

LEGITIMACY AND UN ADMINISTRATION OF TERRITORY*

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ABSTRACT

This article attempts to more succinctly define the basis of legitimacy of a temporary coercive order established by an international territorial administration. More specifically, it ponders the following three questions: (i) on what arguments does an international territorial administration base its claim to the “legitimate” exercise of power?; (ii) towards which audience does it address these arguments?; and (iii) what are the challenges faced by the international administration in the construction of a transitory administrative system that should provide the foundations for a liberal future? Kosovo, in its eighth year of international tutelage, represents the major case under consideration. The article suggests that the notion of legitimacy exhibits a number of abnormalities, notably, an instability which mirrors the fluctuations in the structure of political institutions tenuously tied together by a “dual-key” governance framework. One conclusion is that an international territorial authority needs to concern itself with the legitimacy

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of its rule, as seen through the eyes of the people under its tutelage. Entropy is a persistent feature of social life and few institutions can safely ignore the task of legitimacy maintenance. In order to bolster the legitimacy of rule, an international territorial administration should adjust its idiom of “empire” to enlightened conception of service to the entity it holds in trust.

INTRODUCTION

Given the scope of authority the United Nations has taken upon itself 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 internationalization of state structures . . . through . . . post-conflict governance has [so far] inspired little debate beyond the old peace-keeping discourse.”¹ There may be myriad reasons for the erosion of political authority in a territory temporarily governed by the international community, including corruption, local obstructionism, internal division, failure to promote government transparency, weak links between the civil administration and the military command structure, domestic and international networks of patronage, and all-around incompetence.² This article aims at analyzing some of the *inherent* tensions underlying international institution-building. It introduces the variety of actors operating in an internationalized territory as the quest for legitimacy creates tensions between them and portrays the dynamics that unfold in a process where notions of legitimacy are subject to institutional contestation.

The discussion proceeds in two stages. First, it describes the basic components on which legitimacy rests in a system where the exercise of power is shared between international and local institutions. The argument concludes that legitimacy rests upon a process that seeks to gradually devolve public authority from the former to the latter. Second, this contribution suggests that international agents and local actors rely on discrete sources of legitimacy to justify the exercise of public power. A discussion of the situation in which international and local actors are posited side by side, both exercising social control through reference to different sources of authority, provides a vital key to understanding the tensions which may accompany the presence of an international territorial administration.

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

² Surveys have indicated a trend of decreasing satisfaction with the performance of institutions. The past three years saw a rapid decline of local satisfaction with United Nations Interim Administration Mission in Kosovo’s (UNMIK) performance (from 52% in January-April 2003 to 21% in May-August 2004) and the Special Representative of the Secretary-General’s (SRSG) performance (from 71% in May-August 2003 to 32% in January-April 2004), which was only paralleled by the dramatic decrease of satisfaction with the work of the local executive branch from January-March 2005 (81%) to January-June 2006 (43%). Compare Riinvest, United States Agency for International Development [USAID] & United Nations Development Programme [UNDP], *Early Warning Report Kosovo: Report #6* (Jan.-Apr. 2004), and Riinvest, USAID & UNDP, *Early Warning Report Kosovo: Report #7* (May-Aug. 2004), with Riinvest, USAID & UNDP, *Early Warning Report Kosovo: Report #13* (Jan.-June 2006) [hereinafter *Kosovo Report #13*]. One of the key issues related to the fall of credibility of international institutions was a perception that they were not effective enough in the sphere of law enforcement. *Kosovo Report #13*, *supra*, at 33. Satisfaction with the SRSG’s performance has, however, sharply increased to over 80% after Jessen-Petersen assumed the position, as seen in an opinion poll held in late June of 2005, and has remained relatively stable ever since. Riinvest, USAID & UNDP, *Early Warning Report Kosovo: Report #10*, 9-10 (Apr.-June 2005).

I. TRANSITIONAL ADMINISTRATION IN TRANSITION

*No ethnic ties, no shared traditions, no voluntary act of political confidence unite the rulers and their subjects.*³

Following United Nations Security Council Resolution 1244 of June 10, 1999 and its first implementing regulations, a plenary system of international administration has emerged in the territory of Kosovo.⁴ The Constitutional Framework for Provisional Self-Government, promulgated by the United Nations Interim Administration Mission in Kosovo (UNMIK) two years later, entrenched a highly dynamic mechanism of dual-key governance in which competencies are successively transferred from international to local agents.⁵ This arrangement constituted a *sui generis*, loosely bounded political system in which policy is made by both the international institutions of the U.N. and the national institutions of Kosovo, namely, the Provisional Institutions of Self-Government (PISG). Along the unfolding institution-building

³ ERNST FRAENKEL, *MILITARY OCCUPATION AND THE RULE OF LAW: OCCUPATIONAL GOVERNMENT IN THE RHINELAND, 1918-1923*, at 205 (1944).

