded by our continuing role”).

functions of international and local government. Rather, their reconciliation and integration and the management of the anomalous legitimacy cycle should be seen as the primary *problématique* of state building under international tutelage.

To summarise, the exercise of dual functions by an international administration – governor and state-builder – yields negative externalities only when it is charged with pursuing objectives *perceived to be in possible contradiction* with each other. By exposing the inherent constraints faced by an international agent, this analysis should help policymakers understand why such challenges to political authority arise. Under the constraints imposed by an “open-ended” deployment mandate, in which the final status of a UN-administered territory remains contested, we should be able to predict negative externalities in the form of a gradual erosion of political authority.

As Weber noted, “the basis of every authority, and correspondingly of every kind of willingness to obey, ... is a belief by virtue of which persons exercising authority are lent prestige.”³⁶ His observation that the stability and effectiveness of a political order of domination depends on its recognition as legitimate is equally applicable to an institution-building environment. The “crisis of legitimacy” – understood as the loss of public confidence and the concomitant loss of normative power held by institutions – should ideally prompt the United Nations to search for solutions that bridge the gap between normative ideal and observable reality. Incidentally, these propositions could not be further from the ones contained in the 2003 *Handbook on UN Multidimensional Peacekeeping Operations* which directs SRSGs to “be sensitive to any identification with partisan positions.”³⁷ The *Handbook* thus clearly prioritises the pursuit of the international community interest over the territorial interest. One consideration that underlies these conclusions is therefore whether the United Nations is really uniquely positioned to assume the role of interim government, given that UN’s Department of Peace-Keeping Operations’ top management priority – namely to ensure that a state-building project is conceptualised as a peace-keeping operation with a strong emphasis on UN governorship through the SRSG – is at odds with an international mission’s demand for legitimacy on the local level. As correctly identified in the *Brahimi Report*, the institutional treatment of complex governance missions as peacekeeping operations with an ancillary civilian governance function raises the question of “whether the United Nations should be in this business all,” and if so, which body should be charged with the

³⁶ MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETATIVE SOCIOLOGY* 263 (G. Roth and C. Wittich ed., 1978).

³⁷ UN DPKO Best Practices Unit, December 2003, at 21.

transitional administration of territories.³⁸

To maintain its domestic legitimacy, an administration that assumes the governance of territory for an indefinite period of time cannot merely be the product of an international diplomatic leadership, it must also resonate with the inhabitants under its guardianship. As territorial government, the UN must consistently rely upon the participatory model and thus on the co-operation of the wider public in effectuating its purposes. The reception of such socialisation mechanisms – the extent to which an international organisation actually manages to implement certain ideational standards and normative underpinnings to the community under its tutelage – is crucial. Since an international territorial authority cannot have recourse to the normative power of a plebiscite mandate, the continuation of legitimate rule within the territory is predicated upon its ability to exercise power on behalf, and in the interest, of the polity it administers in a transitional setting.

Local challenges to the legitimacy of international political authority take different forms and shapes. They adopt the language of the street, as they do when UNMIK's headquarter is besieged by protesters. They might arise in in-person confrontations in the parliamentary assembly or take the more civilised form of "exchange of letters." A successful trustee will be expected to manage the anomalous phenomena of legitimacy, rather than being forced into undignified retreat when the local population becomes unwilling to tolerate its continued supremacy. The extraordinary "legitimacy cycle" in Kosovo relates back to the inherent weakness of an international mission's mandate: an "open-ended" deployment setting that portends the struggle over political capital which, in turn, unsettles the transfer of legitimacy to an extent that the implementation of an institution-building mandate might be thrown into jeopardy.

As Caron observes, perceptions of an international institution's illegitimacy will arise when the expectations generated by its promises diverge greatly from what the institutions can actually deliver.³⁹ The core question an international territorial administration has to face concerns the issue of whether the paternalistic impulse (which runs deep in an internationalisation project) is based on an imperative of "strategic liberalisation" and whether it is *justifiable* in terms of the prevalent beliefs and values held in the target society. As evidenced by the case of Kosovo under

³⁸ *Report of the Panel on United Nations Peace Operations*, U.N. Doc. A/55/305, S2000/809, reprinted in 39 *ILM* 1432 (2000), at §78.

³⁹ David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 *AM. J. INT'L L.* 552, 559-561 (1993).

UNMIK rule, justifiability is certainly enhanced when an international administration is seen to act in consistency with, and perform, what this article has termed the territorial interests of the entity under its tutelage. Simply put, when an international administration behaves as ordinary government.