⁴ Security Council Resolution 1244 of 1999 vests UNMIK with “all legislative and executive authority” over the territory and people of Kosovo. *See* On the Authority of the Interim Administration in Kosovo, UNMIK Reg. 1999/1, ¶ 1.1, U.N. Doc. UNMIK/REG/1999/1 (July 25, 1999) (conferring effectively all public powers that would normally be attributed to a state government); *see also* S.C. Res. 1244, ¶¶ 9-10, U.N. Doc. S/RES/1244 (June 10, 1999). UNMIK remains composed of a *pillar structure*, each reporting to the SRSG. *See, e.g.*, Press Release, United Nations Interim Administration Mission in Kosovo, SRSG Michael Steiner’s Intervention in the European Parliament Foreign Affairs Committee, U.N. Doc. UNMIK/PR/985 (June 10, 2003) (declaring the success of UNMIK’s pillar structure uniting under the authority of the SRSG). Until 2005, it was divided into four major components, a “structure [which] reflected the heavy dependence of the operation on the efforts and resources of various states and international organizations.” Michael J. Matheson, *United Nations Governance of Postconflict Societies*, 95 AM. J. INT’L L. 76, 79 (2001). While two pillars remained with the U.N. (civil administration as well as police and justice), the other pillars were distributed to the OSCE (institution building) and the EU (economic reconstruction). For more background on UNMIK’s mandate and institutional configuration, *see generally* Matheson, *supra*, at 79-80 (2001) (describing how the Secretary-General created UNMIK and determined its structure); Matthias Ruffert, *The Administration of Kosovo and East-Timor by the International Community*, 50 INT’L & COMP. L.Q. 613, 622-26 (2001) (explaining how UNMIK derives its power and authority); Ralph Wilde, Comment, *From Danzig to East Timor and Beyond: The Role of International Territorial Administration*, 95 AM. J. INT’L L. 583, 593-601 (2001) (discussing how “UNMIK provided administration pending the establishment of institutions through which self-government could be exercised”); Alexandros Yannis, *The Concept of Suspended Sovereignty in International Law and Its Implications in International Politics*, 13 EUR. J. INT’L L. 1037, 1047-50 (2002) (Italy) (addressing how sovereignty was suspended in Kosovo when UNMIK was given “full international administrative authority”); 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, 442-44 (2001) (Neth.) (describing UNMIK’s mandate, as well as its responsibilities and obligations).

⁵ The Constitutional Framework (CF) divides all spheres of governmental authority into powers that are to be *transferred* to the newly created local institutions and powers that are to be *reserved* for the continued exercise by UNMIK. On a Constitutional Framework for Provisional Self-Government in Kosovo, UNMIK Reg. 2001/9, chs. 5, 8, U.N. Doc. UNMIK/REG/2001/9 (May 15, 2001) [hereinafter CF for Kosovo]. The latter powers mostly concern matters related to sovereignty, such as the management of external relations, the administration of state and public property and enterprises, the maintenance of the civil registry database, the control of railways and civil aviation, the enforcement of public order and safety, the coordination of security at the international level, and the appointment and removal of judges and prosecutors. CF for Kosovo, *supra*, ch. 8. *See* Carsten Stahn, *Constitution without a State? Kosovo under the United Nations Constitutional Framework for Self-Government*, 14 LEIDEN J. INT’L L. 531 (2001) (Neth.), for a concise study on the constitutional history of Kosovo and the recent attempts to build political institutions.

sequence, the international agent is vested with a (decreasing) measure of *Organisationshoheit*—the 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. The local institutions, on the other hand, are gradually assuming competencies for a certain range of issues and discharge municipal functions according to their autonomous spheres of action.

In accordance with former American Deputy Secretary of State Strobe Talbott’s designation of Kosovo as a “ward of the international community,”⁶ we can compare the fluid matrix of competencies of the emergent local institutions with the capabilities of a minor who grows into a certain age. Similarly, the competencies of the guardian should be seen to shrink as they are matched by the increasing capacity of the ward. The local institution’s competence 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 co-government model presents a significant innovation in post-conflict governance, fostering both short-term legitimacy and long-term democratization, 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.⁷

II. THE TWO DIMENSIONS OF THE LEGITIMACY DISCOURSE

Political transitionality hence 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 circumscribe 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 legitimization are pursued.⁸

⁶ Strobe Talbott, Deputy Secretary of State, Address at the Aspen Institute (Aug. 24, 1999), *quoted in* William Bain, *The Political Theory of Trusteeship and the Twilight of International Equality*, 17 INT’L REL. 59, 69 (2003).

⁷ The case of Kosovo’s privatization process illustrates the dilemma of the pursuit of pursuing divergent “interests.” While the provisional institutions of self-government have, since 2002, pursued an intensive campaign to kick-start the privatization 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, 639-42, 645-49 (2005) (Italy).

⁸ This dichotomization is frequently employed. *See, e.g.,* Ed Vulliamy, *Farewell, Sarajevo*, GUARDIAN, Nov. 2, 2005, at 10 (reporting that Lord Jeremy “Paddy” Ashdown, former High Representative for Bosnia and Herzegovina made the following statement: “I am formally accountable to the Steering Board of the [Peace Implementation Council] . . . and I meet with nine ambassadors from the [Peace Implementation Council] every week . . . I have to have the (national) capitals’ broad agreement with what I do. Sometimes, if I have 70% of them behind me, I’ll go ahead with a decision . . . I am also . . . responsible to the Bosnian people. If I pass a decree that is refused, my authority is gone like morning dew.”).

Firstly, we consider the international validation of U.N. governance of a territory. We term this sphere “international legitimacy” because the U.N. addresses its claims to legitimate government towards an international constituency, and towards donor countries in particular.⁹ As the sequence of institution-building unfolds, the Special Representative of the U.N. Secretary-General (SRSG), in whom the executive, legislative, and judicial powers are initially combined, relies on a multi-faceted set of arguments to justify the exercise of largely unchecked powers. The SRSG’s 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 best established practices of good governance.

The importance of those legitimizing strategies in the case of Kosovo’s international administration cannot be overstated. UNMIK was not, like the U.N. Transitional Administration in East Timor (UNTAET), legitimized by the obligations of trusteeship that applied to non-self-governing territories. In addition, its exercise of power cannot be based on an international treaty, sanctioned by the consent of the contracting parties, as in the case of Bosnia. As William 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 the form of resolution 1244.”¹⁰ Without international validation—which, one might add, cannot be taken for granted—the task of U.N. territorial governance is fraught with difficulty.

International political scrutiny of an administrative organ operating in an internationalized territory aims at nothing less than ensuring that its practice complies with a particular system of good governance, forcing it to employ strategies of justification and legitimization 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 mobilize 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.¹¹ The legitimacy of an international territorial administration in the eyes of a global audience naturally increases with the representativeness of such an administration (in terms of participating states and the availability of the resources of leading nations), 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.¹²

⁹ 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, 1166 (2001) (referencing the U.N. Security Council and donor countries as the “primary constituencies” of the U.N. Transitional Administration in East Timor (UNTAET)).

¹⁰ WILLIAM BAIN, BETWEEN ANARCHY AND SOCIETY: TRUSTEESHIP AND THE OBLIGATIONS OF POWER 153 (2003).

¹¹ See, e.g., Eur. Parl. Ass., *Strengthening of Democratic Institutions in Bosnia and Herzegovina*, ¶ 13, 2004 Sess., Res. No. 1384 (2004) (discussing 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 High Representative should be able to take enforceable decisions without being accountable for them or obliged to justify their validity and without there being a legal recourse”), see also Eur. Parl. Ass., *Strengthening of Democratic Institutions in Bosnia and Herzegovina*, ¶ 35, 2004 Sess., Doc. No. 10196 (2004). 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, 286-300 (2006) (Neth.).

¹² See RICHARD CAPLAN, INTERNATIONAL GOVERNANCE OF WAR-TORN TERRITORIES: RULE AND RECONSTRUCTION 34 (2005) (“The broad representative character of [contemporary] administrative or supervisory bodies lends vital legitimacy to operations of this kind . . .”); David Harland, *Legitimacy and Effectiveness in International Administration*, 10 GLOBAL GOVERNANCE 15, 18 (2004) (“[T]he legitimacy of the Provisional Authority with the

Secondly, we consider the U.N.'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."¹³ As the U.N. conceives good governance as ersatz for democratic legitimization in an internationalized territory, its claim to legitimacy is based on the exercise of its powers in a manner inviting societal trust. In the words of Richard Caplan, "The idea of international rule over a foreign territory can be legitimate only if that rule is exercised on behalf of, and for the benefit of, the foreign population."¹⁴ In this domestic sphere, the legitimacy of a U.N. territorial governance mission thus depends on its ability to incorporate the views of the people's representatives. Adversely, an international organization that lacks acceptable legitimated accounts of its activities is vulnerable to claims that they are negligent and unnecessary.

The manner in which an international administration resorts to arguments legitimizing the exercise of control in an internationalized territory thus depends on the function in which it is cast. As a territorial government, an international mission's arguments possess a domestic dimension. As a collective organ of the international community, a U.N. mission is under pressure to justify its plenary administration to an international audience. We have accordingly termed these two discrete dimensions "domestic legitimacy" 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 organized 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 contextualize the various claims to legitimate government. Arguments advanced towards one audience may reinforce claims made to the other; they occasionally can come into 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 utilized to stabilize the energy supply have been put to good use. Hollow platitudes regarding the fulfillment of standards made to the local institutions may signal the shirking of pragmatic exchanges with the international community as to how the U.N. administration itself can be subject to good governance benchmarks. On the other hand, a boost in a U.N. mission's domestic credibility (as witnessed under the leadership of the former UNMIK SRSG Jessen-Petersen) facilitates its re-legitimization in the international sphere.

III. THE PURSUIT OF DOMESTIC LEGITIMACY: TWO PROMISES

An international authority's construction of *legitimate rule* within the administered entity is of a special quality. An instrumental logic designates it as an agent whose short-term purpose

Iraqi people . . . may grow as it is seen to be effective—and congruent with the interests of the Iraqi people—and as it increasingly engages the Iraqis themselves.”).

¹³ Wilde, *supra* note 4, at 585.

¹⁴ RICHARD CAPLAN, A NEW TRUSTEESHIP?: THE INTERNATIONAL ADMINISTRATION OF WAR-TORN TERRITORIES 57-58 (2002).

is to solve the problems of enormous social dislocation and human protection, problems usually associated with the immediate aftermath of war. 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*.”¹⁵ This is, of course, a sociological triviality. However, it still serves to illustrate the point that an international administration can be supposed to rely on other legitimizing 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 their compatibility with prevalent local ideology and cultural background. Beyond traditional considerations of *output legitimacy*, an international administration bases its claim to exercise authority on two argumentative *pillars*.

A. *The Foundational Promise*

As a first-order legitimizing strategy within an internationalized theatre, the international agent relies on its primary competency to activate the latent subjectivity of 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 this 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*.”¹⁶ 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.¹⁷ 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 U.N. responded ambiguously to a 2001 border demarcation agreement between the Federal Republic of Yugoslavia (FRY) and the Republic of Macedonia (FYROM) concerning Kosovo’s southern border with Macedonia.¹⁸ Through this agreement, the FRY, holder of nominal sovereignty, signed away 2500 hectares of pastures claimed by residents of Kosovo.¹⁹ The agreement had

¹⁵ Jens Steffek, *The Legitimation of International Governance: A Discourse Approach*, 9 EURO. J. INT’L REL. 249, 271 (2003) (U.K.).

¹⁶ CF for Kosovo, *supra* note 5, §§ 1.1–2 (emphasis added).

¹⁷ See The Secretary-General, *Report of the Secretary General on “No Exit Without Strategy: Security Council Decision-Making and the Closure or Transition of United Nations Peacekeeping Operations,”* ¶¶ 10–11, delivered to the Security Council, U.N. Doc. S/2001/394 (Apr. 20, 2001).

¹⁸ The agreement was signed on February 23, 2001. Letter from Naste Calovski, Permanent Representative of the Former Yugoslav Republic of Macedonia to the United Nations, to Kofi Atta Annan, United Nations Secretary-General, U.N. Doc. A/56/60, S/2001/234, (Mar. 16, 2001).

¹⁹ Neil MacDonald, *Kosovo Prime Minister Plays Down Border Dispute*, FT.COM, Apr. 27, 2006, <http://www.ft.com/cms/s/4304a52e-d5fb-11da-8b3a-0000779e2340.html>. 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 recognize the United Nations jurisdiction therein. Such interpretation

severe repercussions on Kosovo's institutional structure a year later. As UNMIK continued to state that the agreement was irrelevant,²⁰ President Kostunica of the FRY addressed a letter to the U.N. Secretary-General 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 Serbia and Macedonia, two republics of the former Yugoslavia.²¹ However, SRSG Michael Steiner eventually proclaimed that the border agreement "must be respected,"²² and the Security Council also ended up adopting this view.²³

UNMIK's decision to support the validity of the border demarcation agreement had severe consequences for its ability to generate domestic legitimacy as it openly demonstrated to the wider public that the administration did not wholeheartedly perform Kosovo's interests on the international stage. It instead became clear that, in its second identity as a subsidiary organ of the U.N., UNMIK would have to also pursue the legal interests of the organized 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 of an international agent's governorship emerge as the agent is perceived to breach the trust established between itself and the people it governs, the cornerstone of the international intervention project.

On the flipside, domestic legitimacy can be bolstered by active performance of the fiduciary bond under which UNMIK acts in the interests of the entity under its temporary protection. One such example involved the provisional release of Ramush Haradinaj, former Prime Minister of Kosovo, from the custody of the International Criminal Tribunal for the former Yugoslavia (ICTY) upon a decision of the Trial Chamber in June 2005, after protracted proceedings.²⁴ UNMIK, in a confidential written submission and during the course of oral pleadings before the Chamber, offered guarantees to the ICTY that it was in a position to secure

would see both FYROM and Serbia in breach with their obligations under the U.N. Charter. Cf. Bernhard Knoll, *United Nations Imperium: Horizontal and Vertical Transfer of Effective Control and the Concept of Residual Sovereignty in "Internationalized Territories,"* 7 AUSTRIAN REV. INT'L & EUR. L. 3 (2002).

²⁰ UNMIK Spokeswoman Susan Manuel noted that "it is not up to us to recognize the Agreement or not. We administer the territory as it was defined by [United Nations Security Council Resolution] 1244." Susan Manuel, *New Round of Talks with Political Leaders* (Feb. 21, 2002), <http://www.unmikonline.org/press/2002/trans/tr210202.htm>.

²¹ Marcus G. Brand, *Kosovo Under International Administration: Statehood, Constitutionalism and Human Rights* 143 (2002) (unpublished dissertation, University of Vienna) (on file with author).

²² Press Release, United Nations Interim Administration Mission in Kosovo, SRSG Steiner Meets FYROM President Trajkovski, U.N. Doc. UNMIK/PR/707 (Mar. 18, 2002).

²³ Press Release, Security Council, Security Council Deplores Kosovo Assembly's Resolution Concerning Province's 'Territorial Integrity', in Presidential Statement, U.N. Doc. SC/7413 (May 24, 2002) (declaring that the subsequent resolution by the Assembly of Kosovo on the territorial integrity of Kosovo was declared void by the SRSG and was strongly condemned by the Security Council).

²⁴ Both the decision on Ramush Haradinaj's motion for provisional release and the subsequent permission to engage in political activities have infuriated not only Serbia's government but also the Prosecutor for the ICTY, Carla del Ponte, who alleged that UNMIK "refuses to co-operate fully with the Tribunal." Prosecutor v. Haradinaj, Case No. IT-04-84-PT, Decision on Ramush Haradinaj's Motion for Provisional Release (June 6, 2005) [hereinafter Haradinaj PT]; Prosecutor v. Haradinaj, Case No. IT-04-84-AR65.1, Decision on Ramush Haradinaj's Modified Provisional Release (Mar. 10, 2006); Press Release, International Criminal Tribunal for the former Yugoslavia, Statement by Tribunal's Prosecutor Carla del Ponte to the Security Council (June 7, 2006), *available at* <http://www.un.org/icty/pressreal/2006/p1085e-annex.htm>.

the arrest of the Accused if he should 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.”²⁵ 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.

B. *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 transfers to local actors under a participatory model.²⁶ Hence, the second strategy in pursuit of domestic legitimacy builds upon an international administration’s promise to transfer competences 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 to the legitimate exercise of local administration and governance. As Chesterman suggests, the transfer of power, typically mediated through an election, is an important part of any transitional administration.²⁷ The democratization of a polity administered by the international community serves not only as an organizational arrangement vesting local institutions with the power of legitimacy, but also as a legitimization 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 emphasizes the *constitutionalization*, i.e., the entrenchment within the municipal constitutional order, of the position of local political institutions which, reaping the benefits of popular sovereignty, operate within the terms set for reaching legitimate decisions.

According to this second-order legitimizing strategy, the international agent itself has brought about the institutions whose legitimacy it has not only assisted to activate but indeed created. In turn, “[t]he more powers conferred on local representatives, the closer power is to the people and thus the more legitimate the nature of the administration.”²⁸ As a corollary, the democratic moment endows the local agent with the confidence to represent the perspectives of the new political collective. While a local institution wielding a measure of political authority

²⁵ Haradinaj PT, *supra* note 24, ¶ 41.

²⁶ As 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. Beauvais, *supra* note 9, at 1129-34.

²⁷ SIMON CHESTERMAN, YOU, THE PEOPLE: THE UNITED NATIONS, TRANSITIONAL ADMINISTRATION, AND STATE-BUILDING 223-35 (2004). See also NOAH FELDMAN, WHAT WE OWE IRAQ: WAR AND THE ETHICS OF NATION BUILDING 98-103 (2004).

²⁸ Sergio Vieira de Mello, *How Not To Run a Country: Lessons for the UN from Kosovo and East Timor* para. 16 (2000), available at [http://www.jsmp.minihub.org/Resources/2000/INTERFET%20DETAINEE%20MANAGEMENT%20UNIT%20\(e\).pdf](http://www.jsmp.minihub.org/Resources/2000/INTERFET%20DETAINEE%20MANAGEMENT%20UNIT%20(e).pdf) (last modified Mar. 7, 2006).

will initially pursue a strategy of building domestic legitimacy by acts such as developing mechanisms for aggregating interests and organizing political agendas, the challenge for an international institution-building mission consists in ensuring that international and local institutional activity do not compete for legitimacy at the expense of the other.

IV. 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 makes second-order arguments in order to *resist* the rapid transfer of competencies. On the one hand, the arguments made appear 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 powers to it.

Gradually, however, the international administration's claim to hold on to the exercise of power becomes less plausible the more stable and representative the local agent becomes. The tactic line of defense the international agent will choose to employ in order to oppose the further transfer of competencies to local actors will then sound increasingly hollow as the local political institutions assert their democratic credentials. In such a scenario, the internal power sharing agreement itself is likely to be contested, as seen in the ongoing battle between the respective spheres of competency of the PISG and UNMIK.

From what can be gleaned from the past seven years of international institution-building in Kosovo, local institutions have built effective methods of resisting international authority. At times, their elected leaders have borrowed from the rational legal language of the international administration and argued that, in the discharge of UNMIK's remaining powers, it would not be true to its professed values. In fact, local institutions have mounted increasing challenges that are primarily framed in the aspirational idiom of Western constitutionalism.

A key instance, in which an attentive observer of Kosovo's domestic politics would have concluded that a process of institutional contestation of legitimacy was well under way, occurred in July 2004. In the autumn of 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.²⁹ The working group's proposal was approved by the Kosovo Assembly endorsing amendments to the CF that would, among other infringements of U.N. Security Council Resolution 1244, also have negatively affected 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:

[S]uch 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

²⁹ For the background to the amendment process, see Organization for Security and Co-operation in Europe Mission in Kosovo [OMIK], Pillar III (OSCE) Background Report: On the Assembly's Proposal of Amendments to the Constitutional Framework (July 12, 2004) [hereinafter OMIK, Amendments to the CF].

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

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:

[T]he SRSB [is in a strong position in relation to 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, intended to challenge the international agent’s reliance on its claim to the continued exercise of effective control in key areas, accusing it of implementing *foreign rule* that would be increasingly alienated from the interests and opinions of the *people* that it, the local agent, represents as a structured social group. By seeking approval for the boldness of their actions by virtue of the fact that they defy prevailing norms, local institutions are, in the words of Nathaniel Berman, tempted to make a bid to achieve “legitimacy through defiance.”³³

A. *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 as just and worthy of recognition³⁴—decreases as the local actor refuses to comply with a rule that it perceives as contradicting its aggregate interests. An international agent’s domestic legitimacy weakens the more its rule is perceived to gradually undermine the realization of self-government. De-legitimization can hence be understood as a process of gradually weakening the capacity of a governance system in order 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 their international guardians takes place on two cognitive fronts. On the first front, local institutions perceive the struggle as a conflict over the *degree* of local participation. On the second front, in the minds of international officials, the conflict looms over the *quality* of local participation. Local institutions will find further grounds for disclaiming the authority of an international agent as the latter endeavors to evaluate the former’s governance performance against a set of benchmarks without making the performance of its own governance apparatus subject to any scrutiny whatsoever. 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-legitimize the latter in the eyes of the people who have chosen them. By portraying the local agent as, e.g., overly corrupt and incapable of conforming to the standard set for local self-government, the international authority

³¹ OMIK, Pillar III (OSCE) Spot Report: On the Monitoring of the Assembly of Kosovo 3 (July 7, 2004).

³² OMIK, Amendments to the CF, *supra* note 29, at 2.

³³ Nathaniel Berman, *Intervention in a ‘Divided World’: Axes of Legitimacy*, 17 EUR. J. INT’L L. 743, 747 (2006) (Italy).

³⁴ See JÜRGEN HABERMAS, COMMUNICATION AND THE EVOLUTION OF SOCIETY 178 (Thomas McCarthy trans., 1979) (“Legitimacy means that there are good arguments for a political order’s claim to be recognized as right and just *Legitimacy means a political order’s worthiness to be recognized.*”).

communicates that the institutional resources for democratic authorization are lacking.

In the process, the international agent will, however, contribute to the de-legitimization of its own claim to legitimate rule for, as the article demonstrated, it also relies on the second-order argument of democratic institution-building. Well into their respective *civilizing missions*, both UNMIK and the High Representative for Bosnia and Herzegovina tended to increase their vigilance regarding popular aspects of legitimacy and fell back upon more coercive means. Both in Kosovo and in Bosnia and Herzegovina, the international administrations were accordingly inclined to *perennialize* their stronghold over *reserved competencies*.

The parties have done so by putting forth the argument that they deem that the conditions for the proper exercise of effective control by the local agents are not met at a given point in time. This argument is incoherent as it undermines the normative foundation of the legitimate rule by the international agent. The very purpose of the initial concentration of plenary authority within the international institutions is precisely the mobilization of institutional resources for the democratic authorization of a government and the rapid establishment of a local architecture that is capable of assuming competencies in a sequence of projected transfers. Unless derogation from the participatory paradigm are temporarily necessary to manage emergencies, the maintenance of, or reversion to, the coercive model will be perceived as nothing but a contradiction to the initial mandate.

B. *Negative Externalities*

As a device of social control, legitimacy is believed to have long-term advantages over coercion in reducing enforcement costs. As a corollary, processes of reciprocal de-legitimization between the international agent and local actors impose heavy additional 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 diffusion of what Joseph Raz termed “normative power.”³⁵ The contestation of legitimacy threatens to derail the institution-building sequence and hence results in negative externalities.

As a consequence, the international agent is more likely to be tempted to abandon a *consent-based* model of authority that had placed the local institutions in a partnership role. It may adopt a coercive model which permits it to regain centralized 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 perennializes 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 centralized control that effectively rolls back the process through which local stakeholders have gained a voice in decision-making helps to minimize the short-term risk of open political conflict. At worst, the effective reversal of building local ownership undermines the capacity of local institutions to develop legitimate mechanisms to

³⁵ JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 16-19 (1979) (defining an “exclusionary reason” as a “reason[] to refrain from acting for a reason,” a “protected reason” as a fact that “is both a reason for an action and an (exclusionary) reason for disregarding reasons against it,” and “normative power” as the “ability to change protected reasons.”).

resolve internal conflict.³⁶ Indeed, the international community will have to assume a degree of responsibility for setting in motion a destabilizing 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 which became chronically unable to meet the interests of the people under its tutelage.

CONCLUSION

International agents and local institutions derive 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 legitimizing 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 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 transfer of public authority from international to local institutions and has described an institutional dynamic that bred conflict over the appropriation of political capital.

It is, however, important at this point to recall that the phenomena of reciprocal delegitimization of public authority are not path-dependent. They do not occur as a by-line of the methodology of internationalization of territory, as can be easily shown by the overlapping, mostly simultaneous and mutually reinforcing activities of the South West Africa People’s Organization (SWAPO), “sole and authentic representative of the Namibian people” during the 1970s,³⁷ and the U.N. Council for Namibia. Post-conflict administrations, such as occupation authorities, do not get to choose between the two 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 summarize, 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 U.N.-administered territory remains contested, one should be able to predict negative externalities in the form of a gradual erosion of

³⁶ See generally Gerald Knaus & Felix Martin, *Travails of the European Raj*, 14 J. DEMOCRACY 60, 63-68 (July 2003) (describing a government unable to pass laws to solve its own problems after a representative for the international community dismissed many elected officials). As the former Principal Deputy SRSG Rossin admitted, “the development of their institutions is somewhat retarded by our continuing role.” Nicholas Wood, *Ambitious Experiment Leads Kosovo to a Crossroads*, N.Y. TIMES, Oct. 3, 2005, at A3.

³⁷ G.A. Res. S-14/1, ¶ 6, U.N. Doc. A/RES/S-14/1 (Sept. 20, 1986), available at <http://www.un.org/documents/ga/res/spec/aress14-1.htm>.

political authority.

As Max Weber noted, “the basis of every authority, and correspondingly of every kind of willingness to obey, is a *belief*, a belief by virtue of which persons exercising authority are lent prestige.”³⁸ His observation that the stability and effectiveness of a political order of domination depends on its recognition as a legitimate power 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 United Nations Multidimensional Peacekeeping Operations which directs SRSGs to “be sensitive to any identification with partisan positions.”³⁹ The Handbook thus clearly prioritizes 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 the U.N.’s Department of Peace-Keeping Operations top management priority—to conceptualize a state-building project as a peace-keeping operation with a strong emphasis on U.N. governorship through the SRSG—is at odds with an international mission’s demand for legitimacy on the local level. As correctly identified in the Report of the Panel on United Nations Peace Operations, the institutional treatment of complex governance missions as peacekeeping operations with a civilian governance function attached raises the question of “whether the United Nations should be in this business at all,” and if so, which body should be charged with the transitional administration of territories.⁴⁰

To maintain its domestic legitimacy, an administration that assumes the governance of territory cannot merely be the handiwork of a diplomatic leadership, but must also resonate deeply with the inhabitants under its guardianship. As the territorial government, the U.N. must consistently rely upon the participatory model and thus on the cooperation of the wider public in effectuating its purposes. The reception of such socialization mechanisms—the extent to which an international organization actually manages to implement certain ideal 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 the plebiscite mandate, the continuation of legitimate rule within the territory is predicated upon its ability to build a “complex alliance of two seemingly conflicting sources of legitimacy, that of overarching international authority and that of [an underlying] nationalism” prevalent in the target territory.⁴¹ For an administration, this means exercising power on behalf of, and in the interest of, the polity it administers in a transitional setting, and hence responding favorably to the deepest needs of such nationalisms.⁴²

Local challenges to an international political authority take different forms and shapes. They adopt the language of the street, as they do when UNMIK’s headquarters is

³⁸ 1 MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 263 (Guenther Roth & Claus Wittich eds., Univ. of Cal. Press 1978) (1968).

³⁹ UNITED NATIONS DEPARTMENT OF PEACEKEEPING OPERATIONS [DPKO] PEACEKEEPING BEST PRACTICES UNIT, *HANDBOOK ON UNITED NATIONS MULTIDIMENSIONAL PEACEKEEPING OPERATIONS* 21 (2003).

⁴⁰ Panel on United Nations Peace Operations, *Report of the Panel on United Nations Peace Operations*, ¶ 78, U.N. Doc. A/55/305, S/2000/809 (Aug. 21, 2000), reprinted in 39 INT’L LEGAL MATERIALS 1432, 1453 (2000).

⁴¹ Berman, *supra* note 33, at 760.

⁴² *Id.*

besieged by protesters. They might arise in head-on confrontations in the parliamentary assembly or take the more civilized 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 facilitates the struggle to appropriate legitimizing capital which, in turn, unsettles the transfer of legitimacy to the extent that the implementation of an institution-building mandate might be thrown into jeopardy.

As Caron observes, perceptions of an international institution's illegitimacy can arise where there is great discrepancy between the expectations generated by its promises and what the institutions actually deliver.⁴³ The core question an international territorial administration has to face concerns the issue of whether the paternalistic impulse (which runs deep in an internationalization project) is based on an imperative of *strategic liberalization* 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 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. Put simply, justifiability is enhanced when an international administration behaves as an ordinary local government would.

⁴³ David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT'L L. 552, 559-61 (1993) (“[T]he belief that there is too great a discrepancy between what the organization promises and what it delivers would be at least one major circumstance permitting the resonance of allegations of illegitimacy.”).